In the Matter of an Arbitration

BETWEEN:

**CANADIAN UNION OF PUBLIC EMPLOYEES,
AIR CANADA COMPONENT**

(THE "UNION")

AIR CANADA *Rouge*

(THE "EMPLOYER")

Re: CHQ-Rouge-16-17 (Policy)—Vacation Entitlement

Before: Eli A. Gedalof, Sole Arbitrator

Appearances

For the Union

Adrienne Lei, Counsel, Dewart Gleason LLP
Brett Hughes, Counsel, Dewart Gleason LLP
Marie-Helene Major, Air Canada Component President
Kevin Tyrrell, CUPE National Staff Rep.
Beth Mahan, Air Canada Component Vice-President
Nick Beveridge, Witness
Ivana Jovic Grievance Committee
Dionne Solomon, Grievance Committee
Alex Habib
Craig Smith, Local 4098 Vice-President
Daniela Scarpelli, Witness

For the Employer

Irena Chrisanthopoulos, Counsel, Air Canada
Krystal Johnston, Labour Relations Advisor
Rosemary Capparelli, Rouge
Chris James, Rouge
Giuseppe Morello, Director, Labour Relations
Michael McCory, Director, Labour Relations

AWARD

INTRODUCTION

1. This matter is a policy grievance concerning the interpretation of the vacation entitlement under Letter of Understanding 55 ("LOU 55") to the collective agreement between Air Canada (the "Employer") and Canadian Union of Public Employees, Air Canada Component (the "Union"). LOU 55 sets out terms and conditions of employment for certain employees of Air Canada Rouge, Air Canada's low cost carrier, or "LCC". Specifically, the dispute concerns when employees should move from one level of entitlement to the next. The provision in issue, found at L55.10.02 of the collective agreement, reads:

> Annual Vacation—The vacation period entitlement shall be applicable in accordance with completed years of continuous Company service prior to April 30th each year:
>
> | | |
> |---|---|
> | Less than 1 complete year | 0.83 days per full calendar month |
> | 1 to 3 | 10 calendar days |
> | 3 to 12 | 15 calendar days |
> | 12 or more | 20 calendar days |

2. The Employer's position is that the provision is ambiguous, and that the parties' intention was that employees would not move from the 10-day entitlement to the 15-day entitlement until they have 4 completed years of service, or from the 15-day entitlement to the 20-day entitlement until they have 13 completed years of service. To the extent that the language does not reflect this agreement, the Employer asserts that there has been a mutual mistake that should be rectified. Further, even if the mistake was unilateral on the part of the Employer, the Employer maintains that the provision should nonetheless be rectified.

3. The Union maintains that the provision is clear on its face, and that each band begins with the completed years of service identified (1, 3 or 12), and ends immediately prior to the commencement of the next band. The Union asserts that it is neither necessary nor appropriate to consider extrinsic evidence in the absence of any ambiguity, but that in any event the bargaining history supports the Union's interpretation.

4. The parties agreed at the outset that I would hear their respective evidence related to bargaining the vacation provision, without prejudice to the Union's position that the evidence was unnecessary.

THE FACTS

5. In 2011 Air Canada announced its plans to launch a low-cost carrier, or LCC, in order to compete with other domestic LCCs. The LCC eventually became known as Air Canada Rouge. With the exception of a small number of issues that the parties agreed to have determined through interest arbitration, the terms of the first collective agreement for the LCC, including the vacation provision in issue here, were bargained in a Memorandum of Agreement over the course of 36 hours in late November 2012 (the "MOA"). There was significant pressure to reach a quick agreement because Air Canada had already reached an agreement with the pilots at that time and was ready to launch the new carrier.

6. The Employer called Giuseppe Morello, its Director of Labour Relations, to testify about the bargaining and the basis for the Employer's position that the collective agreement should be rectified. At the time, Mr. Morello was the manager responsible for schedule generation for inflight service. He participated in bargaining the 2012 MOA as the subject matter expert responsible for manpower planning and scheduling cabin crew.

7. Mr. Morello testified that the bargaining arose out of the 2011 Air Canada Mainline negotiations. In that round of bargaining the parties reached a first tentative agreement containing "bare-bones" provisions for the operation of an LCC, but that agreement was rejected by the bargaining unit. Mr. Morello understood that one of the reasons the parties believed the agreement was rejected was the lack of clarity around the LCC issue. The parties therefore set aside the bargaining of terms for an LCC when they negotiated a second tentative agreement, but that agreement was also rejected by the bargaining unit. Ultimately, the parties reached a collective agreement for Mainline through final offer selection, which agreement did not contain any provision for an LCC. Subsequent to that agreement, the dynamic between the parties changed. Specifically, the Employer and the pilots reached a collective agreement, also through final offer selection, that did contain provisions for the operation an LCC. This placed Air Canada in a position to move ahead with its plans, and CUPE in the position of bargaining terms or risking being left out. This change in circumstances placed immediate pressure on the parties to reach a quick agreement. CUPE and Air Canada therefore agreed to meet and negotiate terms and conditions with the mandate of ensuring that the new LCC could compete with carriers such as CanJet, Sunwing, Air Transat and West Jet.

8. The parties met on November 27, 2012 to begin negotiations. To the extent that Mr. Morello's evidence touched on other areas of the bargaining, it was only for the purpose of illustrating that the vacation provision was not

the primary focus of the parties' discussions. The bulk of the discussions focussed on the specifics of the work rules, maximum hours, required rest periods and minimum days off, duty day limitations, layover lengths, *per diems*, and the bidding process. While the parties exchanged conflicting vacation proposals over the course of several passes, they did not discuss these proposals in the initial exchanges.

9. The Employer's initial proposal contained the following vacation proposal:

> X. **Annual Vacation** – Employees shall be entitled to annual vacation of which shall be determined pursuant to years of completed and continuous Company service:
>
> | **Years of Service** | **Number of Work Days** |
> |---|---|
> | Less than 1 complete year | 0.83 days per full calendar month |
> | 1 to 4 | 10 |
> | 5 to 14 | 15 |
> | 15 or more | 20 |
>
> XX. **Proration** – Vacation entitlement shall be prorated for a partial year of service.
>
> XXX. Vacation selection will follow a socialized and fair selection system.
>
> X. Employees shall receive a credit of two hours and thirty-five (2:35) minutes for each General Holiday and vacation day.
>
> X. Unused General Holidays and vacation days will not carry-over to subsequent years and shall be forfeited.

10. Although the allotment of days is less than the Mainline agreement, the "years of service" element of the proposal follows the same format as the Mainline agreement, save that the Mainline agreement has an additional step at "25 or more years". Mr. Morello testified that applying years of service as it is applied under the Mainline agreement, this would mean that an employee would not move from the allotment of days associated with "1 to 4" years of service to the "5 to 14" allotment until they had completed 5 years of service prior to April 30.

11. The Union countered with the following provision:

> X. **Annual Vacation** – The vacation period entitlement shall be applicable in accordance with completed years of continuous Company service prior to April 30th each year:

Less than 1 complete year	.83 days per full calendar month
1 to 3	10 calendar days
3 to 12	15 calendar days
12 or more	20 calendar days

X. Where the entitlement is ten (10) days or more, employees will have that option to take the total entitlement in consecutive calendar days or split them in five (5) day periods as follows:

10 days – up to 1 split
15 days – up to 2 splits
20 days – up to 3 splits

X. **Proration** – Vacation entitlement shall be prorated for a partial year of service.

X. Vacation periods will be bid by seniority.

X. Employees shall receive a credit of two hours and fifty-five (2:55) minutes for each Statutory Holiday and vacation day.

X. Cabin Personnel who fail to bid or submit invalid bids in the second award will be assigned to any remaining vacancies in accordance with the requirements of the service.

12. In subsequent exchanges, the parties worked off of the Union's document, with tracked changes. For the first several passes, the Union continued to seek accelerated progression through the grid and the Employer maintained its opening position, without comment by either party. Mr. Morello testified that at some point, however, Air Canada asked CUPE about the non-sequential numbering between the steps of vacation grid, and explained its understanding that the numbers in CUPE's proposal should read "1-3, 4-12 and 13 or more". According to Mr. Morello, at this point the parties were well into 36 hours of fast-paced bargaining, with practically no sleep. He testified that "somebody"—he could not recall who—from CUPE's team explained that CUPE's language was clearer, since if it read 1-3 and 4-12, that would suggest "not quite 3 and not quite 4", when an employee had 3 years and 6 month's service, and that "up to the point they fall into 4, it is 10 calendar days". According to Mr. Morello, the Employer was "looking to go 5, they were looking for 3, and we agreed to go to 4". Mr. Morello believed that this should have been clear to CUPE given the example provided. According to Mr. Morello, the conversation was about 2 minutes long and he could not recall any other specific discussion concerning the vacation entitlement. He could not remember when this conversation took place, but that it would have been near the end of bargaining. The Employer had no notes of the discussion.

13. The final provision that the parties agreed to and signed off on in the MOA reads as follows:

> X. **Annual Vacation** – The vacation period entitlement shall be applicable in accordance with completed years of continuous Company service prior to April 30th each year:
>
> | | |
> |---|---|
> | Less than 1 complete year | .83 days per full calendar month |
> | 1 to 3 | 10 calendar days |
> | 3 to 12 | 15 calendar days |
> | 12 or more | 20 calendar days |
>
> X. Where the entitlement is ten (10) days or more, employees will have that option to take the total entitlement in consecutive calendar days or split them in five (5) day periods as follows:
>
> 10 days – up to 1 split
> 15 days – up to 2 splits
> 20 days – up to 3 splits
>
> X. **Proration** – Vacation entitlement shall be prorated for a partial year of service.
>
> X. Employees shall receive a credit of two hours and thirty-five (2:35) minutes for each general holiday and vacation day.
>
> X. Employees who fail to bid or submit invalid bids in the second award will be assigned to any remaining vacancies in accordance with the requirements of the operation.

14. The provision, then, includes the Union's language with respect to vacation allotment, but with the lower credit found in the Employer's initial proposal. There is no dispute that overall, the vacation provision constitutes a cost saving as compared to the Mainline agreement.

15. When asked whether the language with respect to the vacation allotment looked clear to him today, Mr. Morello conceded that it did not. Asked why Air Canada agreed to it, Mr. Morello testified that at the time everybody was tired, had not slept for over 24 hours, things were moving quickly, and the parties had other issues they needed to finalize. So long as the intent was clear across the table, he explained, the Employer did not want to get into a debate over the specific language.

16. The Union called two witnesses, Daniella Scarpelli and Nick Beveridge. Ms. Scarpelli is a national representative and was the lead negotiator for the

Union in bargaining the MOA. Ms. Scarpelli described the discussions between the parties in the lead-up to bargaining the MOA, beginning with a presentation by the Employer in which it set out a cost-comparison between Air Canada and West Jet, through the failed tentative agreements, and into the negotiation of the MOA. According to Ms. Scarpelli, it was clear through these discussions, and the Union grudgingly accepted, that it would be necessary to bargain concessions from the Mainline agreement that would allow the new LCC to compete with other domestically registered LCCs. While it was CUPE's goal to maintain as many of the benefits of the Mainline agreement as was possible, it understood, including from the Employer's presentation, that the primary comparators were other LCCs, and not Mainline.

17. According to Ms. Scarpelli, the parties looked to Air Transat, CanJet, West Jet, Sunwing and First Air as comparators in preparing their proposals; basically any carrier other than Mainline. The Union then sought to "cherry pick" terms and conditions from the other LCCs. Most significantly, Ms. Scarpelli testified that, with the exception of the first sentence that remained from the Mainline Agreement, its vacation proposal was "lifted straight from the CanJet agreement". Ms. Scarpelli was familiar with the CanJet agreement, having participated in bargaining that agreement. She testified that under that agreement, an employee with three years of service would move to the 15 day entitlement, and would not have to wait until they had completed 4 years of service. According to Ms. Scarpelli, this was the benefit the Union was seeking to negotiate.

18. Like Mr. Morello, Ms. Scarpelli could not remember the specific details of any conversation concerning this provision, but was similarly sure that the conversation took place. However, Ms. Scarpelli maintained that the language was clear, and that anybody familiar with the manner in which vacation is administered at the other LCCs would know that the steps follow a specific pattern; each band begins with the completed years of service, and ends just prior to, or "less than" the next band. Ms. Scarpelli was unequivocal that this is how the Union explained it at the table, and that the Union did not ever waiver from this position. Ms. Scarpelli did not agree that there was any error in the terms of the bargain reached, which she understood fell squarely within the parties' objective in creating an agreement that was comparable to other LCCs.

19. The Union also called Nick Beveridge, who is currently a member of the pension committee for Mainline and a consultant for the Union, and was at the time of the LCC negotiations the Union's secretary treasurer. Mr. Beveridge handled most of the research for the Union in preparing for the negotiation. He confirmed that Ms. Scarpelli had given him four LCC collective agreements

to look through, and that he had taken the vacation language for the Union's proposal from the CanJet agreement. Mr. Beveridge also confirmed Ms. Scarpelli's explanation of how the CanJet provision was applied. According to Mr. Beveridge, the Union did not waiver from its initial proposal, because it was confident that the company would eventually accept it. As he explained it, the proposal was consistent with the LCC comparators, and was in all instances cheaper than Mainline. The fact that the allotment bumped up in the fourth year (once the employee had completed 3 years) was important to the Union, because it wanted to obtain at least some small benefit for its members in light of the fact that it knew it was negotiating an inferior collective agreement. According to Mr. Beveridge, even in the fourth year the agreement provides a savings as compared to Mainline, because of the lower credit.

20. In cross-examination Mr. Beveridge was taken to the West Jet/Air Canada comparison document prepared by the Employer in the leadup to the LCC negotiations. In that comparison, the West Jet entitlement is described as follows:

> +10 Stats
> '1-4 YRS → 2 blocks
> '4-7 YRS → 3 blocks
> '7++YRS → 4 blocks
>
> NOTE: 1 BLOCK = 5 DAYS

21. Mr. Beveridge denied that the Union's proposal was in fact more generous than the West Jet comparator, because while an employee at West Jet would not move to the 15 day entitlement until after 4 complete years, they would move to 20 days after only 7, and also receive a higher credit.

22. Mr. Beveridge was also taken to the Sunwing agreement, which refers to completed years of service of "1 year but less than 4 Years" and "4 years but less than 10 years". Mr. Beveridge did not agree that this language was clearer than the Rouge language, as he believed that the reference to "completed years of service" in the Rouge language made it very clear when an employee would move to the next step: if at April 30 the employee had not completed the requisite years of service to qualify for the next step on the grid, they would remain at their current step for another year.

ARGUMENT AND ANALYSIS

Union Argument

23. The Union argues that the vacation language in the Rouge agreement provides for a plain and obvious formula: each line reads as "X years or more to less than Y years". There is, argues the Union, simply no other way to read the language, and there was no dispute about what this provision meant until years after the parties bargained it when a number of employees transferred to Rouge from Mainline and were not advanced to the next step in the vacation grid after 3 completed years of service. The Union asserts that the Employer always knew what the language meant, given its own reliance on the West Jet comparator, which follows the same pattern. In support of its interpretation, the Union relies on the principles set out in *Burlington (City) and CUPE, Local 44,* 2017 CarswellOnt 3743 (Surdykowski) and *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27. The Union further relies on *Sola Basic Ltd. and International Assoc. of Machinists, Local Lodge 1168,* (1976) 11 L.A.C. (3d) (Beck et. al.) for the proposition that earned benefits such as vacation entitlement ought not to be "taken away or reduced except by express language" (p. 332).

24. The Union maintains that it is neither necessary nor appropriate to look to extrinsic evidence in this case, and relies on *Schlegel Villages and SEIU, Local 1,* (2015) 259 L.A.C. (4th) 225 (Luborsky) for the proposition that in the absence of an ambiguity (whether patent or latent), the mere fact that the parties disagree about the proper interpretation is not a basis for resorting to extrinsic interpretive evidence. Neither, argues the Union, is this an appropriate case for rectification. Citing *FPC Flexible Packaging Corp. v. G.C.I.U., Local 500-M,* (2002) 108 L.A.C. (4th) 327 (Davie), the Union argues that rectification is generally available only where the agreement does not capture the mutual intention of the parties. In this case, argues the Union, it is clear that there has not been a mutual mistake, as the Union's intention was always to obtain the benefit it seeks to enforce through this grievance. Neither, argues the Union, is this a rare case in which a unilateral mistake would warrant rectification. Citing *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.,* 2002 SCC 19, the Union argues that the Employer would have to establish that the Union's reliance on the plain language of the agreement would amount to "fraud or the equivalent to fraud" (para. 31), for which there is no evidence.

25. With respect to remedy, in addition to crediting employees with their missing vacation entitlement, the Union relies on the decision in *Assiniboine Regional Health Authority and C.U.P.E.,* (2009) 189 L.A.C. (4th) 137 (A.B. Graham), and argues that employees should also be compensated for the lost

opportunity to take their vacation as they saw fit in a timely way in the 2016-17 vacation year. The Union argues that a monetary award of 1/3 of the current regular pay for 5 vacation days would be appropriate.

Employer Argument

26. The Employer argues that the language of the vacation provision is patently ambiguous because on its face it creates two different entitlements for employees at 3 years (either 10 days or 15 days) and 12 years (either 15 days or 20 days). This ambiguity is illustrated, argues the Employer, by the fact that in describing the operation of the provision in its argument, the Union added the words "less than" to distinguish the end of one band from the beginning of the next, when those words do not appear in the collective agreement. In support of its argument, the Employer relies on the decision in *Irving Pulp & Paper v. C.E.P., Local 30,* 2002CarswellNB 107 (NB CA) for the proposition that the words of the collective agreement should be read in the context of the agreement as a whole and given their plain and ordinary meaning unless to do so would lead to an absurdity. In addition to the creation of two separate vacation entitlements for employees at 3 and 12 years of service, the Employer argues that the Union's interpretation conflicts with the preamble of the vacation provision and with the Flow Through provisions for employees transferring to Rouge from Mainline, both of which refer to completed years of service. Citing *Securitas Canada Ltd. v. U.S.W.A.,* (2003) 114 L.A.C. (4th) 259 (Brown) and *A.C. & T.W.U. v. Aliant Telecom Inc.,* 2002 CarswellNat 5446 (Ashley), the Employer argues that the extrinsic evidence is admissible either because of the ambiguity on the face of the agreement or at least because the bargaining evidence discloses a latent ambiguity. In this regard, the Employer emphasises that the parties' intention was to negotiate favourable terms for an LCC, and relies on Mr. Morello's evidence concerning the parties' common understanding of how the provision would be applied.

27. To the extent that the parties formed a common intention to move to the next steps in the vacation grid at 4 and 13 years respectively, the Employer argues that there has been a mutual mistake by the parties in adopting the language of the vacation entitlement, and that this mistake should be rectified. In this regard, the Employer relies on *P.S.A.C. v. NAV Canada,* 2002 CarswellOnt 1063 (ON CA), *Ontario (Metrolinx-GO Transit) and ATU, Local 1587*, 2014 CarswellOnt 11141 (Dissanayake) and *Potash Corp. of Saskatchewan Inc., Lanigan Division v. C.E.P., Local 922*, 2003 CarswellSask 756 (Norman) for the proposition that arbitrators have the authority to grant the equitable remedy of rectification in order to ensure that the agreement reflects the true intention of the parties.

28. Further, as affirmed by the Supreme Court of Canada in *Sylvan Lake, supra*, rectification is appropriately granted even in cases of unilateral mistake, where it is necessary to prevent a document from being used as an instrument of fraud or the equivalent to fraud. The Employer argues that the extrinsic evidence here, both with respect to the parties' general intention in bargaining the LCC agreement and with respect to their discussion at the bargaining table concerning the vacation entitlement, establishes the conditions set out by the Court in *Sylvan Lake*. If in fact the Union intended that the language be interpreted as it now asserts, argues the Employer, it was incumbent on the Union to speak up at the time in light of the representations made at the bargaining table. The Union, argues the Employer, is attempting to take advantage of language it knows or ought to know was a mistake.

29. With respect to remedy, the Employer seeks to have the collective agreement rectified by changing the opening numbers to the third and fourth bands of the vacation grid to "4" and "13", and to have the grievance dismissed. In the event the Union is successful in its interpretative argument, the Employer maintains that there is no basis for a monetary award, and relies on *BCNU and OTEU, Local 15,* 1985 CarswellBC 4258 (Harvey), *Seaspan International Ltd. v. C.M.S.G.,* 2009 CarswellNat 4670 (Blasina), *Dartmouth (City) v. Police Assn. (Dartmouth)*, 1998 CarswellNS 261 (Nathanson), *Dresdon Industrial Co. and UFCW, Local 175,* 2004 CarswellOnt (Lynk) and *Tek Coal Ltd. and USW, Local 7884,* 2013 CarswellBC 2831 (McDonald) in this regard.

Analysis

i) Is the vacation provision ambiguous and is extrinsic evidence required as an aid to interpretation?

30. There is no real dispute between the parties concerning the fundamental principles of contract interpretation. In all cases, the primary goal is to ascertain the intention of the parties from the words that they have chosen. Parties are presumed to have intended that those words be read in their plain and ordinary sense, unless this would lead to an absurd or unlawful result or it is clear from the context of the agreement as a whole that some other meaning was intended (see, e.g., *Irving Pulp & Paper, supra,* at para. 10 and *Burlington (City), supra,* at para. 15). The fact that there may be competing interpretations does not lead automatically to the admission of extrinsic evidence. The following summary of these principles from *Burlington (City)* is apposite:

15 The fundamental rule of collective agreement interpretation is that the words used must be given their plain and ordinary meaning unless it is apparent from the structure of the provision read as a whole in the context of the collective agreement also read as a whole that it has a different or special meaning, or the plain and ordinary meaning result is unlawful or absurd. A fundamental rule of interpretation is that all words must be given meaning. However, the general rules of interpretation presumptions that specific provisions prevail over general provisions, and that same words have the same meaning and different words have different meanings, are rebuttable and a contextual reading of the collective agreement language of a provision may require otherwise.

16 It is often rightly said that as a matter of general principle collective agreements must be interpreted in a manner which preserves the spirit, intent and cohesion of the collective agreement. But when the parties disagree about the meaning or application of a collective agreement provision (which typically arises when the parties have been less than clear with each other about their respective understandings when they agreed to the language), it is the words that the parties have agreed to use to express their presumed "mutual" intent which are of primary importance. That is, when collective agreement parties disagree about what they intended they are presumed to have written what they meant and to have meant what they wrote. Collective agreement language cannot be manipulated and allegedly missing words or terms cannot be implied under the guise of interpretation in order to achieve an interpretation favoured by a party unless that is essential to the apparent intended operation of the collective agreement read as a whole, or to make the collective agreement consistent with legislation which the parties cannot contract out of (most commonly the *Employment Standards Act* or the *Human Rights Code)*. Although much has been written about purpose, fairness, internal anomalies, cost or administrative feasibility, what one or other of the parties "would never have agreed to", or what "should be", such considerations only come into play when the collective agreement language is truly ambiguous, and the arbitrator must choose between equally plausible interpretations. The arbitrator's task is to determine what the collective agreement provides or requires, not what he or one of the parties thinks it should say regardless of any professed unfairness of the effect on either party or the bargaining unit employees. The parties and employees are entitled to no more or less than what the collective agreement stipulates, and clear wording prevails over all considerations other than legislation.

17 The question of ambiguity arises whenever the parties disagree about the meaning of a collective agreement provision. As Arbitrator Luborsky observed in *Schlegel Villages* (paragraph 66), an ambiguity exists when the language in issue is reasonably capable of more than meaning, either on the face of the provision (i.e. a patent ambiguity), or

which is not apparent on the face of the provision but is revealed by extrinsic evidence (i.e. a latent ambiguity).

> 18 An ambiguity may be established or resolved by extrinsic evidence of past practice or negotiating history. However, as Arbitrator Sheehan recognized in *Niagara Catholic District' School Board* (at page 15) a fundamental principle of interpretation is that where possible the meaning of a collective agreement provision should be determined from a contextual reading of the provision without resort to extrinsic evidence as an aid to interpretation — including any past practice, however consistent and lengthy.

31. Applying these principles, I find that it is unnecessary to consider extrinsic evidence in this case, and that the Union's interpretation must prevail. The essence of the Employer's argument is that the provision is ambiguous because it creates two separate vacation entitlements for employees with either 3 or 12 completed years of service, and that the Union's interpretation cannot be reconciled with the preamble to the provision, and requires reading in the words "less than" when those words do not exist. In my view, a careful examination of the parties' agreement does not support either of these conclusions.

32. The preamble to the vacation grid stipulates that "[t]he vacation period entitlement shall be applicable in accordance with completed years of continuous Company service prior to April 30th each year". The Employer effectively reads the preamble as defining any reference to years in the grid below as a reference to a "completed year", such that the reference to the number "3" in both the second and third lines of the grid must be a reference to "3 completed years", hence the conflict. But that is not what the preamble stipulates. Rather, the preamble sets the milestone for progression on the vacation grid as based on completed years of continuous service prior to a particular date each year (April 30th). The Union agrees that the vacation allotment is based on having achieved the stipulated milestone by April 30th, and as Mr. Beveridge acknowledged in his evidence, if an employee misses the milestone by even a day she or he will have to wait another year to progress. In other words, the Union's interpretation is entirely consistent with the vacation allotment being "applicable in accordance with completed years of service".

33. For the same reason, the Union's interpretation also does not conflict with Article 11.03 of LOU 59, providing for Air Canada Rouge and Air Canada Mainline Flow Through, which simply provides that the vacation entitlement where an employee transfers between Mainline and Rouge will be "on the basis of completed years of continuous company service at [Rouge or Mainline] prior to April 30th each year".

34. Neither, in my view, does the grid itself gives rise to conflicting entitlements, or conflict with the agreement as a whole. For ease of reference, I set it out again here:

Less than 1 complete year	0.83 days per full calendar month
1 to 3	10 calendar days
3 to 12	15 calendar days
12 or more	20 calendar days

35. The first level of the grid is clear, and applies to employees with "[l]ess than 1 complete year" of service prior to April 30th each year. Neither can there be any dispute that the grid provides for an employee to move to the second level when they have achieved 1 completed year of service, the third level when they have achieved 3 completed years of service, and the fourth level when they have achieved 12 completed years of service, in all cases prior to April 30th each year. As the preamble makes clear, the allotment must be based on completed years of service prior to April 30th each year. In this light, it is clear that the term "to 3" and "to 12" is intended to set the end of the range, and not to create a completed year entitlement. An employee with 3 years of service but who had not achieved that milestone prior to April 30 will remain at the second step of vacation grid for another year. That is the end of the range for the second step of the vacation allotment. The next year, she or he will have completed 3 years prior to April 30th, and will therefore advance to the next step. The same pattern is repeated at the third step. It is only if one reads the preamble to the provision as defining every reference to years in the grid as a reference to "completed years of continuous Company service prior to April 30th each year" that a conflict arises. In my view, there is no reason to read the preamble in this manner, and to do so creates a conflict where one need not exist.

36. For these reasons, I find that the vacation language is not ambiguous, and there is no need to resort to extrinsic evidence to arrive at an appropriate interpretation.

37. However, even if one accepts that an ambiguity exists, whether latent or patent, I find that the evidence would not support the Employer's position in this case.

38. Most of the bargaining evidence before me was not contested. In particular, the parties either agreed on or at least did not challenge the bulk of the evidence concerning the background and lead up to bargaining the MOA

for the LCC, the parties' intentions in entering into the MOA, and the specific proposals passed between the parties.

39. Much of the Employer's argument focussed on the parties' agreement that that the terms and conditions to be negotiated would allow the new LCC to compete with other domestic LCCs. Implicit in this agreement, argued the Employer, was an understanding that the terms and conditions would not be superior to those at Mainline. The Employer argues that the Union's interpretation violates this principle. Yet the uncontradicted evidence before me is that the vacation entitlement bargained in the MOA, even on the Union's interpretation, represents a savings at every step when compared to the Mainline entitlement. Further, the provision is not only consistent with the entitlement at CanJet, one of the LCCs with which Air Canada was seeking at the time to compete, but identical. In the case of the West Jet comparator, the entitlements under the MOA are different and provide for accelerated progression in one respect, but as noted by Mr. Beverage they are inferior in several other respects.

40. There is a significant conflict between the parties' evidence with respect to the alleged conversation concerning the vacation entitlement at the bargaining table. None of the witnesses was able to describe this conversation with any particularity, and neither party had any notes of the conversation. This lack of clarity with respect to the origin of a single provision in a collective agreement is not surprising in the context of the bargaining out of which it arose: the parties were addressing a wide range of substantial issues under serious time pressures and with little sleep. There is often a tension in collective bargaining between care and precision, on the one hand, and the need to actually get the job done, on the other.

41. Further, while the evidence is in conflict I do not find that any of the witnesses were being untruthful, in the sense of deliberately misrepresenting what took place. Rather, the conflicting evidence is far more likely to reflect a combination of: a) memories fading over a significant period of time during which this issue lay dormant, where the provision was not the parties' primary focus at the time and was discussed for no more than a couple of minutes; b) a genuine misunderstanding between the parties of the kind that can easily arise when parties are engaged in fast paced, high-pressure and multi-issue bargaining; and, c) the colouring of memory over time as influenced by the tug of self-interest and the hardening of positions. In my view, both parties' evidence of the alleged conversation likely reflects what they genuinely believe must have happened in order to have arrived at the position in which they now find themselves, more so than it reflects any specific memory of what took place.

42. In assessing each party's version of events it is necessary to consider both internal consistency as well as consistency with the overall context of bargaining and the evidence that is not in dispute. In this light, I find that if a specific conversation concerning the interpretation of the vacation proposal did take place, it is highly unlikely that the parties would have agreed that employees required 4 completed years of service to move to the 15-day entitlement.

43. The Employer's position is that at the time, it accepted the Union's representation that inserting a "3" rather than a "4" at the start of the third level somehow made it more clear that an employee did not achieve that level until they had 4 complete years of service. There is quite simply no coherent explanation for how this could possibly be the case. If the entitlement was intended to begin with 4 "completed" years of service inserting a 3 cannot possibly signify this intention. There is an area of potential ambiguity that both parties spoke to, where an employee has more than 3 complete years of service, but less than 4 complete years (i.e., when they are in the course of completing their 4th year, but continue to have only 3 complete years' service). But there is no possible overlap between 3 years of service and 4 "complete" years of service, and therefore no circumstance in which a reference to 3 could possibly indicate 4 complete years.

44. Further, the evidence establishes that the Union's intention from the outset was to obtain a vacation grid that mirrored the CanJet agreement. The Union's lead negotiator was familiar with both the agreement and its operation, and the uncontested evidence is that under that agreement, employees would have moved up at 3, not 4 years. The Union proposed the CanJet language specifically in order to obtain that accelerated advancement through the grid, as consolation for the overall inferiority of the provision as compared to Mainline. I note as well that the format of the proposed grid was the same as the format in the summary of the WestJet agreement, suggesting that the Employer was familiar with the model.

45. Finally, the Employer's position that the parties agreed to settle on 4 years of completed service as a trigger for the next level of entitlement is not consistent with Mr. Morello's understanding of what the Union was initially seeking to achieve with its vacation proposal, and the fact that its initial proposal was not materially different from the provision the parties settled upon. Mr. Morello testified that the Union was looking for 3 years, the Employer 5, and that the parties settled on 4. Yet the parties agreed to the preamble and the grid from the Union's initial proposal. In order to accept the Employer's position, I would have to find that the Union agreed to move off of the CanJet comparator but concluded that the language did not need to be adjusted to reflect this concession, and then proffered an absurd

explanation for why this was the case which the Employer accepted without further question. The evidence does not support this conclusion.

ii) Has there been a mutual mistake that should be rectified?

46. As noted above, Ms. Scarpelli's evidence was that the Union's intention from the outset was to obtain accelerated progression through the vacation grid equivalent to the entitlement at CanJet. The inclusion of non-sequential numbering in the grid was not an error on the Union's part, but rather reflected its intention to adopt the grid and progression provided for under the CanJet agreement. The CanJet agreement also includes non-sequential numbering and the same thresholds, and Ms. Scarpelli testified that it was interpreted and applied in the same manner the Union seeks through this grievance. I find no reason to doubt Ms. Scarpelli's testimony in this regard, which is consistent with the documentary evidence before me and the Union's overall approach to bargaining. In this light, any mistake with respect to the terms of the vacation provision cannot have been mutual, and I would not grant rectification on this basis.

iii) Has there been a unilateral mistake that should be rectified?

47. There is no dispute between the parties that the equitable remedy of rectification is available in the appropriate circumstances, including in cases of unilateral mistake, or that the decision of the Supreme Court of Canada in *Sylvan Lake, supra,* sets out the appropriate analysis. The Court in *Sylvan Lake* describes the nature of the remedy and the kind of evidence required and the hurdles a party must clear in order to obtain it, as follows (at paras 31-41):

> ***A. Rectification of Contract***
>
> 31 Rectification is an equitable remedy whose purpose is to prevent a written document from being used as an engine of fraud or misconduct "equivalent to fraud". The traditional rule was to permit rectification only for mutual mistake, but rectification is now available for unilateral mistake (as here), provided certain demanding preconditions are met. Insofar as they are relevant to this appeal, these preconditions can be summarized as follows. Rectification is predicated on the existence of a prior oral contract whose terms are definite and ascertainable. The plaintiff must establish that the terms agreed to orally were not written down properly. The error may be fraudulent, or it may be innocent. What is essential is that at the time of execution of the written document the defendant knew or ought to have known of the error and the plaintiff did not. Moreover, the attempt of the defendant to rely on the erroneous

written document must amount to "fraud or the equivalent of fraud". The court's task in a rectification case is corrective, not speculative. It is to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other: *Hart v. Boutilier* (1916), 1916 CanLII 631 (SCC), 56 D.L.R. 620 (S.C.C.), at p. 630; *Ship M. F. Whalen v. Pointe Anne Quarries Ltd.* (1921), 1921 CanLII 57 (SCC), 63 S.C.R. 109, at pp. 126-27; *Downtown King West Development Corp. v. Massey Ferguson Industries Ltd.* (1996), 1996 CanLII 1232 (ON CA), 133 D.L.R. (4th) 550 (Ont. C.A.), at p. 558; G. H. L. Fridman, *The Law of Contract in Canada* (4th ed. 1999), at p. 867; S. M. Waddams, *The Law of Contracts* (4th ed. 1999), at para. 336. In *Hart*, *supra*, at p. 630, Duff J. (as he then was) stressed that "[t]he power of rectification must be used with great caution". Apart from everything else, a relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts.

...

C. *The Conditions Precedent to Rectification*

35 As stated, high hurdles are placed in the way of a businessperson who relies on his or her own unilateral mistake to resile from the written terms of a document which he or she has signed and which, on its face, seems perfectly clear. The law is determined not to open the proverbial floodgates to dissatisfied contract makers who want to extricate themselves from a poor bargain.

36 I referred earlier to the four conditions precedent, or "hurdles" that a plaintiff must overcome. To these the appellants wish to add a fifth. Rectification, they say, should not be available to a plaintiff who is negligent in reviewing the documentation of a commercial agreement. To the extent the appellants' argument is that in such circumstances the Court may exercise its discretion to refuse the equitable remedy to such a plaintiff, I agree with them. To the extent they say the want of due diligence (or negligence) on the plaintiff's part is an absolute bar, I think their proposition is inconsistent with principle and authority and should be rejected.

37 The first of the traditional hurdles is that Sylvan (Bell) must show the existence and content of the inconsistent prior oral agreement. Rectification is "[t]he most venerable breach in the parol evidence rule" (Waddams, *supra*, at para. 336). The requirement of a prior oral agreement closes the "floodgate" to unhappy contract makers who simply failed to read the contractual documents, or who now have misgivings about the merits of what they have signed.

38 The second hurdle is that not only must Sylvan (Bell) show that the written document does not correspond with the prior oral agreement, but that O'Connor either knew or ought to have known of the mistake in reducing the oral terms to writing. It is only where permitting O'Connor to take advantage of the error would amount to "fraud or the equivalent of fraud" that rectification is available. This requirement closes the "floodgate" to unhappy contract makers who simply made a mistake. Equity acts on the conscience of a defendant who seeks to take advantage of an error which he or she either knew or ought reasonably to have known about at the time the document was signed. Mere unilateral mistake alone is not sufficient to support rectification but if permitting the non-mistaken party to take advantage of the document would be fraud or equivalent to fraud, rectification may be available: *Hart*, *supra*, at p. 630; *Ship M. F. Whalen*, *supra*, at pp. 126-27.

39 What amounts to "fraud or the equivalent of fraud" is, of course, a crucial question. In *First City Capital Ltd. v. British Columbia Building Corp.* (1989), 1989 CanLII 2868 (BC SC), 43 B.L.R. 29 (B.C.S.C.), McLachlin C.J.S.C. (as she then was) observed that "in this context 'fraud or the equivalent of fraud' refers not to the tort of deceit or strict fraud in the legal sense, but rather to the broader category of equitable fraud or constructive fraud. . . . Fraud in this wider sense refers to transactions falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained" (p. 37). Fraud in the "wider sense" of a ground for equitable relief "is so infinite in its varieties that the Courts have not attempted to define it", but "all kinds of unfair dealing and unconscionable conduct in matters of contract come within its ken": *McMaster University v. Wilchar Construction Ltd.* (1971), 1971 CanLII 594 (ON SC), 22 D.L.R. (3d) 9 (Ont. H.C.), at p. 19. See also *Montreal Trust Co. v. Maley*(1992), 1992 CanLII 8264 (SK CA), 99 D.L.R. (4th) 257 (Sask. C.A.), *per* Wakeling J.A.; *Alampi v. Swartz* (1964), 1964 CanLII 303 (ON CA), 43 D.L.R. (2d) 11 (Ont. C.A.); *Stepps Investments Ltd. v. Security Capital Corp.* (1976), 1976 CanLII 648 (ON SC), 73 D.L.R. (3d) 351 (Ont. H.C.), *per* Grange J. (as he then was), at pp. 362-63; and Waddams, *supra*, at para. 342.

40 The third hurdle is that Sylvan (Bell) must show "the precise form" in which the written instrument can be made to express the prior intention (*Hart*, *supra*, *per* Duff J., at p. 630). This requirement closes the "floodgates" to those who would invite the court to speculate about the parties' unexpressed intentions, or impose what in hindsight seems to be a sensible arrangement that the parties might have made but did not. The court's equitable jurisdiction is limited to putting into words that — and only that — which the parties had already orally agreed to.

41 The fourth hurdle is that all of the foregoing must be established by proof which this Court has variously described as "beyond reasonable doubt" (*Ship M. F. Whalen*, *supra*, at p. 127), or "evidence which leaves no

'fair and reasonable doubt'" (*Hart*, *supra*, at p. 630), or "convincing proof" or "more than sufficient evidence" (*Augdome Corp. v. Gray*, 1974 CanLII 172 (SCC), [1975] 2 S.C.R. 354, at pp. 371-72). The modern approach, I think, is captured by the expression "convincing proof", i.e., proof that may fall well short of the criminal standard, but which goes beyond the sort of proof that only reluctantly and with hesitation scrapes over the low end of the civil "more probable than not" standard.

48. In this case, I find that the Employer cannot clear any of the first, second or fourth hurdles. For the reasons set out above, I have found that the evidence before me does not establish that there was a prior oral agreement between the parties that differs from the written agreement. Neither does the evidence establish that the Union acted in any manner akin to fraud—in the broad equitable sense of the word—that would cause the Employer to mistakenly believe that the Union was making an agreement different from the written document. I cannot find that the Union, while intending to obtain advancement to the third step of the grid upon completion of 3 years of service, not only told the Employer that it agreed that advancement would not take place until 4 completed years of service, but also represented that inserting a 3 instead of a 4 at the beginning of the step made this agreement clear and that the Employer simply accepted this explanation without further comment. As noted above, the Union's intention in adopting the grid from the CanJet agreement was clear from the outset, and at no time did the Union waiver from its initial proposal. The Employer's evidence is of a vaguely remembered statement alleged to have been made by an unidentified representative of the union at an unspecified time in the latter stages of bargaining, in the course of a very brief exchange of which there are no notes or records. On the basis of this evidence, I cannot find, whether on the balance of probability or on any higher standard of proof, that the Union mislead the Employer in any manner that would give rise to the remedy of rectification.

CONCLUSION

49. For the Reasons set out above, I declare that third step in the vacation grid begins with 3 completed years of service and the fourth step in the vacation grid begins with 12 completed years of service. I further order that the Employer credit employees who were not allocated vacation in accordance with this interpretation with 5 days of vacation.

50. I have considered the Union's request for an additional award of damages in compensation for the lost opportunity to take vacation in a timely manner. While there may be circumstances in which such an additional award is warranted, I am satisfied that in this particular case the in-kind remedy ordered above is sufficient to address the Employer's breach of the collective agreement.

51. I remain seized with respect to any issues arising from the implementation of this award.

Dated at Toronto, Ontario, this 4th day of May, 2018

Eli A. Gedalof
Arbitrator

Ex. 4

Base	Impacted Employees	Total Liability (Days)	Total Liability (hours)
YTO	317	1585	4095
YMQ	32	160	413
YDT	41	205	530
Total	390	1950	5038