IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADIAN UNION OF PUBLIC EMPLOYEES, AIR CANADA COMPONENT

and

AIR CANADA *rouge*

Meal Allowances During Training Grievance (CHQ-rouge-17-19)

Before: Jesse M. Nyman
Sole Arbitrator

Appearances

For the Union: Adrienne Lei – Counsel
Brett Hughes – Counsel
Robyn Jenkins – President, Local 4098
Craig Smith – Vice-President, Local 4098
Nicole Ratis – Secretary-Treasurer, Local 4098
Alex Habib – Grievance Committee
Ivana Jonc – Grievance Committee
Dianne Solomon – Grievance Committee

For the Employer: Jackie VanDerMeulen – Counsel
Irene Chrisanthopoulos – Senior Counsel, Labour & Employment
Giuseppe Morello – Director of Labour Relations
Annette Anand – Senior Director, Inflight Services, *rouge*
Christine Devine – General Manager, Labour & Crew Performance
Krystal Johnston – Labour Relations Advisor

This grievance proceeded to a hearing in Toronto, Ontario on April 30, 2018.

1. The employer, Air Canada *rouge* (the "Employer" or "Rouge") is a Low Cost Carrier Airline ("LCC"). The union, Canadian Union of Public Employees, Air Canada Component ("CUPE" or the "Union") represents the Cabin Personnel employed by Rouge.

2. The issue raised by the grievance is whether Flight Attendants employed by Rouge are entitled to meal allowances when they attend mandatory training at their home base. CUPE argues that they are. Rouge argues that they are not and that even if they are, CUPE is estopped from relying on its strict legal rights. At

the hearing, and without prejudice to its position in any other matter, Rouge elected to not proceed with an argument that the grievance was untimely.

3. The hearing proceeded by way of an expedited process. Both parties filed comprehensive briefs that contained detailed Witness Statements, full submissions and case law. At the hearing the parties were given the right to cross-examine the individuals who had provided Witness Statements. Counsel then made full argument.

4. Having carefully considered the parties' submissions and case law, I find that the grievance must be dismissed. My reasons are as follows.

FACTS

5. The facts below are derived from the Witness Statements of Robyn Jenkins, Local President of CUPE (filed by CUPE), Craig Smith, Vice-President of CUPE (filed by CUPE) and Christine Devine, currently the General Manager, Labour & Crew Performance at Rouge (filed by Rouge). Rouge cross-examined Mr. Smith on some areas of his Witness Statement. No one else was cross-examined.

6. CUPE represents all of the cabin personnel employed by Air Canada Mainline ("Mainline") and Rouge. Although Rouge argued otherwise, there is one bargaining unit comprised of all cabin personnel employed on both carriers. The terms and conditions of work for the bargaining unit are, unsurprisingly, contained in the same Collective Agreement. The current Collective Agreement has a term of April 1, 2015 to March 31, 2019. The terms and conditions for the Mainline cabin personnel are contained in Articles 1 to 24, the Letters of Understanding and other attached rules, appendices and memoranda. The terms and conditions of work for the Rouge cabin personnel are contained in Letter of Understanding Number 55.

7. The parties have agreed to enter into successive collective agreements with terms of April 1, 2019 to May 31, 2022 and April 1, 2022 until March 31, 2025 and that there will be no strikes or lockouts in the negotiations for those collective agreements. There will however be an opportunity to bargain and proceed to interest arbitration, if necessary.

8. Flight Attendants periodically attend training. The training serves several purposes, one of which is maintaining qualifications as a Flight Attendant pursuant to the *Canadian Aviation Regulations.*

9. At Rouge, attendance at training is mandatory. In a document titled "ePub" Rouge set out the following expectations for flight attendants:

Training Sessions

- Attend all training sessions when assigned. Training sessions are considered flights (duty). Keep yourself informed of the local requirements and start times.

  …
- You are unable to attend training if you are booked off during the duration of the training.

10. Christine Devine's Witness Statement states that the purpose of the ePub was to communicate that training is mandatory but was not intended to suggest that training counts as a duty period for the purpose of Meal Allowances or attracts any specific compensation.

11. Training at Rouge is carried out in classrooms and on simulators. Training does not take place when Flight Attendants are working on a flight or on a legal layover. Flight Attendants are paid a training credit equal to 50% of their regular pay for each hour of training. Training may be booked by Rouge for up to eight hours per day plus a half hour break. Employees are free to leave the training area during the half hour break.

12. The relevant provisions respecting entitlement to Meal Allowances for Rouge cabin personnel is found in Article L55.08.01. That provision reads:

> L55.08.01 MEAL ALLOWANCES – Meals will be provided or meal allowances paid only where an Employee is on duty or on a legal layover during an entire recognized meal period. No meal or meal allowances will be provided for scheduled flight departures from Home Base and scheduled flight arrivals at Home Base during recognized meal periods when originating or terminating a duty period at Home Base. No meals or meal allowances will be provided outside the recognized meal periods.
>
> …
>
> L55.08.01.01 For greater certainty, the provisions of Article 7 of the Air Canada Mainline Collective Agreement regarding pay in lieu of meal allowances shall not apply to Air Canada Rouge Employees.
>
> L55.08.02 **Recognized Meal Periods are as follows:**

	Departures	**Arrivals**
Dinner	0300 to 0530	0300 to 0430 (Night Flight)
Breakfast	0800 to 0930	0800 to 0930
Lunch	1230 to 1330	1230 to 1330
Dinner	1800 to 1930	1700 to 1830 (except overseas)
Snack	2300 to 0100	2300 to 0100

13. With the exception of Article L55.08.01.01 (set out above) and its corollary in Article 7 of the Mainline provisions, the relevant Meal Allowance provisions in Letter of Understanding Number 55 (Articles L.55.08.01 to L.55.08.06) are identical to the Meal Allowance provisions in Article 7 of the Mainline provisions (Article 7.02 to 7.02.05).[1] Having said this, Letter of Understanding No. 55 contains a definition of "Per Diem" as a "payment… to cover meal expenses while on a pairing" that is not contained in the Mainline provisions.

14. Rouge Flight Attendants are also expressly entitled to additional pay, including a Meal Allowance Per Diem, when training occurs away from home base. The relevant provision of the Collective Agreement reads:

> L55.06.08 When required by the Company to travel to and from the training location away from home base, the Employee will be credited, for pay purposes only, two (2) hours for each calendar day of travel and the Per Diem provided by Article 7.

15. There is no similar provision to L55.06.08 in the Mainline portions of the Collective Agreement.

16. Rouge suggested that the reference to Article 7 in Article 55.06.08 is an error and should in fact reference Article 8. It is not necessary to resolve this issue for the purpose of this decision.

17. Rouge began operations in 2013. Rouge has never paid meal allowances to its Flight Attendants when they are engaged in training at their home base. It was not disputed, however, that Mainline cabin personnel do receive meal allowances when engaged in training at their home base and that this practice predates Rouge's inception.

18. Rouge asserted, and it was not challenged, that Flight Attendants do not receive meals or meal allowance while on special assignment at a marketing event or while on Special Assignment as a training instructor.

19. The evidence also establishes that members of CUPE's executive were involved in training and were not paid a meal allowance as early as 2014. The grievance was not filed however until May 3, 2017.

[1] There is also a commitment to board "Power Packs" on Mainline flights in Article 7 that does not appear in the Rouge Letter of Understanding Number 55 but that distinction is not material to the issue before me.

POSITIONS OF THE PARTIES

20. Both parties agree that the issue before me is one of collective agreement interpretation. They also agree on the general principles applicable to collective agreement interpretation. They referred me to a number of cases that set out those principles including: *Burlington (City) v CUPE, Local 44 (MacDougall)*, 2017 CarswellOnt 3743 (Ont Arb) (Surdykowski); *Irving Pulp and Paper v. CEP, Local 30*, 2002 NBCA 30; *Cancoil Thermal Corp. and UFCW, Local 175* (2017), 284 L.A.C. (4th) 76 (Gee); *DHL Express (Canada) Ltd. v. CAW-Canada, Local 4215* (2004), 124 L.A.C. (4th) 271 (Hamilton); *Golden Giant Mine v U.S.W.A., Local 9364*, [2004] O.L.A.A. No. 600 (Marcotte); and, *Nigel Services for Adults with Disabilities Society and CSWU, Local 1611 (Severance Allowance)* (2013), 230 L.A.C. (4th) 400 (McPhillips). Where they join issue is on the application of those principles to the language of the Collective Agreement.

21. CUPE's position is relatively straightforward. It argues that training is mandatory. It is therefore work for the employer and thus "duty". When training occurs over a period of time that encompasses a full "meal period" a Meal Allowance is due. CUPE relies on the language of Article L.55.08.01 and submits that if a Flight Attendant is at mandatory training for a period of time that covers a meal period they are entitled to a Meal Allowance because they are "on duty …during an entire recognized meal period."

22. CUPE relies on *Canadian National Railway Company v. Teamsters Canadian Rail Conference*, 2014 CanLII 41683 (Can Arb) (Picher) and *British Columbia Emergency Health Services and Ambulance Paramedics of British Columbia (CUPE, Local 873)*, 2015 CarswellBC 4101 (BC Arb) (Sullivan) for the proposition that if an employee is under the direction of the employer then they are "on duty". CUPE referred me to *Persona Communications Inc. and IBEW, Local 213*, 2017 CarswellNat 7491 (Can Arb) (Hall) for the proposition that mandatory training is work for the purpose of a collective agreement.

23. CUPE argues that a Flight Attendant does not need to be assigned to a flight to receive a Meal Allowance. It argues that Flight Attendants have different types of duty and Meal Allowances are not restricted to one type of duty. CUPE asserts that a flight attendant may be on standby duty over a meal period and not be assigned to a flight and still receive a Meal Allowance.

24. CUPE argues that other provisions of the Collective Agreement lead to the conclusion that training is duty. In support CUPE points out that training time is included in the calculation of a "duty period" which is relevant for calculating rest periods and maximum consecutive duty hours. Training time is also counted for the determination of whether an employee has met their minimum monthly pay guarantee.

25. CUPE argues that Article L.55.02.02 protects union officials from more severe discipline than other bargaining unit members when performing Flight Attendant duties and Article L.55.01.02.06 defines crew rest as "time free from all duty for the Company". CUPE argues that if training is not duty then these protections do not apply during training. CUPE argues that this would be an absurd result.

26. CUPE argues that the extrinsic evidence supports its position. CUPE submits that the "ePub" is an admission by Rouge that training is duty and that it is treated as a "flight".

27. CUPE also relies on the unchallenged practice at Mainline of providing meal allowance during training that predates Rouge's inception. CUPE points to Article 55.02.01 which reads (in part):

> L.55.02.01 …
> The parties agree that there is one (1) bargaining unit consisting of all Cabin Personnel at Air Canada, including those cabin personnel employed at [Rouge].

28. CUPE argues that there is one Collective Agreement applicable to all of the cabin personnel and therefore the practice at Mainline is relevant and informs the proper interpretation of Article L.55.08.01 and L.55.08.02.

29. Rouge approaches the issue slightly differently. Rouge argues that in order to claim a Meal Allowance a Flight attendant must be either "on duty" or on "a legal layover" for "an entire recognized meal period". Rouge notes there is no suggestion that training is "a legal layover" and argues that the term "duty" under Letter of Understanding Number 55 refers to periods immediately before, during and after a flight. Rouge argues therefore that Flight Attendant training is not "duty".

30. Rouge relies upon Article L55.15.01.01 which defines a "duty period" as commencing one hour prior to a scheduled departure time and ending fifteen minutes after the flight arrival time. Rouge argues that as training is not in connection with a flight, it is not during a duty period and thus is not duty for the purposes of Letter of Understanding Number 55.

31. Rouge also argues that in order to be entitled to a Meal Allowance, a Flight Attendant must be on duty for an "entire recognized meal period." Article L.55.08.02 defines "recognized meal periods" by reference to times in the context of an "Arrival" or "Departure". Rouge argues that therefore a "recognized meal period" can only occur when a Flight Attendant has duty in relation to an actual flight. Since training does not occur in connection with a

flight, the training is not duty and does not occur over a "recognized meal period", and therefore there is no entitlement to a Meal Allowance.

32. Rouge argues that a Meal Allowance is a "Per Diem" under Letter of Understanding No. 55. Rouge points out that CUPE called the Meal Allowances a "per diem" in its grievance. Rouge also relies on Article L55.08.05 in the Meal Allowance provisions. It reads:

> L55.08.05 The amount of the per diem meal allowance will in no case be less than that provided to other flight crews.

33. Rouge argues that the term "Per Diem" is expressly defined in Article L55.01.02.20 as follows:

> **"Per Diem"** means a payment made to a Flight Attendant to cover meal expenses while on a pairing including deadheading and layover;
>
> [emphasis in original]

34. Rouge argues that a Per Diem to cover meal expenses is therefore defined as a payment when on a pairing. As training at home base does not involve a pairing or any flight segment, there is no basis for the payment of a Per Diem or Meal Allowance.

35. Rouge argues that in Article L.55.06.08 the parties expressly agreed that a Flight Attendant who is required to travel away from their home base to attend training is entitled to a Meal Allowance Per Diem. Rouge argues that this implies when training is at the Flight Attendant's home base there is no entitlement to a Meal Allowance because if a Meal Allowance was payable for all training this clause would be redundant.

36. Rouge argues that there are other types of non-flying duty, such as special assignment at a marketing event or as a training instructor, that do not attract Meal Allowances. Rouge argues this implies training likewise does not attract a Meal Allowance.

37. Rouge argues that the generally understood basis for the payment of a meal allowance is to cover meal expenses when an employee is away from home. Rouge argues that it would be exceptional to provide a meal allowance to an employee engaged in training at their home base when that employee is also entitled to a half hour break during which they are free to do as they wish.

38. Rouge argues that CUPE's reliance on extrinsic evidence is misplaced because there is no ambiguity in the Collective Agreement and thus no basis for recourse

to extrinsic evidence. In the alternative, Rouge argues that the "ePub" is not a concession that makes any commitment to any type of compensation for training. Rouge also argues that the practice evidence at Mainline is irrelevant because Air Canada is a different employer and the Mainline and Rouge cabin personnel are in two different bargaining units. Rouge also argues that if extrinsic evidence is admissible, the established practice of Rouge not paying Meal Allowance to Flight Attendants engaged in training at their home base supports Rouge's position.

39. Finally, and in the alternative, if Flight Attendants are entitled to a Meal Allowance while training at their home base, Rouge argues that CUPE is estopped from asserting its strict legal rights. Rouge argues that it has never paid Meal Allowance to Flight Attendants during training, that CUPE was aware of this prior to the last round of bargaining through the express knowledge and experience of its officers and members and that CUPE never put Rouge on notice that it would assert its strict legal rights to Meal Allowance during training at any time prior to or during the last round of negotiations. Rouge relied upon CUPE's silence, or failure to claim Meal Allowance during training, and, as a result, did not pursue or secure any change in the language in the last round of bargaining. Rouge argues that all of the elements of an estoppel are therefore present.

ANALYSIS AND DECISION

40. The determination in this case is an exercise in Collective Agreement interpretation. The parties referred me to several cases that set out some of the applicable interpretative principles. These principles are well established and there is no need to review those cases in detail as they all turn on their own facts and language in issue. The established interpretive approach requires an arbitrator to determine the "objective intention of the parties" by giving all of the words used their plain and ordinary mean within the context of the provision in which they appear and the Collective Agreement as a whole. Extrinsic evidence, such as evidence of the parties' practice, can be relied upon as an aid to interpretation when the collective agreement contains a patent or latent ambiguity.

41. The cases relied upon by CUPE referred to above determine whether certain duties or obligations constitute being "on duty" in the context of the specific duties and the language of the collective agreements in those cases. The cases are therefore of some assistance in defining the concept of duty in a general sense, but they go no further. In *Persona Communications Inc.*, *supra*, the arbitrator held that the determination as to whether "training" was work that attracts pay turns on whether the training is mandatory or not. There is, however, no dispute in this case that Flight Attendant training is mandatory or

that it attracts pay. It is unquestionable that the Flight Attendant training is duty within that generally understood meaning of the term.

42. I also accept CUPE's argument that other provisions in Letter of Understanding Number 55 lead to the conclusion that training is "duty" within the meaning of term in Letter of Understanding Number 55. This is the only logical conclusion that flows from the protection of Union Officials engaged in "normal Flight Attendant duties" in Article L.55.02.02 and the definition of Crew Rest as "a period of time free from all duty for the Company" in Article L.55.01.02.06. If mandatory paid training is not "duty" then Union Officials are not protected during training and training can be scheduled during Crew Rest. This could not have been the parties' intention.

43. Rouge relies upon Article L.55.15.01 which defines a "duty period" in relation to flight departure and arrival times. However, Article L.55.08.01 only requires that an employee be "on duty" not that they are working a "duty period". The fact that "duty" is a concept that extends beyond a "duty period" is bolstered by Article L.55.15.03 which reads:

> Notwithstanding Article L55.15.01.01 [the definition of a "duty period"], an Employee may be required by Air Canada Rouge to report for duty up to thirty (30) minutes prior to any duty period ("Pre-Duty Period Extension"). Any Pre-Duty Period Extension time shall be included in any duty period limitations but, shall be excluded from the calculation of all guarantees and flight time limitations. Any Pre-Duty Period Extension will be paid at one-half (1/2) of the Employee's hourly rate of pay.

44. Thus, the parties have expressly recognized the distinction between "duty" and a "duty period" and that an employee may be on "duty" even though that duty is not part of a "duty period".

45. For these reasons I conclude that mandatory training is "duty" for the purpose of Letter of Understanding Number 55.

46. The second, and more difficult, issue in this case is whether Flight Attendant training is the type of "duty" that attracts Meal Allowance under the Collective Agreement. Rouge's position is that it is not because training is not duty in relation to a flight and therefore is not duty over an entire "recognized meal period" as that term is defined in Article L.55.08.02 the Collective Agreement. For ease of that Article reads:

> L55.08.02 **Recognized Meal Periods are as follows:**
>
> **Departures Arrivals**

Dinner	0300 to 0530	0300 to 0430 (Night Flight)
Breakfast	0800 to 0930	0800 to 0930
Lunch	1230 to 1330	1230 to 1330

47. The use of the headings “Departures” and “Arrivals” above the listed meal times in this Article at least suggests that the parties intended the Recognized Meal Periods to refer to times in connection with flights. If these headings were the only reference to the requirement for a flight in connection with the payment of a Meal Allowance, I might be persuaded that the Collective Agreement was ambiguous on this point. However, the requirement for a connection between Meal Allowance and a flight is supported by other articles of Letter of Understanding No. 55.

48. I accept Rouge’s argument that the terms “Per Diem” and “Meal Allowance” mean the same thing and are used somewhat interchangeably under Letter of Understanding No. 55. In Articles L55.06.08 and L55.08.05 a Meal Allowance is referred to as a “Per Diem” and a “per diem meal allowance” respectively. There is no basis for drawing what would be a tortuous distinction between the two terms and finding that the parties meant one thing when they used the term Meal Allowance and another when they used the term Per Diem.

49. The term “Per Diem” is defined in Article L55.01.02.20 as a “payment… to cover meal expenses while on a pairing…” This definition of “per diem” requires a flight. In order to accept CUPE’s position that a flight is not a prerequisite to the receipt of a meal allowance I would have to ignore the use of the headings “Departures” and “Arrivals” in Article L55.08.02 and conclude that the parties intended a Per Diem to be only payable in connection with a flight but that the payment of a Meal Allowance does not require a flight. There is no support for this distinction in the language of the Collective Agreement.

50. Moreover, Article L55.06.08 expressly provides for, in part, the payment of a Per Diem (or payment to cover meal expenses while on a pairing) to Flight Attendants who are required to travel away from their home base for training. One of the relevant principles of interpretation is that all words used must be given meaning. If CUPE’s position that training attracts a Meal Allowance is accepted, this part of Article L55.06.08 is rendered meaningless. The interpretation consistent with the applicable interpretative principles is that training does not attract a meal allowance and so Article L55.06.08 provides an exception to this rule.

51. For these reasons I conclude that the language of the Collective Agreement is unambiguous and there is no basis for relying on the extrinsic evidence. However, if I am wrong in this regard, I would reach the same result.

52. First, while the "ePub" clearly sets out Rouge's expectation that training is mandatory, it does not contain any reference to compensation for training. While it does equate training with "flights" the nature of that statement is equivocal at best. In the absence of more, I would not be prepared to draw the conclusion that Rouge intended to commit to any type of compensation during training. For example, it was not suggested that that the "ePub" entitles Flight Attendants to Flight Credits as opposed to Training Credits as compensation for attendance at training despite Rouge equating training with flights in the "ePub".

53. The issue of past practice is more difficult. The unchallenged evidence is that Mainline cabin personnel are paid meal allowances for training at home base. I do not accept Rouge's argument that this evidence is irrelevant because Mainline is a separate employer with a separate bargaining unit or collective agreement. The Collective Agreement is quite clear that there is one bargaining unit and one Collective Agreement. In these circumstances the practice at Mainline cannot be dismissed out of hand.

54. There are, however, some material differences in the language of the Mainline provisions and Letter of Understanding No. 55 that support a distinction in the interpretation and practice between the two carriers. While the Meal Allowance provisions are materially the same, the Mainline provisions do not contain an equivalent definition of Per Diem as that found in Article L55.01.02.20, nor is there an equivalent provision in the Mainline articles providing for a Per Diem when training away from home base. As noted above, it is the presence of these two provisions that supports the finding that Letter of Understanding Number 55 is unambiguous and solidifies the interpretation that requires a flight in order to enable a Flight Attendant to receive a Meal Allowance. The result is that the absence of these provisions in the Mainline provisions are material and could support a different interpretation. At the very least it is arguable that their absence renders the Mainline provisions sufficiently ambiguous and that recourse to the practice evidence at Mainline is necessary to resolve the ambiguity. For the purposes of this decision that means that the practice evidence at Mainline is not of assistance because that practice derives, in part, from materially distinct collective agreement language.

55. The result is that even if Letter of Understanding No. 55 is ambiguous, the extrinsic evidence does not support a result in CUPE's favour.

56. Finally, and while given my findings above it is unnecessary to decide the point, even if Letter of Understanding Number 55 provided for the payment of a Meal Allowance while training at home base, CUPE is clearly estopped from asserting that right until the conclusion of bargaining for the next Collective Agreement. Rouge's consistent practice of not paying meal allowance to Flight Attendants engaged in training at home base was known to CUPE through the first-hand

knowledge of its officers and members. That practice however remained unchallenged throughout the full term of one collective agreement and the subsequent bargaining for the current collective agreement. In such a case, CUPE's silence amounted to a representation to Rouge that it would not rely on its strict legal rights, and Rouge lost the opportunity to secure its practice during the negotiations for the current Collective Agreement. As such all of the elements of an estoppel are present.

57. For the foregoing reasons the grievance is dismissed.

DATED at Toronto this 22nd day of May, 2018.

Jesse Nyman
Sole Arbitrator