IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADIAN UNION OF PUBLIC EMPLOYEES, AIR CANADA COMPONENT

and

AIR CANADA ROUGE

Lead Premium – HOS and Sick Pay Grievance (CHQ-rouge-17-04)

Before:	Jesse M. Nyman Sole Arbitrator
Appearances	
For the Employer:	Jackie VanDerMeulen – Counsel Irene Chrisanthopoulos – Senior Counsel, Labour & Employment Law Giuseppe Morello – Director of Labour Relations Christopher James – Manager, Financial Analysis Christine Devine – General Manager, Labour & Crew Performance, Air Canada rouge Annette Anand, Senior Director, In Flight Services, Air Canada rouge Rosemary Capparelli – Senior Director, Finance, Air Canada rouge Krystal Johnston – Labour Relations Advisor Rachel Devon – Articling Student
For the Union:	Adrienne Lei – Counsel Brett Hughes – Counsel Marie-Hélène Major - CUPE Air Canada Component President Beth Mahan - CUPE Air Canada Component Vice President Wesley Lesosky - CUPE Air Canada Component Secretary Treasurer Robyn Jenkins - Rouge President Nicole Ratis - Rouge Vice President Kevin Tyrell - CUPE National Representative Ivana Jonic - Executive Assistant, CUPE Air Canada Component Grievance Committee

This grievance proceeded to a hearing in Toronto, Ontario on February 6, 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. Rouge and CUPE are parties to a collective agreement covering the Cabin Personnel (the "Collective Agreement"). The term of the Collective Agreement is April 1, 2015 to March 31, 2019.

2. The issue raised by the grievance is whether Flight Attendants ("FA") employed by Rouge who are unable to work a flight for which they are scheduled as the Lead Flight Attendant ("LFA") because of illness, injury or because they have been held out of service pursuant to Article 55.20.02 of the Collective Agreement, are entitled to the Lead Flight Attendant pay for that missed shift.[1]

3. The hearing proceeded by way of an expedited process. Both parties filed comprehensive briefs that contained detailed witness Will-Say Statements, full submissions and case law. At the hearing the parties were given the right to cross-examine the individuals who had provided Will-Say Statements following which counsel made full argument. It was obvious that the issue raised in this grievance is significant to both parties. Counsel and the parties are to be commended for the extremely thorough and excellent work they did in preparing their briefs and presenting their arguments at the hearing.

4. Having carefully considered the parties' submissions and case law, I find that the Collective Agreement does not require Rouge to pay LFA pay to FAs who miss a flight on which they are scheduled as the LFA because they are on sick leave or held out of service. However, Rouge is estopped from changing its practice of paying LFA pay in these circumstances until the conclusion of bargaining for the 2019 to 2022 Collective Agreement. My reasons are as follows.

FACTS

5. The facts below are derived from the Will-Say Statements of Robyn Jenkins, Local President of CUPE (filed by CUPE), Christopher James, currently Manager, Financial Analysis at Mainline (filed by Rouge) and Giuseppe Morello, currently the Director of Labour Relations at Air Canada (filed by Rouge). CUPE briefly cross-examined Mr. Morello on some areas of his Will-Say. No one else was cross-examined.

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[1] Whether the amount paid to the Lead Flight Attendant is classified as a "rate" or a "premium" is contentious and has implications for the resolution of this matter. As such it is defined as "Lead Flight Attendant pay" or "LFA pay" for the purpose of this decision.

6. In 2012, Air Canada decided it would launch an LCC. It advised CUPE of its intention and recognized CUPE as the bargaining agent of the cabin personnel of the LCC. CUPE and Air Canada ultimately entered into what is now Letter of Understanding Number 55 ("LOU 55") which is appended to and forms part of the Collective Agreement between Air Canada Mainline and CUPE applicable to cabin personnel. LOU 55 contains all of the terms and conditions of employment applicable to the Rouge cabin personnel represented by CUPE.

7. Rouge began operations in 2013. The Collective Agreement (including what is now LOU 55) that was then in effect expired on March 31, 2015. Between April and November, 2015 the parties bargained a renewal agreement. That renewal agreement is the Collective Agreement currently in effect.

8. Pursuant to the *Canadian Aviation Regulations*, SOR/96-433, one FA on every flight must be designated as the "In-Charge flight attendant". The "In-Charge flight attendant" has additional pre-flight, in-flight and post-flight duties beyond those of the other FAs including completing paperwork and certain safety related responsibilities.

9. As set out in greater detail below, LOU 55 contains a complex compensation structure for the FAs, the starting point of which is a wage grid setting hourly rates based on years of service. It also provides that the most senior FA on each flight will be designated as the "In-Charge flight attendant" and will be called the LFA. Article 55.07.01 of the Collective Agreement provides that "[e]mployees shall receive a premium of fifteen [*sic*] (15%) of their hourly wage rate when operating the Lead Flight Attendant Position on a flight."[2] If the FA scheduled as the LFA on a flight is not present because they are sick, held out of service, or any other reason, then the senior FA who is on the flight will assume the "In-Charge" duties and receive LFA pay.

10. The FAs bid on their monthly flight schedules by seniority. The FA schedules are posted approximately two weeks prior to the start of the next month. When the schedules are posted the FAs can see if they are scheduled as the senior FA on a flight and designated as the LFA on that flight. At the time they bid they will not know if they will be the senior FA for any given flight pairing. The schedules can change after they are posted in accordance with the Collective Agreement and operational needs. For example, a flight may be cancelled or an FA may be drafted to a different flight. In some circumstances an FA will be drafted from a flight on which they are the scheduled LFA to a flight on which they are not. In these cases the FA will not receive LFA pay.

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[2] Provided the senior FA on the flight has not exercised a right to "opt-out" of the LFA role and is otherwise qualified. In other words, there are some exceptions where the senior FA may not be designated the LFA.

11. LOU 55 also provides for pay during sick leave and pay while an FA is held out of service for up to seven days pending a disciplinary investigation. From the day Rouge began operating in 2013 up until December 31, 2015, if an FA was scheduled as the LFA on a flight but did not fly because he or she was sick (and entitled to sick pay) or held out of service as a result of a disciplinary investigation, the FA would receive sick pay or held out of service pay equivalent to LFA pay for that missed flight.

12. A pay stub from an FA from the month of May, 2015 was placed in evidence. On that paystub the FAs flight hours worked as an FA are paid according to a payroll code "FLYHRSFA" and the rate attached to that code is her hourly rate. Her hours worked as an LFA are paid according to a payroll code "FLYHRSLD" and the rate attached to that code is her LFA pay rate (her FA hourly rate plus 15%).

13. On that paystub, the FA's sick pay was recorded under payroll code "SICK FA". The rate for SICK FA was equal to the hourly rate for the FA when not scheduled as an LFA. When she was sick and scheduled as an LFA, she was paid according to a different code, "SICK-LD". The SICK-LD rate was equal to LFA pay.

14. In November, 2015, Rouge reviewed its payroll and business records system in order to better understand its financial analytics. During this process Rouge management discovered that FAs were being paid the equivalent of LFA pay when they were sick or held out of service and missed a flight on which they were scheduled to be the LFA. Rouge also discovered the payroll codes SICK-LD and HELDLEAD were being used and that the pay rates attached to these codes were equivalent to LFA pay. Mr. James' Will-Say confirms that both of these codes were in use and were being used to pay FAs the equivalent of LFA pay when they missed flights for which they were scheduled to be an LFA.

15. Rouge management believed this was a mistake. As a result, the codes were changed and commencing on January 1, 2016, FAs were no longer paid the equivalent of LFA pay when sick or held out of service. After that date FAs who were sick or held out of service were paid sick pay and held out of service pay at their applicable FA hourly rate regardless of whether they missed a flight on which they were scheduled as the LFA.

16. There is no evidence that this change was discussed with CUPE prior to its implementation or at any time prior to the conclusion of the most recent round of bargaining in November, 2015. This is not to suggest Rouge was acting in an underhanded or inappropriate manner. To the contrary, it is not clear from the evidence that Rouge was even aware of the issue prior to the conclusion of bargaining. Nor has Rouge taken any steps to recover or claw back the LFA pay that it paid to sick FAs and FAs that were held out of service between 2013 and

December 31, 2015 despite its position that those payments were improperly made.

17. Needless to say, CUPE did not agree to this change. When it became aware of the change, it filed the grievance that is before me.

Initial Bargaining at Rouge

18. Mr. Morello was involved in the bargaining that culminated in the initial LOU 55. Mr. Morello's evidence is that at bargaining Rouge explained its intention was to have all FAs trained to handle the "In-Charge" duties and that the LFA would not be a separate classification. Mr. Morello's evidence is that this was a marked distinction from Air Canada Mainline where the "In-Charge" is a separate classification (called a "Service Director" or "Purser") and where the "In-Charge" rate applies to employees in those classifications in all aspects of their employment (i.e. vacation, sick pay, etc.)

19. While the parties reached agreement on almost all of the items in the first round of bargaining, the first Rouge agreement was ultimately settled by interest arbitration. That Award introduced seniority bidding for flights into the Collective Agreement.

The Current Collective Agreement

20. In the last round of bargaining the parties agreed there would be no strike or lock-outs until 2025. They agreed that there would be three collective agreements covering this period with respective terms of April 1, 2015 to March 31, 2019 (which is the current Collective Agreement); April 1, 2019 to March 31, 2022; and, April 1, 2022 to March 31, 2025.

21. Either party may give notice to bargain during the last three months of these three collective agreements, however, the parties may not strike or lock-out in 2019 or 2022. After 90 days of bargaining, either of the parties may refer the outstanding items to mediation. If mediation is unsuccessful, the parties can each refer a maximum of 10 items (subject to certain exclusions) that remain in dispute to interest arbitration. Any other unresolved item will remain unresolved.

22. Rouge's position is that the sick pay provisions and LFA pay are items that can be bargained and advanced to interest arbitration if either party so desires in 2019 and again in 2022. CUPE did not take issue with this assertion but submitted it was speculative to predict what the parties may do in the 2019 and 2022 rounds of bargaining.

The Collective Agreement

23. There are a number of provisions of the Collective Agreement that are relevant. They are set out below.

> 55.01.02 Definitions – The following terms, when used in this Agreement, shall have the meanings set out below unless otherwise stated:
> …
> 55.01.02.10 "Employee" means a Flight Attendant employed by [Rouge];
> …
> 55.01.02.12 "Flight Attendant" means an Employee employed by the Company to perform the duties and responsibilities of a Flight Attendant;
> …
> 55.01.02.16 "Lead Flight Attendant Position" means a Flight Attendant when exercising the duties and responsibilities of an In-Charge Flight Attendant pursuant to the Canadian Aviation Regulations and as directed by the Company.
> …
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> 55.04 CLASSIFICATIONS
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> 55.04.01 Lead Flight Attendant – A Lead Flight Attendant shall be assigned to every flight operated by Air Canada Rouge and shall be responsible for performing the duties required by the Canadian Aviation Regulations and as directed by Air Canada Rouge.
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> 55.04.01.01 All Employees shall be trained in the Lead Flight Attendant position.
> …
> 55.04.01.03 When submitting monthly bids, Lead qualified Employees will indicate their preference for a Lead position. If there are insufficient Leads to cover all pairings, an Employee on the opt-out list will be assigned to an open pairing in reverse order of seniority.
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> 55.04.02 Flight Attendant – Flight Attendants shall be responsible for performing the duties required by the Canadian Aviation Regulations and as directed by Air Canada Rouge.

55.05 RATES OF PAY

Employees shall be paid in accordance with the following graduated wage scale following the successful completion of initial training:[3]

	Hourly Rate							
Year	April 1, 2015 through March 31, 2018	Apr 1 2018	Apr 1 2019	Apr 1 2020	Apr 1 2021	Apr 1 2022	Apr 1 2023	Apr 1 2024
0-1								
2nd year								
3rd year								
4th year								
5th year								

55.05.05 SPECIAL ASSIGNMENT

55.05.05.01 Employees assigned to a Rouge Ambassador assignment will be paid as follows:
1. For assignments of less than one (1) block month: Employees will be paid four (4) hours credit per day worked.
…
55.06 CREDITS AND GUARANTEES

55.06.01 Flight Credits – Employees shall receive credit per duty period equal to the greater of the following:
The total scheduled flight time contained in the pairing;
1. [*sic*] The actual flight time contained in the pairing;
2. Four (4) hours;
3. (50%) [*sic*] of actual duty period worked applied for pay purposes only and not for flight time limitation purposes.

55.06.02 Monthly Pay Guarantee – Employees who are available for duty for an entire month shall receive a monthly pay guarantee of seventy-five (75) hours.
…
55.06.04 Deadhead Credits – Employees involved in an operational deadhead shall be credited with the greater of one-half (1/2) of the actual or scheduled flight time between the originating and terminating deadhead points. Employees required to deadhead by surface transportation shall be credited with one-half (1/2) of the actual deadhead time involved. When the first flight of a duty period is a deadhead, such duty period shall commence thirty minutes prior to scheduled departure time at home base and at departure time away from home base.

[3] Actual wage rates have been redacted. Wage rates increase with each year of service and on each anniversary date.

NOTE: A Lead Flight Attendant involved with the operation of a ferry flight as a designated working crew member shall receive flight time credits for all Block to Block Flight time worked.

55.06.05 Training Credits – Employees who are required to attend training shall receive a minimum credit equivalent to the greater of four (4) hours or actual hours for each day of training paid at fifty percent (50%) of their hourly wage rate. Employees shall be scheduled for a maximum of eight (8) hours a day excluding half (1/2) hour lunch.
…
55.06.06 Online training – Employees shall be paid at one-half (1/2) of his/her hourly rate of pay with a minimum guaranteed entitlement of one (1) hour. …

55. 06.07 Reserve/Standby Duty – Employees shall be guaranteed a credit of four (4 hours) [*sic*] for each standby duty day.
…
55.07 PREMIUMS

55.07.01 Lead Flight Attendant – Employees shall receive a premium of 15% of their hourly wage rate when operating the Lead Flight Attendant Position on a flight.
…
55.07.03 Over 95 Hours – Employees who work in excess [*sic*] ninety-five hours in a block month shall receive a premium of fifty percent (50%) of their hourly wage rate for all hours worked above this threshold…

55.07.05 The Company recognizes drafting as an exception and not a regular occurrence. When drafted on scheduled days off, Employees will receive, for pay purposes only, a draft premium equivalent to fifty percent (50%) of their hourly wage rate. This premium shall not be flight-time limiting.
…
55.11 SICK LEAVE

55.11.01 Employees shall be granted forty-eight (48) new hours of paid sick leave on January 1st of each year. These credits may be accumulated, up to an absolute maximum of 144 hours…

55.11.04 One (1) hour of sick leave credits is equivalent to one (1) hour of flight time credits.
…
55.20 DISCIPLINE AND DISCHARGE
…
55.20.02 Where disciplinary or discharge action is contemplated, the Employee may be held out-of-service with pay for not more than seven

(7) consecutive calendar days in order to conduct a thorough investigation.

…

55.24.06 Air Canada Rouge will provide a yearly bank of three thousand (3000) hours, calculated at their current rate of pay, plus lead premium for the purposes of Union business. There will be a minimum of two (2) union officers released at any time. All other releases will be subject to operational requirements. Unused hours will not carry over to the following year.

POSITIONS OF THE PARTIES

24. The positions of the parties can be summarized as follows.

25. CUPE argues that the LFA is a separate classification and that LFA pay is a pay rate that is equivalent to 115% of the FA's regular hourly rate. CUPE argues that only FAs can fill the LFA position and that the Collective Agreement creates two rates of pay: FA pay and LFA pay.

26. CUPE argues that cabin personnel at Rouge are paid "credits" for various types of work including flight time, vacation, deadhead, training and sick leave. CUPE points to the language of the provisions above and argues that a one-hour flight time credit is equivalent to one-hour of flight time by the employee. To this end, pursuant to Article 55.06.01 if the actual duty period of an FA or LFA is less than four hours, he or she will be paid four hours of flight credits as if they had flown for four hours.

27. CUPE argues that the Collective Agreement must be read as a whole and that this supports finding that LFA is a separate classification and LFA pay is a separate rate of pay. CUPE argues that this is confirmed by the "Note" under Article 55.06.04 – Deadhead Credits, that requires an FA to be paid LFA pay on a ferry flight.

28. CUPE argues that vacation, ground duty and special assignment credits are not about an FA being assigned as an LFA, and thus the FA pay rate attached to that work does not assist Rouge. CUPE points out as well that Union Business is paid at the LFA rate (Article 55.24.06) even though leave for union business has nothing to do with LFA duties.

29. CUPE argues that an FA will know in advance if they are scheduled as an LFA on a flight and may count on the higher income from that flight. CUPE argues that more senior FAs will work a higher proportion of their flights as an LFA and many count on that as well.

30. CUPE argues that when its members are the LFA they are paid pursuant to a distinct payroll code "FLYHRSLD" which is equal to 115% of their regular hourly rate. CUPE argues that this is distinguished from a premium that would simply show a 15% increase for certain hours. CUPE points to the payroll codes SICK FA and SICK-LD as further evidence that LFA pay is a distinct rate and is treated as such by Rouge. CUPE argues that these are more than just internal payroll codes – they are distinct rates of pay.

31. CUPE argues that what the parties discussed in bargaining and Rouge's intentions about the status of an LFA is irrelevant. CUPE also argues that the way in which the parties have delineated the "In-Charge" position into a clear, separate classification under the Mainline portion of the Collective Agreement is equally irrelevant. What matters is what the parties have agreed to in LOU 55 applicable to Rouge cabin personnel.

32. CUPE argues that the Sick Leave provisions of the Collective Agreement require Rouge to compensate FAs for the pay they would have received but for their illness. CUPE argues this includes LFA pay. CUPE argues the word "premium" in Article 55.07.01 (Lead Flight Attendant) reflects the regular rate of pay for an LFA, unlike the overtime premium which compensates for additional work.

33. CUPE argues that arbitral jurisprudence makes clear that sick pay provisions in a collective agreement are designed to indemnify employees for the loss of wages they would have earned but for their illness or injury. CUPE referred me to the following authorities in support: *Board of Education of School District No. 79 (Cowichan Valley) and United Steelworkers, Local 1-1937*, 2014 CanLII 22992 (BC LA); *Halifax Infirmary Hospital v. C.B.R.T. & G.W.*, Local 606 (1989), 5 L.A.C. (4th) 138 (Veniot).

34. CUPE argues that pursuant to Article 55.11.01 Rouge cabin personnel receive 48 hours of sick pay each year and that no specific rate is attached to these hours. CUPE points out that Article 55.11.04 provides that a one-hour sick leave credit is equivalent to a one-hour flight time credit, and argues that this is equivalent to the pay for one hour of flight time. CUPE argues that the rate is calculated at the time of the illness in order to maintain the employee's income. As a result, if an FA is scheduled as the LFA on a flight that they miss because they are sick or held out of service, the FA will be paid a sick leave credits (for sick leave) or pay (for being held out of service) equal to the LFA hourly rate of pay.

35. CUPE relies upon *General Teamsters, Local Union No. 362 and Garda Screening Inc.*, 2014 CanLII 25551 (AB GAA). That case dealt with a similar situation where the employees' wage rate was expressed as a premium relative to another position's rate. CUPE relies upon the follow passage from that decision (at pp. 8-9):

> I take from [the union and employer's] submissions and the jurisprudence relating to these two common collective agreement benefits, that there is agreement that the purpose of holiday pay and sick pay provisions is to insulate employees from the loss of the regular pay they would otherwise receive but for their absence from work due to sickness or holiday. The point of the Employer's argument is that, if the 12.5% paid to Point Leaders' is a premium, it is not part of the regular pay. The point of the Union's argument is that their regular pay includes the 12.5%.
>
> Reading the collective agreement as a whole, I am persuaded by the Union's arguments outlined above and I conclude that the parties have agreed that the regular rate of pay for persons in the classification of Point Leader is 112.5% of the Level 3.4 Screening Officers' wage rate. I acknowledge that the use of the term "premium rate" if considered in isolation, lends some superficial strength to the Employer's submission. However, the use of that terminology alone does not convince me that the parties intended that employees who are routinely and regularly paid at a wage rate of $21.16 per hour should receive only $18.81 reimbursement on the days they are absent due to sickness or holiday. With respect, that is inconsistent with the purpose of holiday and sick pay and borders on creating an absurdity.

36. CUPE acknowledges that in *Garda*, *supra*, there was a difference because the employment classifications in that case were also employment statuses. CUPE argues, however, that the reasoning still applies because LFA pay is a regular rate of pay.

37. CUPE argues that the cases relied upon by Rouge in its Brief are distinguishable. CUPE submits that decisions dismissing grievances seeking an overtime premium to be included in sick pay are distinguishable because LFA pay "is a regular rate of pay for the LFA classification", and Rouge FAs are required to work as LFAs, whereas overtime is a greater rate of pay than the employee would otherwise receive for performing the missed work. CUPE argues that overtime is different from LFA premium because it compensates employees for hours worked beyond the regularly allotted hours of work.

38. In the alternative, CUPE argues that Rouge is estopped from altering its practice of paying LFA pay to employees who miss a flight on which they were scheduled as an LFA and who are entitled to sick pay or who are held out of service pay for that missed flight. CUPE relies upon the well-established principles necessary to find an estoppel: a representation by one party that it will not rely upon its strict legal rights upon which the other party has relied to its detriment.

39. CUPE argues that Rouge's practice of paying LFA pay, where applicable, as sick pay and held out of service pay, was Rouge's representation. CUPE argues it was not put on notice that Rouge would change the practice and therefore it lost the opportunity to bargain over the issue. CUPE relies upon *Coca-Cola Bottling Company and United Food and Commercial Workers International Union, Local 393W* (2003), 117 L.A.C. (4th) 238 (Marcotte) and *O.P.S.E.U. v. George Brown College of Applied Arts & Technology* (2002), 113 L.A.C. (4th) 208 (Campbell, MacDowell, Murray).

40. CUPE argues that the parties agreed to a ten-year deal and that the estoppel lasts at least that long. CUPE argues it is premature to speculate what would happen during any of the "reopener" periods.

41. Rouge argues that the essential question is whether LFA pay is a separate wage rate or a premium payable when acting in the LFA role.

42. Rouge relies upon the well-established interpretation principles that the language of the Collective Agreement is to be given its plain and ordinary meaning in the context of the provisions in which it appears and the collective agreement as a whole. Rouge also relies upon the principle that every word in a collective agreement must be given meaning. Rouge referred to *Irving Pulp & Paper Ltd. v. C.E.P., Local 30i*, 2002 NBCA 30; *DHL Express (Canada) Ltd. v. CAW-Canada, Local 4215* (2004), 124 L.A.C. (4th) 271 (Hamilton) and *Garda*, *supra*.

43. Rouge argues that the language of the collective agreement requires active performance of the LFA duties to trigger LFA pay. Rouge points to Article 55.07.01 which says that a "premium" is payable when an FA is "*operating* the Lead Flight Attendant position *on a flight*." Rouge relies on the definition of "Lead Flight Attendant Position" in article 55.01.02.16 which defines the term as an FA "…*when exercising* the duties and responsibilities of an In-Charge Flight Attendant…" Rouge argues that, absent actual performance of the LFA duties, an FA is not in the LFA Position and is not "operating" the LFA Position "on a flight". Rouge argues that therefore being sick or held out of service cannot trigger LFA pay. Rouge argues that CUPE's position reads out the active elements of the LFA definition and LFA pay.

44. Rouge argues that other provisions of LOU 55, such as the monthly guarantee, reserve, standby duty and special assignments make references to "with pay" or "pay" and that these credits do not attract LFA pay.

45. Rouge further submits that LFA is not a classification because it is not a position which is occupied by any specific employee. Rather it applies to the senior FA operating a given flight (provided they have not opted out and are otherwise qualified) in the "In-Charge" position. Rouge argues that an FA cannot bid into

the LFA position. Rouge also points out that there is no guarantee of LFA pay even when scheduled as the LFA. For example, there are times where an FA who is scheduled as a LFA will be drafted to a different flight where they are not the LFA. Alternatively, an FA may be scheduled as an LFA but the flight may be cancelled. When either of these events happen, LFA pay is not triggered or paid. Rouge also points out that when the FA scheduled as the LFA on a flight does not actually work the flight because they are held out of service, sick or drafted to another flight, the next senior FA on the flight is deemed the LFA and assume the responsibility to perform the LFA duties and receive LFA pay. CUPE's interpretation would result in two FAs receiving LFA pay for the same flight.

46. Rouge argues that LFA pay is not payable for any other FA hourly credit under the Collective Agreement and this is because the FA is not performing LFA duties. This includes credits for training, Rouge Ambassador, deadheading, vacation and holiday, ground duties, monthly pay guarantee and standby.

47. Rouge argues that LFA pay is payable to the designated "In-Charge" FA on a ferry flight because pursuant to the Regulations there must be an "In-Charge" FA on every flight and that designated FA has the additional applicable "In-Charge" duties assigned to him or her. Rouge argues this is consistent with the notion that LFA pay is only payable when the "In-Charge" duties are being actively performed.

48. Rouge contrasts the language of the sick pay credits provision with the language of the provision dealing with credits for union business. Rouge argues that the parties expressly agreed that the hourly pay for union business would include LFA pay (Article 55.24.06) but did not include such language in the sick pay provisions. The implication being that sick pay does not attract LFA pay.

49. Rouge contrasts the LFA pay provisions in the Rouge LOU 55 with the Mainline Agreement. In the Mainline Agreement the "In-Charge" duties are performed by a distinct classification – pursers – who have their own schedule and pay scale that attaches to all pay including vacation and other non-working credits. Rouge argues that the parties were familiar with the concept of the "In-Charge" being a distinct classification and chose a different structure when negotiating the LFA and LFA pay provisions of LOU 55. Rouge argues that these two structures appear in the same Collective Agreement and so may be properly contrasted as part of the interpretive exercise.

50. Rouge argues that CUPE must clearly establish a monetary benefit based upon the language of the Collective Agreement. Rouge relies upon *Golden Giant Mine v. U.S.W.A., Local 9364*, [2004] O.L.A.A. 600 (Marcotte) in support of that principle. Rouge argues that CUPE has failed to establish a clear entitlement to

LFA pay when sick or held out of service on the language of the Collective Agreement.

51. Rouge submits that if there is an ambiguity in the language, the bargaining history – in particular Mr. Morello's evidence that the LFA would not be a separate position at Rouge – supports its interpretation.

52. Rouge further argues that CUPE's cases stand for the proposition that sick pay is to cover lost wages but that they do not go so far as to include the payment of premiums. Rouge also relies upon *Lady Minto Gulf Islands Hospital and HEU, Re*, [1995] B.C.C.A.A.A. No. 24 (Munroe, Fuller and Tarasoff) in support. Rouge argues that LFA pay is a premium and that CUPE's cases therefore support Rouge's position. Moreover, Rouge argues, and is correct, that ultimately it is the terms of the Collective Agreement that govern any given situation.

53. Rouge contends that it paid LFA pay to FAs who were sick or held out of service between 2013 and December 31, 2015 in error. It argues there is no basis for an estoppel and that CUPE has failed to establish the necessary grounds for an estoppel. Rouge argues that it has been clear from the onset of bargaining between the parties that the LFA would not be a distinct position or classification and that it would only be a role when occupied on a given flight. Therefore there was no basis for CUPE to rely on the erroneous payments made between 2013 and December 31, 2015 as a representation that such amounts were in fact due or would be continued. Rouge also argues that CUPE's evidence does not establish that it would have bargained the issue in the last round of bargaining had it known the practice would change.

54. In the further alternative, Rouge argues that if an estoppel exists, it will come to an end during the next reopener period in 2019 when the parties can bargain the issue.

55. In reply, CUPE argues that the definition of FA is "an Employee employed by the Company to perform the duties and responsibilities of a Flight Attendant" and that, like the LFA definition, the definition of FA has "active" elements to it as well. CUPE submits that there is no argument that sick pay is not payable at the FA rate even though an FA is not actually performing FA duties when sick. Therefore, the fact that the LFA definition has active elements is irrelevant to the issue before me.

56. CUPE argues that the Will-Say of Mr. James makes clear that Rouge was paying LFA pay to FAs who were sick and held out of service. CUPE argues that this clear and consistent practice was a representation. CUPE argues it had no basis to assume the issue should be bargained in the last round because CUPE had no issue with how sick pay and held out of service pay was being handled. CUPE

argues that the evidence is that it did not consent to the change and would therefore have bargained the issue. CUPE argues that if there is an estoppel it should last for the full ten years – until the parties can strike or lockout - because it is premature to guess what the parties will do in 2019 and 2022.

ANALYSIS AND DECISION

The Interpretation Issue

57. Having carefully considered the parties' submissions and briefs I come to the conclusion that the Collective Agreement does not require LFA pay to be paid when an FA is unable to work a flight on which they are scheduled as the LFA because they are either sick or held out of service.

58. The starting point is the language of the Collective Agreement. There is no dispute about the well-established, relevant interpretive principles. Specifically, all words used are to be given their plain and ordinary meaning in the context of the provisions in which they appear and the collective agreement as whole. An arbitrator is not permitted to add to or amend the collective agreement.

59. The language of the sick pay and held out of service pay provisions are somewhat ambiguous when viewed in isolation. The sick pay provision (Article 55.11.04) says that "one (1) hour of sick leave credits is equivalent to one (1) hour of flight time credits". "Flight time credits" is not a defined term so it leaves open the possibility that it may include LFA pay. Likewise, Article 55.20.02 says that an "employee may be held out of service with pay" but does not define what that "pay" is. Both provisions, on their own, are thus ambiguous as to whether they include LFA pay.

60. However, the language used in the Lead Flight Attendant Premium (Article 55.07.01) and the definition of Lead Flight Attendant Position (Article 55.01.02.16) is not ambiguous. Both provisions require an FA to be acting as the "In-Charge" on a flight. For ease of reference the two Articles read:

> 55.01.02.16 "Lead Flight Attendant Position" means a Flight Attendant when exercising the duties and responsibilities of an In-Charge Flight Attendant pursuant to the Canadian Aviation Regulations and as directed by the Company.
>
> 55.07.01 Lead Flight Attendant – Employees shall receive a premium of 15% of their hourly wage rate when operating the Lead Flight Attendant Position on a flight.

61. According to the definition of Lead Flight Attendant Position, an FA is only in that position when they are "exercising the duties and responsibilities of an In-Charge Flight Attendant". The Lead Flight Attendant Premium is only payable when an FA is "operating the Lead Flight Attendant Position on a flight." Both of these provisions require the actual performance of the "In-Charge" duties on a flight.

62. An FA who is sick or held out of service cannot be in the Lead Flight Attendant Position because they cannot be *exercising* the duties and responsibilities of an "In-Charge" Flight Attendant in absentia. An FA who is sick or held out of service cannot be "operating the Lead Flight Attendant Position on a flight" because they are not in the course of "operating" any position, are not in the Lead Flight Attendant Position, nor on a flight. The result is that they cannot come within the language of Article 55.07.01 when sick or held out of service and are therefore not entitled to LFA pay.

63. To find that an FA who is sick or held out of service is still entitled to LFA pay would require an interpretation that reads out the requirement for the active exercise of the "In-Charge" duties on a flight and reads the words "scheduled as an LFA" into the Article 55.07.01. As the relevant interpretative principles make clear, each word must be given its plain and ordinary meaning and an Arbitrator is not permitted to read in or add words to a Collective Agreement.

64. CUPE argues that the definition of FA also requires active work and that if FA pay is payable when an FA is sick or held out of service, there is no basis for requiring active performance of LFA duties for the receipt of LFA pay. I do not agree. Flight Attendant is defined as follows:

> "Flight Attendant" means an Employee employed by the Company to perform the duties and responsibilities of a Flight Attendant;

65. An FA who is not working because he or she is sick or held out of service is still employed by Rouge to perform the duties and responsibilities of an FA. Being sick or held out of service does not end their employment or alter the purpose of that employment. They thus remain an FA as defined by LOU 55 when sick or held out of service.

66. The conclusion that LFA pay is only payable when actively performing LFA duties is further supported by the other provisions of the Collective Agreement. CUPE is correct that the fact that LFA pay is not paid when an FA is acting in the Rouge Ambassador role or is on standby, reserve, in training or deadheading is not inconsistent with its position because in those cases the employee is not losing a scheduled LFA flight. However, the parties have elsewhere clarified two specific situations where LFA pay is payable outside of being assigned as an LFA on a typical flight pairing.

67. The first is on a ferry flight (Article 55.06.04). In such a situation one FA must act as an LFA on the ferry flight because that is required by the Regulations. The Note in Article 55.06.04 clarifies that in that case the FA is acting as the "In-Charge" and is therefore entitled to LFA pay because they are working in the LFA Position on a flight.

68. The second is Union Business (Article 55.24.06). Pursuant to that provision Rouge must provide a yearly bank of 3,000 hours, calculated at the FA's current rate "plus lead premium". Thus, in the case of Union Business, the parties specifically agreed that such leave attracts LFA pay despite the fact that LFA duties are not being performed. This must be contrasted with the sick pay and held out of service provisions which do not specify that LFA pay is payable. Given that the parties specifically identified a situation in which LFA pay is payable despite the non-performance of LFA duties, the implication is that, with respect to sick pay and held out of service pay, where such a payment is not specifically provided for, LFA pay is not payable.

69. CUPE argues that LFA pay is a "rate of pay" equal to 115% of an FA's regular rate. CUPE argues that because LFA pay is a rate, it is the rate that is payable as sick pay or held out of service pay when a flight on which an FA is scheduled as the LFA is missed due to sick leave or being held out of service. CUPE's position is based on Rouge's payroll codes and the language of the Collective Agreement. Despite this initially compelling argument, I find that it ultimately does not succeed.

70. First, CUPE argues that, because Rouge's payroll system codes LFA pay as a compounded rate that is 115% of the regular FA rate, LFA pay must be a rate. Otherwise it would show up in the payroll system as a 15% increase for certain hours. I do not agree. There is no connection between the codes Rouge uses for its payroll system and the Collective Agreement. In other words, nothing in the Collective Agreement dictates how Rouge should code wage payments in its payroll management system, and therefore the codes have no bearing on the interpretative issue before me. It cannot be that Rouge's unilateral choice of payroll system codes determines whether a monetary payment is a rate or premium. If that were so, it would be open to Rouge to change the LFA pay status by making coding changes in its payroll system.

71. Second, and more importantly, the language of the Collective Agreement does not support LFA pay being a distinct rate. CUPE relied significantly on *Garda*, *supra*, in support of its position. The issue in that case was the rate of sick pay for Point Leaders. As is the case in the Collective Agreement in this proceeding, the Point Leaders' pay rate was defined as a "premium rate" of 12.5% above the rate payable to a Screening Officer. The employer in that case, like this case, argued

that sick pay was payable at the Screening Officer rate and that the Point Leader "premium" was not payable.

72. Under the collective agreement in *Garda*, *supra*, Point Leader was defined as a separate classification with its own duties and wage rate. It was also a separate classification for the purpose of vacation. Screening officers applied for Point Leader positions through the job posting provisions and were subject to a 90 day probationary period if they were the successful applicant. If they successfully completed the probationary period, they were entitled to remain in the "position" for a minimum of one year. Shift bidding was based on seniority and classification. Moreover, their status as a Point Leader did not depend on the active performance of certain duties.

73. In *Garda*, *supra*, both parties accepted the proposition that "premiums are not generally included in the calculation of holiday and sick pay." The issue before the arbitrator in that case ultimately turned on whether the Point Leaders' rate was in fact a premium. The arbitrator concluded that Point Leader was a separate classification with a distinct wage rate because it was defined as such, subject to the job posting provisions with an attendant probationary period and minimum service period and was distinct for the purpose of vacation. The arbitrator held that the expectation was that a Point Leader would only work in the capacity of a Point Leader. The result was that the Point Leader "premium" was not a true premium, but rather a wage rate applicable to Point Leaders. Having reached that determination, the arbitrator concluded that Point Leaders should likewise receive sick pay (and holiday pay) at their regular Point Leader rate.

74. The issue in *Garda, supra*, is similar to the issue presently before me. However, the way in which Point Leaders were treated under that collective agreement is materially different than the treatment of LFAs in the Collective Agreement. Under the Collective Agreement Lead Flight Attendant is listed under Article 55.04 as a Classification, but the Article simply provides that an "LFA shall be assigned to every flight operated by Air Canada Rouge and shall be responsible for performing the duties required by the Canadian Aviation Regulations…" In practice, the most senior qualified FA who has not opted out is deemed to be the LFA on any given flight. In this respect, and as set out in detail above, the designation of an FA as an LFA under the Collective Agreement is tied directly to the active performance of "In-Charge" duties on a flight and absent performance of those duties an FA is not in the LFA position or classification.

75. Moreover, FAs cannot bid into an LFA position. It is filled on a flight to flight basis based upon the relative seniority of the cabin personnel. An FA scheduled as the LFA may have that status changed if they are drafted to another flight where they are not the senior FA or their flight is cancelled. Nor are LFAs treated as

distinct for the purpose of vacation or any other provisions or entitlements under the Collective Agreement. In other words, an FA can claim no entitlement to the LFA position or LFA pay outside of the time they are actually performing "In-Charge" duties on a flight.

76. Finally, the receipt of LFA pay, which is defined as a premium, is directly connected to the assumption of additional duties and responsibilities on a flight. LFA pay compensates the FA for the additional work that is required when they are on a flight fulfilling the "In-Charge" duties and responsibilities. If they are not on that flight, they are not doing that additional work, and therefore not entitled to the additional compensation.

77. For these reasons, I find that LFA is not a classification, and further, that LFA pay is a premium. As a result the reasoning in *Garda*, *supra*, supports a conclusion that LFA pay is not payable when an FA is sick or held out of service.

78. CUPE relies upon two additional cases that it asserts stand for the proposition that sick pay is designed to compensate an employee for the wages they would have earned but for their illness. I take no issue with the reasoning in those cases but they turn on the language of the collective agreements in issue and they are distinguishable from the issue before me.

79. The issue in *Cowichan Valley*, *supra*, was which hours would be used to accumulate sick pay. The decision did not consider the rate at which sick pay was paid. CUPE is correct that the arbitrator held that the purpose of sick pay is to indemnify employees against the loss of wages they would have earned but for their absence from work due to illness or injury. However, that was put forth as a general proposition in the context of the issue of the accumulation of sick pay that was before the arbitrator. Given the very different issue in that case, it is of limited guidance in this case.

80. The issue in *Halifax Infirmary*, *supra*, was whether an employee was entitled to the receipt of sick pay for missing a shift which he picked up outside of his regular schedule. In short, the employee agreed to pick up a shift on a Sunday and then became ill and could not work that shift. The employee claimed sick pay for the missed shift and the employer denied it. The arbitrator held as follows:

> 63 Sick leave is pay for time off from work. It is paid for by the employer to the employee at the employee's then usual rate of pay. That is definitional once it is recalled that paid sick-leave is an income maintenance scheme. The sick leave "bank" contains time, not money. Accumulated sick-leave time has no "rate", it just maintains the going rate for the person's normal job at the time it is required to be used to

> maintain income. It, accordingly, is just time off paid at the person's normal rate of pay.
>
> 64 It is true the work [the grievor] was unable to perform would have paid him overtime rates had he performed it, but the fact of the matter is that he did not. Therefore it would not be appropriate for him to claim it. What he is claiming, and properly, in my opinion, is a lost day's pay against his bank of sick-leave credits. The claim would be for one day's pay, which would be regular rates for 7.5 hours.

81. While the issue in *Halifax Infirmary*, *supra*, was somewhat different than the issue in this case, to the extent it applies, it tends to support Rouge's position that sick pay credits ought to be paid at FAs regular rate, and not at the LFA pay rate which is paid for the performance of additional duties and responsibilities.

The Estoppel Issue

82. Notwithstanding counsel to Rouge's very able submissions I find that on the facts of this case, Rouge is estopped from changing its practice of paying LFA pay to FAs who are sick or held out of service.

83. The elements required to find an estoppel are as well established as the relevant interpretative principles reviewed above. The seminal statement of the law is found in *Combe v. Combe*, [1951] 1 All E.R. 767 (Eng. CA) where Denning L.J. held (at p. 770):

> The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to effect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself so introduced, even though it is not supported in point of law by any consideration, only his word.

84. It has long been established that arbitrators have the jurisdiction to apply the doctrine in appropriate cases and that this may include requiring an employer to maintain the provision of a benefit even where that benefit is greater than provided for in the collective agreement: see for example *Canadian National Railway Co. v. Beatty*, 1981 CanLII 2953 (ON SCDC), (1981), 34 OR (2d) 285; 128 DLR (3d) 236 which was reviewed in detail in *George Brown College*, *supra*.

85. In *Canadian National Railway*, *supra*, the Divisional Court upheld an arbitrator's decision holding that the employer was estopped from refusing to pay employees sick pay during the three-day waiting period for weekly indemnity benefits. While the collective agreement did not require the employer to pay wages during the waiting period, there was a long-standing practice of paying wages, to certain employee groups, during that period. The union grieved the employer's unilateral decision to end the practice of paying certain employees during the waiting period and, at arbitration, the arbitrator ruled the employer was estopped from doing so. The arbitrator's decision was judicially reviewed.

86. The Divisional Court upheld the arbitrator's award and in so doing confirmed that the company's practice of making the wage payments during the waiting period was a representation. Moreover, the union had relied on the practice and lost the ability to bargain over the issue and attempt to secure it as a collective agreement benefit. The Court therefore upheld the arbitrator's finding that the company was estopped from changing its practice of paying wags during the waiting period until the end of the next round of bargaining.

87. In the case before me, the Will-Say of Mr. James establishes that Rouge has paid LFA pay to FAs who were scheduled as LFAs on a flight but missed that flight because they were sick or held out of service. The practice comes out of Rouge's payroll system and there is nothing to suggest that the system or practice changed at any time between Rouge's inception and January 1, 2016.

88. The Will-Say of Ms. Jenkins establishes that at the time she became a CUPE officer in August, 2015 she was aware of the practice of paying LFA pay to FAs who were sick. Thus, CUPE did have knowledge of the practice during the last round of bargaining and prior to the change. Ms. Jenkin's Will-Say also establishes that CUPE was not put on notice of the change by Rouge before or during the last round of bargaining, and that CUPE did not consent to the change.

89. On these facts I have no difficulty finding that Rouge's practice of paying LFA pay to FAs who were sick or held out of service was a representation by conduct. This practice, which was in existence from inception to December 31, 2015, was at the very least a representation by Rouge that it would not rely on whatever strict legal right it had under the Collective Agreement.

90. I do not agree that Rouge's position during the initial round of bargaining meant that CUPE ought to have known that there was no such representation. While the evidence establishes that Rouge wanted the LFA position to be different than the purser position at Mainline, there is no evidence that the impact on sick pay was ever discussed. Absent an express discussion about the intended impact of the LFA structure on sick pay there is an insufficient basis to find that CUPE ought

to have understood that Rouge never meant for an FA to receive LFA pay for a missed flight due to sickness or being held out of service. That would ascribe a level of insight by CUPE beyond what is reasonable on the evidence of this case.

91. This is also an answer to Rouge's argument that because the payment was a mistake it should not be taken as a representation by CUPE. Moreover, the mistake was Rouge's. If that mistake lead CUPE to believe in a state of affairs that denied CUPE the opportunity to bargain over the issue, Rouge ought to bear the prejudice arising from its mistake.

92. Finally, while the evidence about what CUPE would have done during the last round of bargaining had it known of the impending change is not as robust as it could be, it is still sufficient to establish CUPE detrimentally relied upon Rouge's representation by conduct. In particular, Ms. Jenkins' Will-Say establishes that CUPE knew of the practice, was not put on notice prior to or during bargaining that the practice would change and that CUPE did not and does not consent to the change. From these facts I conclude that CUPE lost its opportunity to bargain over the benefit during bargaining. Given that it knew of the practice and did not consent to the change, I have no difficulty concluding that the issue would have been raised at the bargaining table if CUPE was aware of the need to do so.

93. In sum, I find that Rouge's practice was a representation to CUPE that it would not rely on its strict rights under the Collective Agreement. CUPE relied on this representation and lost the opportunity to bargain over the issue prior to its change. The net result is that Rouge is estopped from changing its practice.

94. The parties disagreed about the length of the estoppel. The basis for the estoppel is CUPE's lost opportunity to bargain the issue. CUPE is correct that it is not open to the arbitrator to speculate about what will happen in 2019 when the two parties have an opportunity to bargain. However, I need not determine what the parties will do in 2019. What can be said with certainty is that CUPE will have an opportunity to pursue the issue at the bargaining table, and possibly interest arbitration, at that time, if it so desires. This will cure the unfairness caused by Rouge changing the practice mid-term of the Collective Agreement, and bring an end to the estoppel.

95. For all of the foregoing reasons the grievance is allowed in part. Rouge is estopped from changing the practice of paying FAs LFA pay who miss a flight on which they are the scheduled LFA because they are on sick leave or being held out of service pursuant to Article 55.20.02. The estoppel will last until bargaining for the April 1, 2019 to March 31, 2022 collective agreement concludes. Rouge is ordered to make any affected employee whole for any loses as a result of its change of the practice commencing on January 1, 2016.

96. I am seized with respect to any issues arising out of the implementation of this award or the damages owed to any particular employee as a result of the foregoing order.

DATED at Toronto this 26th day of February, 2018.

Jesse Nyman
Sole Arbitrator