

FINDINGS AND DECISION

IN A DISPUTE

between

LABRADOR AIRWAYS (Air Labrador) LTD

("the Employer")

and

INTERNATIONAL ASSOCIATION OF MACHINISTS

and AEROSPACE WORKERS

("the Union")

Grievor: Ms. Cindy Garland

APPEARANCES:

For the Union

Presenter: Mr. Ken Russell, IAMAW

For the Employer

Presenter: Mr. Ronald S. Noseworthy, Q.C.

Advisor: Mr. Brent Acreman, Chief Pilot

Witness: Mr. Brent Acreman

Arbitrator Dr. John A. Scott

The Grievance was heard at St. John's on October 21, 2009

Grievance & Articles Violated: Articles 17, 12, and any other relevant articles.

Remedy requested: (February 27, 2009) "To be re-instated in my original position with retroactive pay from re-instatement back to the layoff date of February 14th, 2009 and to be made whole."

Employer Reply: "no article of the Collective Agreement was violated."

ITEMS TAKEN INTO EVIDENCE:

Consent	#1	Grievance dated February 27, 2009
"	#2	Collective Agreement "On Behalf of Pilots"
"	#3	Seniority List January 13,2009
"	#4	Dash 8 Schedule February March 2009 Captains
"	#5	Dash 8 Schedule February March 2009 First Officers
"	#6	E-mail: Mr. Cooper to Mr. Russel, March 12, 2009
"	#7	E-mail: Mr. Russell to Ms. Sparkes
BA	#1	Ms. Garland's lay off effective February 14, 2009

THE PARTIES AGREED THAT:

- the Arbitrator was properly appointed with authority to hear the case;
- the Arbitrator's notes of the evidence and argument as recorded in the final award will prevail in the event of conflict;
- all parties likely to be affected by the outcome of the hearing have received notice and been informed of their right to appear and/or be represented;
- all matters pertaining to the grievance procedure and all time limits, whether statutory or arising from the collective agreement, were either properly observed or are waived;
- there are no other points to be raised as to arbitrability or other preliminary objections;
- issues of quantum will be considered separately, and if the parties are unable to reach agreement within thirty (30) calendar days after publication of the award they are to be referred to the Arbitrator for determination;
- the Arbitrator will remain seised of the matter for period of thirty (30) calendar days after its publication should issues of interpretation of the Award arise.

ARTICLES FROM THE COLLECTIVE AGREEMENT CONSIDERED

ARTICLE 1 – JURISDICTION

1.02 The Union recognises that it is the exclusive responsibility and right of the Company to conduct, direct and manage the Company according to the stipulations of the present agreement, and notwithstanding the generality of the preceding, these rights will include the introduction of technical improvements, new ways of operations, the right to promote, demote, transfer, suspend, dismiss, discipline or discharge the employees for cause.

1.06 The Company shall enter into no contract, either expressed or implied, with any employee or group of employees covered by this Agreement, except through the medium of this Agreement.

ARTICLE 12 – SENIORITY

12.03 Seniority shall govern all pilots in case of promotion or demotion, their retention in case of lay-off, their assignment due to expansion, reduction or change in scheduled operations, their recall following lay-off, their choice of vacancies provided that the pilots (*sic*) qualifications are satisfactory for the good conduct of the operations. Should the Company consider that the pilot lacks certain qualifications he/she shall be furnished with a written statement to that effect, upon request.

ARTICLE 13 – POSITIONS, ASSIGNMENTS, PROMOTION

13.07 In the case where no pilot has submitted a bid for a posted position, the Company may assign the position to the most junior pilot who is qualified for the position.

13.08 If the most senior bidder on a permanent vacancy does not have the required qualifications, but has demonstrated the skills, aptitude and maturity necessary for the position as determined by the Company acting reasonably, the Company shall provided (*sic*) the bidder with the opportunity to obtain the necessary qualifications for the type of aircraft involved in accordance with its training program.

ARTICLE 14 – LAY-OFF AND RECALL

14.01 Lay-offs shall be effected in the reverse order of seniority in order of the status involved.

14.02 The pilot concerned shall be notified in writing at least fifteen (15) days in advance of reduction in the number of permanent assignments in his/her status if he/she has completed less than one (1) years' service; thirty days if he/she has completed one (1) year or more of service. In the event of a voluntary resignation, a pilot shall give the same notice. Failure to give the required notice by either party will result in financial compensation in the amount of the number or days short of the required notice.

14.03 A pilot affected by a reduction in the number of permanent assignments in his/her status shall have the right to exercise his/her seniority to displace any pilot junior on the seniority list, whatever his/her status may be.

14.04 A pilot affected by a reduction in the number of permanent assignments shall have a period of seven (7) days from the date of notification of such reduction to inform the Company of his/her intention to exercise his/her seniority.

Failing to exercise this right, the said pilot cannot exercise his/her seniority anywhere else on the system, but shall retain his/her recall rights.

14.05 A laid-off pilot shall be recalled when a vacancy occurs.

14.06 Recalls shall be affected in the reverse order of lay-offs, taking into consideration the previous status. If the Company requires the services of a First Officer on a certain type aircraft, the Company shall recall the First Officer who had acquired this status before the lay-off.

14.07 The parties agree that the status of a pilot is the one acquired while in the employ of the Company.

14.08 A pilot affected by a lay-off shall retain his/her seniority for a period of eighteen (18) months after which period his/her recall right shall cease. However, if the Company requires a pilot for which the laid-off pilot is qualified, he/she will get the first consideration to apply.

14.09 A laid-off pilot shall file his/her address with the immediate supervisor and shall thereafter promptly advise, by registered mail, of any change of address.

POSITIONS AND TEMPORARY ASSIGNMENTS

14.10 Temporary positions of less than three (3) months shall be offered to qualified pilots in the order of seniority and taking into consideration their preference.

14.11 The most junior qualified pilot for the position available shall, in accordance with the requirements of operations, if necessary, have to accept the position as provided in article 13.07.

ARTICLE 19 – ARBITRATION

19.03 The Arbitrator will make his/her award as to the matter in dispute known to the Parties within thirty (30) calendar days of the last hearing and in making his/her award, shall not have the power to amend, delete from, or add to, any provision of this Agreement.

19.04 The award so made shall be final and binding upon the Company, the Union, and the pilot.

OPENING STATEMENTS

FOR THE UNION Mr. Russell described the grievance as involving the Grievor, Ms. Garland, who was laid off from her position out of seniority order. Ms. Cindy Garland is senior to Jim Barrett.

The Flying schedules for Pilots and First Officers are very clear. Ms. Garland was off the job on short term disability and was approved to return to work on February 14, 2009 after a death in the family.

The Union understands that the Company will, at times, have operational requirements that will require a Pilot to fly in a First Officer's seat. This occurs when it is a necessity, but not as a convenience. It has never been the intent to build extra pilot shifts at the expense of the First Officers seniority list. On the schedules there are:

- 31 First Officer shifts which have been filled by a Captain (either Jim Barrett, Brad Taylor, or other Captains),
- 13 reserve shifts have been covered by a second Captain (which means there are 2 Captains and no First Officers on reserve),
- 8 days in the month there was only one reserve Pilot to cover all positions and shifts (with no reserve First Officer).

The Pilots listed on the First Officers schedule are:

- Hebert - 14 flying shifts, 7 reserve shifts

- Ball - 13 flying shifts, 5 reserve shifts
- Taylor - 13 flying shifts, 7 reserve shifts (regardless of position flown)
- Barrett - 11 flying shifts, 5 reserve shifts (regardless of position flown).

It is the nature of the job that Pilots are constantly on the move. Upon checking with Mr. Paul Cooper, IAMAW Pilot with a 1996 seniority date, he confirmed that Jim Barrett was scheduled to have worked 21 days in March and only one (1) was scheduled as a Captain Reserve shift. This shift may have been covered by the Chief Pilot. In Mr. Cooper's professional opinion, Mr. Barrett is strictly a First Officer on the schedule.

The Company clearly chose to schedule out of seniority, to award the shifts to a pilot unnecessarily. Ms. Garland was out one month's wages at the time of the grievance. Based on the information provided, Ms. Garland should be paid for all time lost from February 14, 2009 up until her revised lay-off letter.

For the Employer, Mr. Noseworthy outlined the Employer's argument. Ms. Garland is senior to Mr. Barrett, and also accepts that Mr. Barrett is "strictly a First Officer on the schedule." But that is clear after the fact.

For the Union, Mr. Russell noted that the decision concerning whether Mr. Barrett or Ms. Garland should fly was made on or about February 14. Ms. Parkes acknowledged that this was a required operational decision, and the Union wants proof that a Pilot / Captain was required on all occasions.

The only Witness, for the Employer, was Mr. Brent Acreman, Chief Pilot, who operates out of Goose Bay.

Mr. Acreman confirmed that Ms. Garland is senior to Mr. Barrett, and that the Grievor is not qualified to fly as Captain, but as First Officer. While her work performance is satisfactory, the difference is one of experience. A

Captain has a higher level of experience. Mr Barrett's experience was gathered through flying with other airlines. Ms. Garland "just did not have experience for upgrade."

Asked whether consideration had been given to her rescheduling, Mr. Acreman said:

Yes. The schedule was altered. Cindy's mother had health issues and she had to be near her mother, so we did take that into account. She had extra days off when she needed to be at home in St. John's. That accommodated her personal situation.

Asked why she was laid off prior to Mr. Barrett, Mr. Acreman said:

It was an operational requirement. We were in survival mode to save the Dash 8 service. We had to lay off pilots. We had already laid off the Montreal group and we also had to lay off the St. John's group... We had a situation where guys were calling in sick. So we had Barrett, who could do both left and right seat, whereas Cindy could not do both seats. He did move seats but that was to back stop pilots when they called in sick, to forestall sick calls.

Mr. Acreman confirmed that the Dash 8 service was being changed due to economic reasons, first on the Montreal run and then on the St. John's run. All were on the seniority lists and could exercise their bumping rights. Ms. Garland received 2 weeks notice of her lay off, as she had less than one year with the Company at that time. Mr. Acreman identified Ms. Garland's lay off as BA #1. He also confirmed that Captains are paid at a higher rate than First Officers, and that Mr. Barrett was therefore more expensive for the Company...

But as an operational requirement it was decided, on January 30, 2009, to retain him. With Mr Barrett able to fly either as Captain or as First officer we could use him.

Asked whether on January 30, the Company knew whom they would need

at various points, Mr. Acreman said:

It was hard to say ahead of time. We knew we were trying desperately to save it, like we said to Cindy in our letter... Ultimately, the Dash 8 was cancelled on April 28. All our Captains and First Officers were laid off.

Asked whether there was any advantage to laying off Ms. Garland, other than the operational requirement, Mr. Acreman said:

No. From our side, even though it was more expensive, it was to save the Company money. We went out of the way to help the Company.

Asked whether Ms Garland had the qualifications that the Company needed in January and February of 2009, Mr. Acreman answered:

Cindy's qualifications did not let us keep her on. What we did was for the good of the Company... I spoke with her, and I thought she understood what was going on. I was surprised it went to arbitration... No, no one asked for a written explanation.

On Cross Examination, Mr. Acreman was asked whether the Collective Agreement has an article that permits backstopping positions. He said:

No. But as a Company, we had experience with some pilots. This was for the good of the Company and the pilots.

Asked whether he knows whether Mr. Barrett was flying as Captain or as a backstop on any particular occasion, Mr. Acreman said:

No, but I could find it out. We had him there to do both jobs. He was a Captain / First Officer.. The fact that he was scheduled all these as First Officer does not mean he did all them as First Officer... I think he ended on March 26.

Asked whether there were massive bookoffs and absences, he said:

It was getting pretty regular.

Asked if it would be reasonable to say that Mr. Barrett flew at least half of the shifts recorded as Captain, Mr. Acreman said:

Yes. That's reasonable... But not all of them.

On Redirect Examination, Mr. Acreman confirmed that both the Grievor and Mr. Barrett were based in St. John's.

ARGUMENT

For The Union, Mr. Russell pointed out that Article 12 does not provide authority for the Employer's actions. Seniority is a key element of the Collective Agreement. Article 12 does not allow it. While it is possible unusual circumstances were at play, in the Union's view, the extent of the Employer's action was punitive toward the Grievor. Mr Barrett, the junior employee, got 6 weeks more work than Ms. Barrett, the Grievor and senior employee. She should get some compensation. Operational requirements are OK, but in the Union's view, the Grievor should have got more work.

It is hard for either side to prove its case, due to the obvious lack of evidence, but the Company's claims on sick calls were not substantiated.

For the Employer, Mr. Noseworthy pointed out that there was no evidence of dissatisfaction with Ms. Garland's work performance. There was no question about her qualifications and ability for the job she was doing.

It is also important to note that the Union's surprise with the schedules arises after the fact. The schedule is posted in January for February and March. The seniority list is key and respect for it is crucial. But the simple fact is that Mr Barrett had the qualifications required for that particular operation. Operational requirements were decisive and the good of the operations.

The Employer urged the Arbitrator to consider carefully the provisions of Article 12.03. The plain fact is that the Grievor lacked the required qualifications. The Employer's actions were bonafide.

In Rebuttal Argument for the Union, Mr. Russell pointed out that Article 12 does not sanction what was done. It does not talk about the instant situation. It talks about the move from the First Officer to the Captains list. The Union accepts Mr. Acreman's description of the facts, but does not accept that it all comes down to the issue of whether the pilot's particular "qualifications are satisfactory for the good conduct of the operations" as set out in Article 12.03.

The Union has not claimed the Grievor was qualified as a Captain, but this was not a normal pattern, and not one the Agreement allows.

CONSIDERATIONS

Standard of proof: The matter is to be determined on the normal standard for arbitration, viz., "on the balance of probabilities."

Authority of the Arbitrator: I note that the Collective Agreement provides, at Article 19.04, that my Award "shall be final and binding upon the Company, the Union, and the pilot."

Onus: As the Party grieving, the Union bears the onus of proving its case.

At issue between the Parties is an alleged violation of the Seniority provisions of the Collective Agreement in the lay off of the Grievor, a senior employee, while Mr. Barrett, a junior employee, was kept on for a period of approximately 6 weeks. Article 12.03 reads as follows:

Seniority shall govern all pilots in case of promotion or demotion, their retention in case of lay-off, their assignment due to expansion, reduction or change in scheduled operations, their recall following lay-off, their choice of vacancies provided that the pilots (*sic*) qualifications are satisfactory for the good conduct of the operations. Should the Company consider that the pilot lacks certain qualifications he/she shall be furnished with a written statement to that effect, upon request.

Thus, I note that in administering seniority where issues of "retention in case of lay-off", "reduction or change in scheduled operations", or "recall following lay-off" are involved, this Article provides for consideration of whether "... pilots (*sic*) qualifications are satisfactory for the good conduct of the operations". I also note that in Article 13 the Parties recognise the importance of qualifications for the position.

On the evidence provided, therefore, the Company was within its rights, in the instant matter, to make its lay off and recall decisions in the light of such issues.

The grievance was filed on February 27, 2009 relating to schedules posted in January (Consent #s 4 &5) to cover the February and March period. I note, however, that Article 14.04 reads:

A pilot affected by a reduction in the number of permanent assignments shall have a period of seven (7) days from the date of notification of such reduction to inform the Company of his/her intention to exercise his/her seniority.

Failing to exercise this right, the said pilot cannot exercise his/her seniority anywhere else on the system, but shall retain his/her recall rights.

The Collective Agreement clearly requires timely notification.

As noted above, the Union carries the onus to prove violation of the Collective Agreement. With respect, I am not persuaded that the Union has discharged its onus in this matter on the evidence submitted.

DECISION

In light of the foregoing considerations, I therefore find that

The Grievance fails.

Respectfully submitted as the decision of the Arbitrator.

John A. Scott, Arbitrator

November 30, 2009