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Reasons for decision

Canadian Union of Public Employees, Airline Division, Air Canada Component,

applicant,

and

Air Canada,

respondent.

Board File: 25912-C
CIRB/CCRI Decision No. 394
November 2, 2007

A reconsideration panel of the Board composed of Mr. Warren R. Edmondson, Chairperson, and Ms. Julie M. Durette, former Vice-Chairperson, and Mr. Edmund Tobin, Vice-Chairperson, considered the above-noted application.

Section 16.1 of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*) provides that the Board may decide any matter before it without holding an oral hearing. The Board is satisfied that the parties' submissions and documents on file are sufficient to decide the application without the requirement of an oral hearing.

Appearances

Ms. Beth Symes, for Canadian Union of Public Employees

Mr. John D. Lewis, for Air Canada

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I–Nature of the Application

[1] By application filed on September 6, 2006, the Canadian Union of Public Employees, Airline Division, Air Canada Component (the applicant or the union) asked the Board to: (1) reconsider, pursuant to section 18 of the *Code*, the Board's decision in *Air Canada*, [2006] CIRB no. 358; (2) issue an interim order, pursuant to section 19.1 of the *Code*, staying *Air Canada (358)*, *supra*; and (3) issue an order, pursuant to sections 99, 134 and 156 of the *Code*, declaring that Air Canada (the employer) has breached certain provisions of Parts I and II of the *Code*.

[2] On October 25, 2006, the Board rendered its decision with respect to the application for an interim order pursuant to section 19.1 of the *Code* (*Air Canada*, October 25, 2006 (CIRB LD 1519)) and dismissed the applicant's request for a stay of *Air Canada (358)*, *supra*.

II–Background

[3] *Air Canada (358)*, *supra*, sets out the facts that are relevant to this longstanding dispute. Only a brief summary of the relevant recent facts is necessary in order to understand this dispute.

[4] Following the most recent amendments to Part II of the *Code* (Occupational Health and Safety), a Policy Health and Safety Committee and six Workplace Health and Safety Committees were established at Air Canada. The Board's decision *Air Canada (LD1519)*, *supra* states that, of the 7,000 flight attendants employed by Air Canada, approximately 25 fulfill–either on a full-time or part-time basis–duties as employee health and safety representatives and members of these committees.

[5] On September 29, 2003, the employer forwarded to the union a Payment of Wages Policy which it had unilaterally formulated and which addressed, among other things, the number of hours that could be spent by the flight released attendants performing health and safety duties and the rate of pay for those hours. The union contested the proposed Policy and it filed a complaint with the Board,

on November 5, 2003, asking the Board to find that various provisions of the *Code* had been contravened and asking the Board to set aside the Policy.

[6] On November 21, 2003, the parties agreed to the terms of a Memorandum of Agreement (the Memorandum), which set out the mediation process they had agreed to follow in order to attempt to resolve the issues that were in dispute. The terms of the Memorandum are contained in *Air Canada (LD1519)*, *supra*. In the event that mediation proved unsuccessful, the Memorandum provided that the remaining issues that were alleged to constitute violations of Parts I and II of the *Code* would be referred to the same Chairperson or Vice-Chairperson of the Board who had acted as the mediator, for determination in accordance with the provisions of the *Code*.

[7] In accordance with this Memorandum, the Board's Chairperson attempted to mediate these issues. Mediation proved unsuccessful and the union's complaint was therefore referred for determination to the same Chairperson, who by that time had become the former Chairperson of the Board. *Air Canada (358)*, *supra,* was ultimately issued on August 16, 2006, by the former Chairperson (the original panel).

[8] In *Air Canada (358)*, *supra*, the original panel concluded that clear collective agreement direction was lacking in regards to the issues in dispute. The collective agreement did not specify the number of hours to be spent by attendants performing health and safety duties and the rate of pay for those hours.

[9] The original panel reviewed the practices of the parties, the provisions of their collective agreement and a 1992 decision of a Regional Safety Officer (now known as an Appeals Officer) relating to this matter. The original panel determined that the flight attendants performing health and safety duties should be compensated at a ratio of 80 to 138 (i.e. 58%) of their flying rate, for those duties. It also concluded that the issues relating to the number of hours to be worked, and the number of employees to be flight released to perform health and safety duties, were matters that fell within the joint responsibility of the chairpersons of the committees. The original panel did not find that any of the provisions of the *Code* had been contravened by the employer.

[10] Approximately one week after the issuance of *Air Canada (358)*, *supra*, Air Canada announced the implementation of its 2006 Payment of Wages Policy. According to the employer, the 2006 Policy implements the rulings made in *Air Canada (358)*, *supra*. The union, on the other hand, is of the view that the 2006 Policy contravenes several sections of the *Code*.

III–Position of the Parties

A–The Union

[11] The union submits that the Board made serious errors of law and failed to respect principles of natural justice.

[12] The applicant states that the original panel's finding, that a key purpose of Part II of the *Code* is that no health and safety committee member should lose income when performing health and safety duties, is contrary to the specific wording of section 135.1(11) of the *Code*, ignores the legislative history of the provisions, and flies in the face of the *Code* amendments that came into effect in 2000. According to the applicant, as a result of the amendments, income protection is no longer the underpinning for the payment of those performing health and safety duties. Instead, members are entitled to be compensated for the time they spend on health and safety matters, whether inside or outside their normal working hours. Consequently, argues the union, the Board's determination constitutes a fundamental error in law that ignores the specific provisions of section 135.1(11) of the *Code* and that effectively turns back the clock to a time before the amendments were made to the *Code*.

[13] According to the applicant, the Board erred in law when it considered irrelevant factors in regard to the nature and scope of health and safety work as compared to flying duties, when it found that health and safety work is less physically demanding than flying and, therefore, less valuable to the employer, and when it ultimately ruled that health and safety committee members were only entitled to 58% of their regular flying rate. The applicant points out that the regular work of flight attendants is to fly. Consequently, flight attendants who are removed from their flying duties to

perform health and safety functions should be paid at their flight credit rate, the same rate they would have received had they flown.

[14] The applicant submits that by only awarding the attendants 58% of their flying rate, the Board wrongly applied section 135.1(11) of the *Code*, wrongly amended the collective agreement, and wrongly assumed jurisdiction to establish a new rate of pay for the health and safety work. According to the union, there is nothing in either the *Code* or the Memorandum that gives the Board the power to establish a new rate of pay for health and safety work.

[15] The union states that, according to the Memorandum, the Board was to determine the outstanding issues in accordance with the principles of the *Code*. Therefore, it argues that the original panel had to consider all the provisions of the *Code*, including section 147 which provides for no penalization of employees who perform health and safety functions.

[16] According to the applicant, *Air Canada (358)*, *supra,* results in flight attendants who perform health and safety duties being effectively penalized for a variety of reasons, including the fact that they will be paid at a discounted rate of pay for the health and safety work they perform.

[17] The applicant further submits that the original panel failed to exercise its jurisdiction by not concluding that Air Canada's conduct, which was under review in *Air Canada (358), supra*, and its conduct subsequent to the release of that decision, contravened various provisions of the *Code*. The applicant argues that the Board did not provide any evidence for its conclusion that no labour relations purpose would be served by finding that Air Canada had violated sections of the *Code*.

[18] As relief, the union requests that the Board, among other things: (1) set aside the portions of *Air Canada (358)*, *supra*, that violate the *Code* and/or breach the collective agreement; (2) order the employer to pay the attendants their flying rate of pay for each hour of health and safety functions performed; and (3) order the employer to cease and desist from implementing its 2006 Payment of Wages Policy.

B–The Employer

[19] The employer submits that this application for reconsideration should be dismissed. It argues that it does not persuasively reveal errors of law or policy that warrant reconsideration. It argues that the Board respected the principles of natural justice. According to the employer, this reconsideration application constitutes nothing more than an attempt by the applicant to reargue its case, by presenting the same arguments made to the original panel and by introducing new arguments that it failed to make at the hearing.

[20] The employer states that the Board's jurisprudence establishes that reconsideration of its decisions, given the wording of section 44 of the *Canada Industrial Relations Board Regulations, 2001* (the *Regulations*), should only occur in exceptional circumstances. The employer submits that the Board's reconsideration powers under section 18 of the *Code* are not intended to be an appeal process and that section 22 of the *Code* underscores the finality of Board decisions.

[21] The employer states that *Air Canada (358)*, *supra,* is a very unique decision that was issued in regards to an unconventional workplace and it answered the question both parties asked the Board to answer. The employer argues that the Board found that the proper interpretation of section 135.1(11), as it concerns the attendant's regular rate of pay, is that both part-time and full-time attendants who are flight released for health and safety work should be paid 58% of their flying rate of pay.

[22] The employer argues that the Board did not indicate anywhere in its decision that health and safety duties were easier than, or not as valuable as, flying duties. The employer argues that since there is a collective agreement in this case, section 135.1(11) required the Board to look at that document to determine the regular rate of pay for flight attendants doing health and safety work. The employer argues that the Board's conclusions were reasonable, given the lack of any agreement between the parties and the lack of clear collective agreement language on this issue.

[23] The employer submits that the applicant simply does not agree with the new wage rate determined by the Board. The employer ventures that the applicant would not be trying to attack the Board's reasoning as constituting errors of law or policy if the Board had used the same reasoning and arrived at a ratio of payment of one flight credit for one hour of health and safety work.

[24] The employer disagrees with the applicant's submission that the Board failed to exercise its jurisdiction by not concluding that Air Canada had contravened the *Code*. The employer argues that the Board did in fact exercise its jurisdiction. It was exercised by using the discretion that it has under the *Code* not to grant relief to the applicant.

[25] Lastly, the employer asks the Board to strike out all paragraphs of the union's reconsideration application that relate to the implementation of its 2006 Payment of Wages Policy, which was issued subsequent to the release of *Air Canada (358)*, *supra*. The employer argues that the allegations surrounding this new issue have been improperly pleaded in the course of this application for reconsideration and should be the subject of a new complaint before the Board.

IV–Analysis and Decision

A–The Memorandum

[26] The parties entered into a Memorandum that described the resolution process they agreed to follow in relation to the complaint that was before the original panel. The Memorandum provided that the parties would endeavour to resolve through mediation—with the Board's Chairperson or a Vice-Chairperson acting as the mediator—the issues raised in the complaint relating to "the selection/removal of health and safety committee members, the location of offices for health and safety committee members and ... the issues of pay, time, accountability for time and location of offices for health and safety committee members."

[27] Given that the constructive settlement of disputes promotes long-term industrial relations stability in the workplace, the Board is reluctant to interfere with agreements of this type. While the

Memorandum did not resolve the substantive issues that divided the parties, it did nevertheless constitute an agreement regarding the terms for a process the parties agreed to follow in their attempt to have this dispute resolved. As the Board stated in *NorthwesTel Inc.*, [2003] CIRB no. 226:

> We applaud the parties for taking the initiative to resolve their differences before coming to the Board. **The Board has a long-standing practice of encouraging parties to reach mutually acceptable settlements on disputes arising between them and, on many occasions, the Board's labour relations officers assist the parties to this end. Indeed, the most recent amendments to the *Code* include a general power to assist the parties under section 15.1(1)**.
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> (page 5; emphasis added)

[28] Once the parties to a dispute before the Board enter into a settlement agreement, the Board has indicated that it has jurisdiction to enforce the terms of that settlement:

> ... where the parties have engaged in the informal settlement process contemplated by the express provisions and general statutory objectives of the *Code*, to resolve issues in disputes that are properly before it, **the Board has the necessary jurisdiction to determine the issue of whether a settlement has in fact been reached, and if so, to enforce its terms**. ...
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> (*Canadian National Railway Company*, [2006] CIRB no. 362, page 17; emphasis added)

[29] In accordance with the Memorandum, the former Chairperson agreed to act as mediator. Accepting this assignment was consistent with the general objectives set out in the Preamble to the *Code* and the specific jurisdiction granted to the Board by section 15.1(1) of the *Code* to mediate disputes.

[30] Unfortunately, the mediation initiative proved unsuccessful. As provided for in the Memorandum, the former Chairperson then proceeded to consider, "in accordance with the provisions of the *Code,*" the remaining issues that were alleged to constitute violations of Part I and Part II of the *Code*. In hearing the complaint, the former Chairperson was able to draw on the considerable experience he had already acquired in handling labour relations disputes in the airline industry in general, and on the insights he had gained during the mediation process regarding the issues that underlied this specific dispute.

[31] It is clear from *Air Canada (358)*, *supra*, that one of the key issues underlying the parties' dispute was the amount of pay that the flight attendants should receive for the health and safety duties they perform. It is also clear that the parties had been attempting to resolve this issue for a long time.

[32] Health and safety officers administer and enforce Part II of the *Code*. They are appointed by the Minister of Labour and, presently, they occupy positions within the Department of Human Resources and Skills Development Canada (HRSDC). In 1991, a health and safety officer issued a direction to Air Canada regarding this issue. In 1992, a Regional Safety Officer (RSO), also appointed by the Minister of Labour pursuant to Part II of the *Code*, heard the appeal filed concerning that direction. The RSO addressed issues regarding the scheduling of the health and safety committee meetings. He also decided that Air Canada should pay the attendants those wages that they would have normally earned, in a manner consistent with their duties at the time, for the time spent performing health and safety functions. Unfortunately for the parties, this decision did not resolve the remuneration issue.

[33] Given the longstanding nature of this dispute, the wording of the Memorandum, the fact that several obvious issues were underlying this dispute, the fact that the parties sought the Board's assistance in resolving these issues, the Board's mandate to encourage the constructive settlement of disputes, and the importance the Board places in respecting settlements negotiated in good faith in regards to either procedural or substantive matters, it is not surprising that the original panel tackled the fundamental issue of remuneration, along with other issues, in its decision.

[34] This reconsideration panel, however, is not being asked to analyse what motivated the original panel to issue *Air Canada (358)*, *supra*. Rather, this application for reconsideration is asking the Board to determine whether that decision contains errors of law or policy or fails to respect the principles of natural justice.

[35] Had the decision in question been rendered by an arbitrator, acting pursuant to the dispute resolution mechanism in the collective agreement, then the Board would have had no jurisdiction

to reconsider it. Similarly, had the former Chairperson indicated what the regular rate of pay should be for the health and safety work in a mediation report as part of the mediation process between the parties, then that report could not have been reconsidered pursuant to the *Code*.

[36] The situation in this case, however, is that *Air Canada (358)*, *supra*, was issued by an original panel of the Board and the Board now finds itself seized of an application to reconsider that decision. It is not an option for the reconsideration panel to decline to consider the application for reconsideration on the basis that the original panel appears to have followed the terms of the parties' Memorandum and that the original panel appears to have done its best to address the underlying issues to the dispute. One must look to the *Code*, and not the Memorandum signed by the parties to this dispute, in order to determine whether the original panel properly exercised its jurisdiction.

[37] Once seized of an application for reconsideration, the Board must proceed to deal with the application in the same manner it deals with all other applications for reconsideration. This reconsideration panel's task is to apply the provisions of the *Code* and *Regulation*s in light of the relevant jurisprudence, and determine whether sufficient grounds have been established for setting aside the original panel's decision. The question this panel must address is whether *Air Canada (358)*, *supra*, contains errors of law or policy or fails to respect the principles of natural justice.

B—Part II of the *Code*

[38] The purpose of Part II of the *Code* is to prevent accidents and injury to health arising out of, or linked with or occurring in, the course of employment. Part II contains a comprehensive set of health and safety provisions that apply to all federal works, undertakings or businesses.

[39] Sections 124 to 126 of Part II of the *Code* set out the obligations that both employers and employees must meet to ensure safe workplaces. Part II grants health and safety officers, who occupy positions within the HRSDC Department and have no connection to this Board, a wide range of powers so that they may carry out their various duties. A health and safety officer who detects a contravention of a provision of Part II has the power to direct the employer or employee, as the case

may be, to cease the contravention. In situations where the officer detects a danger in the workplace, Part II obliges the officer to issue a direction. Directions issued by the health and safety officer may be appealed to an official now known as an Appeals Officer. Subject to section 148, every person who contravenes a provision of Part II is guilty of an offence. Similarly, every person who contravenes a direction issued by an health and safety officer is guilty of an offence.

[40] In 1978, the Board was given jurisdiction to review all safety officer decisions regarding whether or not a danger existed in the workplace. Successive amendments to the *Code* removed that jurisdiction. Presently, Part II confers only very limited responsibilities on this Board in relation to health and safety matters. Those responsibilities will be reviewed later on in this decision.

[41] Part II requires employers, in certain circumstances, to create health and safety committees in their workplaces. Provisions regarding the composition, administration, duties and powers of these committees are set out in sections 134.1(1) to 135.1(14) of the *Code*. As a result of its obligations under Part II, Air Canada created a Policy Health and Safety Committee and various Workplace Health and Safety Committees.

C—*Air Canada (358)*, *supra*

[42] In the decision under review, the original panel concluded that there were two major issues underlying the complaint before it: (1) the health and safety hours to be worked by the attendants and the number of attendants to be flight released to perform these functions; and (2) the remuneration to be paid to the flight attendants for the health and safety functions performed.

[43] Both the first issue, and the separate additional questions raised by the complaint, received little attention in *Air Canada (358)*, *supra*. The original panel indicated that the first issue was the responsibility of the joint chairpersons. It briefly addressed the additional questions. For reasons that will become apparent later in this decision, there is no need for this reconsideration panel to deal with these particular matters any further.

[44] The second issue, the amount of remuneration that the attendants were entitled to receive for the health and safety work they performed, was the subject of most of the original panel's attention in *Air Canada (358)*, *supra*.

[45] The wages that health and safety committee members are entitled to receive are prescribed by section 135.1(11) of the *Code*, which states:

> 135.1(11) A committee member shall be compensated by the employer for the functions described in paragraphs (10)(a) and (b), whether performed during or outside the member's regular working hours, **at the member's regular rate of pay or premium rate of pay, as specified in the collective agreement or, if there is no collective agreement, in accordance with the employer's policy**.
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> (emphasis added)

[46] It is not necessary to linger over the differences there may be between the terms "regular rate" and "premium rate." For the purposes of this decision, it is sufficient to simply use the term "regular rate" of pay.

[47] A collective agreement was in force at all relevant times in the present case. It is clear from a reading of *Air Canada (358)*, *supra*, that the original panel was of a view that the collective agreement, on its face, did not clearly specify what was the regular rate of pay for flight attendants who were flight released to perform health and safety duties. The original panel thoroughly reviewed the provisions of the collective agreement and the practices of the parties when it considered this issue. After conducting a complicated mathematical analysis, the Board then concluded that the attendants who performed health and safety duties should receive the equivalent of 58% of their flying rate of pay:

> [40] For certainty, **OSH for representatives on part-time release should be compensated at a ratio of 80 to 138 of the flying rate for all hours of OSH worked**. For those full-time employees released to OSH duties, all OSH hours to their shadow bid level or yearly average limit should be paid at a ratio of 80 to 138 of their flying rate, with the expected duty period for full compensation being four days a week. Overtime should be compensated at a premium rate to be agreed upon. Banking, which has been a long-standing practice, should continue where appropriate.
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> [41] It is the Board's view that **the payment of wages issue resolved as set out herein will, on all the evidence, compensate committee members at their regular rate as contemplated in the statute and in accordance with the collective agreement**. This approach, it is suggested, will allow

> the retention of most of the other elements and features of the collective agreement, including recognition of employee seniority and block bidding. ...
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> (pages 21-22; emphasis added)

[48] The original panel took it upon itself to attempt to resolve the pay issue for the parties. What the original panel did was set the rate of pay that flight released attendants should be paid for the health and safety work. It determined that if Air Canada paid these attendants at a 58% rate, it would be acting in accordance with section 135.1(11) of the *Code* and with the collective agreement.

[49] The original panel ended its decision after it set the wage rate for the attendants. For the reasons contained in its decision, the original panel concluded that there would be no labour relations purpose served by finding that Air Canada had contravened any provisions of the *Code*.

[50] Given the wording of the Memorandum and the labour relations underlying the dispute between the parties, this reconsideration panel understands why the original panel felt compelled to address the rate of pay issue. The parties had requested in their Memorandum that the Board address it. The original panel had identified the pay issue as one of the underlying issues to the complaint before the Board. The dispute had been a longstanding one. Discussions had been unsuccessful. An adversarial mood prevailed. The dispute had escalated to the point where a complaint had been filed before the Board alleging that the employer had contravened various provisions of the *Code*. The hearing before the original panel had lasted 21 days.

[51] The legal test to be applied to an original panel decision under reconsideration, however, is not whether the panel acted reasonably in its attempts to assist the parties in resolving the issues underlying their dispute. This reconsideration panel is obliged to consider whether *Air Canada (358)*, *supra*, contains errors of law or policy that cast serious doubt on the interpretation of the *Code* or fails to respect the principles of natural justice.

[52] Notwithstanding the original panel's apparent well-intended desire to assist the parties, this panel is of the view that *Air Canada (358)*, *supra,* must be set aside on the basis that it contains errors of law and policy.

[53] In the reconsideration panel's view, the decision under review exceeds the Board's limited jurisdiction under Part II of the *Code* and it constitutes an improper exercise of the Board's remedial powers. Both these areas merit individual consideration.

1—The Board's Jurisdiction

[54] By setting the regular rate of pay and thereby effectively ordering Air Canada to pay its flight released attendants at that rate, the original panel exceeded the limited jurisdiction that Parliament conferred on the Board in relation to health and safety matters for two reasons: (a) the Board has no jurisdiction to set the regular rate of pay; and (b) the Board has no jurisdiction to make an order of this nature. This panel will deal with each of these issues separately.

(a) Regular Rate of Pay

[55] While the requirement under section 135.1(11) that employers must pay health and safety committee members their regular rate of pay is an important Part II obligation, it is but one of many obligations that Parliament has prescribed in relation to the administration and operation of these committees. Part II enumerates a myriad of obligations employers and unions must meet to ensure the proper functioning of these committees. Section 125, for example, imposes committee-related obligations on employers in areas such as training, consultation, co-operation, availability of resources, and inspections. Sections 134 and 135 contain further obligations the employer must meet regarding the establishment of these committees, the time committee members are entitled to take during regular working hours to carry out their health and safety duties and the rate of pay the members are to receive. Part II also imposes specific obligations on unions in relation to these committees.

[56] In short, Part II contains a sophisticated legislative regime that spells out how these committees are to operate as they carry out their important mandate. These provisions apply to federal works, undertakings, or business falling within federal jurisdiction, regardless of whether these workplaces are unionized or not. By contrast, Part I—which sets out this Board's mandate in regards to labour relations matters—applies almost exclusively to unionized federal jurisdiction workplaces.

[57] Once designated by the Minister of Labour, the HRSDC health and safety officers are responsible for administering and enforcing the various provisions of Part II, including the provisions relating to the health and safety committees. The Regional Safety Officer who issued the 1992 decision relating to the pay issue, referred to earlier, was an official with the Labour Program. The Operations Program Directive (OPD 907-1), which was produced in evidence and which provided comments regarding the operation of section 135.1(11), was prepared by the department that is now known as HRSDC.

[58] OPD 907-1 provides an example of what kind of assistance the health and safety officer can provide to parties that deal with this kind of issue:

> ... Those committee members not working a standard 8-hour day, 5-day week (e.g., rail, air, trucking, or shift work) may encounter specific problems in that a 2-5 day assignment or a 6-hour trip may need to be relinquished or a midnight to 0800 hours shift would make attending an afternoon committee meeting a problem. **A health and safety officer could suggest a formula be established wherein a committee member's pay is not adversely affected as a result of activities related to their mandate**. ...
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> (pages 10-11; emphasis added)

[59] Part II of the *Code* does not give the Board any jurisdiction over either the administration or enforcement of any of the provisions relating to the operation of health and safety committees. The present wording of Part II does not give this Board jurisdiction to address the myriad of matters relating to the administration and operation of these committees, that are found in both unionized and non-unionized workplaces. Part II does not give the Board jurisdiction, for example, to determine the amount of training, the level of resources, or the amount of time away from their regular duties that should be provided to committee members at the hundreds, if not thousands, of workplaces falling under federal jurisdiction. Similarly, it does not give this Board jurisdiction to set the regular rate of pay of employees who perform health and safety work.

[60] The only jurisdiction the Board has under Part II of the *Code* is to hear complaints alleging that an employer has punished an employee for exercising the rights spelled out in section 147 of the *Code*. Section 147 provides as follows:

> 147. No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee
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> (a) has testified or is about to testify in a proceeding taken or an inquiry held under this Part;
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> (b) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or
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> (c) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.

[61] The argument that in order to determine whether the employer has imposed a financial penalty in contravention of a statute of Parliament, one implicitly has jurisdiction to determine the regular rate of pay, is not convincing. Asking the Board to first set the rate of pay and then determine whether the wages paid by the employer meet that rate, is like asking a traffic court magistrate to first set the speed limit for a section of highway and then determine whether the speed travelled by a motorist contravened that limit. Just as the magistrate only has jurisdiction to determine whether the speed travelled by the motorist is in compliance with the predetermined speed limit, this Board only has jurisdiction to determine whether the actual wages paid by the employer are in compliance with the regular rate of pay that has already been predetermined— predetermined by the parties and not the Board. It is only once the regular rate of pay has been determined by the parties that this Board would then be in a position to assess whether s. 147 has been contravened.

(b) Order

[62] By setting the regular rate of pay for the health and safety work, the original panel effectively ordered the employer to pay its employees at that rate.

[63] A review of sections 133, 134, 147 and 156 of Part II of the *Code* indicates that the only jurisdiction the Board has regarding health and safety matters is to adjudicate complaints alleging that an employer has punished an employee for having exercised certain rights.

[64] If the Board finds that an employer has contravened section 147, then section 134 authorizes the Board to issue certain orders:

> 134. **If, under subsection 133(5), the Board determines that an employer has contravened section 147, the Board may, by order, require the employer to cease contravening that section and may, if applicable, by order, require the employer to**
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> (a) permit any employee who has been affected by the contravention to return to the duties of their employment;
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> (b) reinstate any former employee affected by the contravention;
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> (c) pay to any employee or former employee affected by the contravention compensation not exceeding the sum that, in the Board's opinion, is equivalent to the remuneration that would, but for the contravention, have been paid by the employer to the employee or former employee; and
>
> (d) rescind any disciplinary action taken in respect of, and pay compensation to any employee affected by, the contravention, not exceeding the sum that, in the Board's opinion, is equivalent to any financial or other penalty imposed on the employee by the employer.
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> (emphasis added)

[65] It is clear from the above provisions that the pre-condition to the issuing of a section 134 order is a finding by the Board that section 147 has been contravened.

[66] The complaint before the original panel alleged, in part, that Air Canada had contravened section 147 by imposing a financial penalty on these attendants. The applicant argued that section 135.1(11) obliged the employer to pay these attendants their regular rate of pay, that their regular rate of pay was their flying rate, and that by not paying that rate when the health and safety duties were being performed, the attendants suffered a financial penalty in contravention of section 147 of the *Code*.

[67] The original panel did not find that section 147 had been contravened. Rather, it concluded that the collective agreement did not specify what wages the attendants should be paid for doing the health and safety work and that there was no agreement between the parties as to what the regular rate of pay should be for this work. It did not find that the attendants had suffered a financial penalty by not being paid their regular rate of pay for the health and safety work they performed. Not having

found a contravention of section 147, the original panel lacked jurisdiction to effectively make any order pursuant to section 134 directing Air Canada to pay the attendants.

2—The Board's Remedial Powers

[68] By setting the rate of pay and by effectively ordering the employer to pay the attendants 58% of their flying rate for the health and safety work, the original panel exceeded the authority vested in it to take remedial action. By setting the rate of pay, the original panel interpreted and amended the parties' collective agreement. Part I or Part II of the *Code* do not expressly authorize the Board to either interpret a collective agreement or amend one, by imposing a term of employment on the parties.

[69] The labour relations regime created by the *Code* and the Board's jurisprudence emphasize the importance of the practice of free collective bargaining and the principle that collective agreements should be interpreted by arbitrators and not the Board. The jurisprudence indicates why the Board is very reluctant to become involved in what are, for all intents and purposes, collective agreement disputes.

[70] Occasionally, the Board becomes seized of an application whose underlying issues essentially relate to a dispute regarding the interpretation and administration of the terms of a collective agreement. The *Code* provides the Board with the authority necessary to refer the matters in question to arbitration. Section 16(l.1) authorizes the Board to defer deciding any matter where the Board considers that it could be resolved by arbitration or an alternate method of resolution. Similarly, section 98(3) provides that the Board may refuse to determine any complaint made pursuant to section 97 of the *Code*, if in the Board's opinion the matter could be referred by the complainant to arbitration pursuant to a collective agreement.

[71] The underlying issues in this case related to a dispute regarding the interpretation and administration of the parties' collective agreement. The collective agreement did not specify the number of hours to be spent by the attendants performing health and safety duties and the rate of pay for those hours. The original panel took it upon itself to set the regular rate of pay for the parties:

> [32] ... Lacking agreement and clear collective agreement direction upon this key item, the time to be worked must be set at a reasonable level which reflects the regular rate of pay or an applicable premium rate. ...

(*Air Canada (358)*, *supra*, page 24)

[72] A review of the Board's jurisprudence indicates that its practice is to either defer or refuse to determine any complaint that essentially constitutes, as does this one, a dispute involving the interpretation and administration of a collective agreement.

[74] In *Société Radio-Canada*, [2005] CIRB no. 308, for example, the Board reconsidered one of its decisions that had upheld an unfair labour practice complaint involving the use of freelancers by the employer. The Board overturned the original panel's decision and found that it was the grievance arbitrator who had the appropriate jurisdiction to determine the validity of the contracting out that was in issue. The reconsideration panel made the following comments with respect to disputes involving the interpretation of collective agreements:

> [74] ... The Board must exercise care with regard to collective bargaining and the processes provided for implementing the end result, which is the collective agreement.
>
> [75] Encouraging free collective bargaining is one of the fundamental objectives of the *Code*. Therefore, the present reconsideration panel cannot approve an interpretation of the *Code* that would limit the scope of the provisions that the parties freely and legitimately negotiated in reaching a collective agreement. **Nor may it approve an interpretation of the *Code* that would cause the Board to take the place of a grievance adjudication procedure, the only genuine jurisdiction for determining disputes related to the interpretation and application of the provisions of a freely negotiated collective agreement**.

(pages 23-24; emphasis added)

[75] In *Maritime Employers Association*, [2001] CIRB no. 145, the union argued that the disciplinary action taken by the employer against five linesmen contravened provisions of the *Code*. The Board concluded that the dispute must be settled according to the provisions of the collective agreement:

> [39] The *Code* contains express provisions on the content of collective agreements, more precisely sections 57 to 60. Under these sections, each collective agreement must have, among other things, a clause stipulating the process for dispute resolution; ...

> [40] The Board holds that these provisions, whether they are incorporated into the collective agreement by mutual consent of the parties, or by reference to the *Code*, **indicate the government's desire to ensure that the parties to a collective agreement should preferably settle their problems and disputes through arbitration before turning to the Board. Furthermore, this notion is**
>
> **entrenched in the spirit of the Preamble to the *Code*,** ...
> (pages 8-9; emphasis added)

[76] Similarly, the jurisprudence interpreting Part I of the *Code* is well established regarding the Board's very limited jurisdiction to actually amend a collective agreement. Exceptional circumstances will have to exist before the Board invokes its discretion to impose a term of employment on the parties to a dispute. The Board made it clear in *TELUS Communications Inc.,* [2005] CIRB no. 317, that it considers the Supreme Court of Canada's decision in *Royal Oak Mines Inc.* v. *Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369, to be the seminal judicial pronouncement regarding this Board's jurisdiction to impose intrusive remedies, such as one that imposes terms of employment on parties to a dispute.

[77] The Federal Court of Appeal has confirmed that it will review Board decisions in light of the broad framework set out in *Royal Oak Mines Inc.* v. *Canada (Labour Relations Board)*, *supra*:

> [94] *Royal Oak Mines* provides the broad framework within which to consider whether it was patently unreasonable for the Board to impose the terms that it did in this case in order to remedy the BLE's breach of the *Code*. Thus, the question is whether the Board's imposition of terms to resolve the long running dispute was patently unreasonable on the facts of this case...
>
> (*Via Rail Canada Inc.* v. *Cairns*, [2005] 1 F.C.R. 205; (2004) 241 D.L.R. (4th) 700; (2004) 321 N.R. 201; (2004) 16 Admin. L.R. (4th) 55; and [2005] CLLC 220-041 (F.C.A. no. A-273-03), pages 242-243; 727-728; 221-222; 80; and 143,340)

[78] The Federal Court of Appeal has indicated that intrusive remedies must be reserved for exceptional cases:

> [105] In reviewing the legality of Board-imposed terms of employment, the Court's role is to ensure that the Board recognized that the imposition of terms is a significant interference with the important principle of free collective bargaining and that, consequently, it is a remedy that must be reserved for exceptional cases in which attempts to resolve a serious dispute consensually have foundered and there is no practicable alternative to Board intervention.
>
> (*Via Rail Canada Inc.* v. *Cairns*, *supra*, pages 245-246; 730; 223; 82; and 143,341)

Accordingly, even if one was prepared to assume that the Board has jurisdiction to impose intrusive remedies in a case involving a Part II complaint, the circumstances would have to be exceptional before the Board would impose such a remedy.

[79] In this case, the original panel effectively ordered Air Canada to pay the attendants 58% of their flying rate. By so doing, the Board imposed a term and condition of employment on the parties to this dispute.

[80] The factors relevant to this dispute are set out in this decision and in *Air Canada (358)*, *supra*. It is true that the dispute had been longstanding and that the issues were complex. However, it is also true that the issues underlying this dispute are collective agreement issues. In this reconsideration panel's view, these relevant factors fall far short of the kind of exceptional circumstances that would have to exist before this Board could amend a collective agreement by setting a term and condition of employment.

[81] The essence of the dispute in the present case is the regular rate of pay to be paid to the health and safety committee members. At this stage, this matter relates to the interpretation and application of the collective agreement. Once the regular rate of pay has been set, then—and only then— would this Board have jurisdiction to determine whether an alleged failure by the employer to pay that rate, by paying a rate specified in its 2003 Payment of Wages Policy, constituted disciplinary action that contravened section 147 of the *Code*. Given this conclusion, it is unnecessary for this reconsideration panel to address the issue raised by the employer as to whether the allegations surrounding the 2006 Payment of Wages Policy have been improperly pleaded in this reconsideration application.

V - Conclusion

[82] This reconsideration application provided the Board with an opportunity to review the limited jurisdiction that sections 133, 134, 147 and 156 of Part II of the *Code* confer on it in relation to workplace health and safety matters.

[83] The employer's 2003 Payment of Wages Policy triggered the complaint that was filed with the Board in this case. The Policy addressed, among other things, the number of hours that could be spent by Air Canada's flight attendants performing health and safety duties and the rate of pay to be allocated to those hours. The union asked the Board to set aside the Policy and to find that Air Canada had contravened various provisions of the *Code*.

[84] The issue as to what wages Air Canada must pay its flight attendants who perform health and safety duties was central to the dispute that was before the original panel. The collective agreement did not specify the number of hours to be spent by the attendants performing health and safety duties and the rate of pay for those hours.

[85] The original panel set the regular rate of pay to be paid to the flight attendants performing health and safety duties. It concluded that, if Air Canada paid these attendants an amount equivalent to 58% of their flying wage rate, it would be acting in accordance with section 135.1(11) of the *Code* and with the provisions of the collective agreement. The original panel did not find that any of the provisions of the *Code* had been contravened.

[86] This reconsideration panel is setting aside the original panel's decision because it exceeded the limited jurisdiction of the Board to deal with health and safety matters and constituted an improper exercise of the Board's remedial powers. Since the Board does not have jurisdiction to set the regular rate of pay, the Board is not is a position to determine whether section 147 has been contravened. Accordingly, the union's complaint is dismissed.

[87] Even though this panel is setting aside *Air Canada (358)*, *supra*, it wishes to remind the parties that the original panel that heard this complaint had considerable experience in handling disputes in the airline industry. As well, the original panel appears to have done its best, after hearing considerable evidence, to address the underlying issues to this longstanding dispute. Accordingly,

the Board suggests that the parties seriously explore whether it might not be in their best long-term labour relations interests to accept the findings of the original panel in an attempt to move forward.

Warren Edmondson
Chairperson

Julie M. Durette
Vice-Chairperson

Edmund Tobin
Vice-Chairperson