Canada Industrial Relations Board Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for decision

Air Line Pilots Association, International

applicant,

and

Air Georgian Limited,

employer.

Board File: 31860-C

Unifor,

applicant,

and

Air Georgian Limited,

employer.

Board File: 31861-C

Canadian Union of Public Employees,

applicant,

and

Air Georgian Limited,

employer.

Board File: 31862-C

Ontario Regional Employee Association,

applicant,

and

Air Georgian Limited,

employer.

Board File: 31865-C
Neutral Citation: 2017 CIRB **847**
January 26, 2017

The Canada Industrial Relations Board (the Board) was composed of Ms. Ginette Brazeau, Chairperson, and Messrs. André Lecavalier and Gaétan Ménard, Members.

These reasons for decision were written by Ms. Ginette Brazeau, Chairperson.

I. Nature of the Application

[1] Air Georgian Limited (Air Georgian or the employer) is a privately owned airline operating scheduled and chartered services on domestic and international routes. It operates primarily from two bases, located at Lester B. Pearson International Airport (Pearson) and Calgary International Airport.

[2] On July 31, 1998, the Ontario Regional Employee Association (OREA or the union) was certified by the Board to represent a unit of employees at Air Georgian described as follows:

> all employees of Air Georgian Limited at Pearson International Airport, **excluding** supervisors and those above, crew chief, chief pilot, maintenance director, operations director, flight operations manager, production manager, training manager, charter coordinator, contract liaison, lead hand, flight safety officer and controller.

[3] OREA has now filed an application pursuant to section 18 and 18.1 of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*) seeking a review of the bargaining unit structure at Air Georgian. It asks the Board to divide the current all employee unit into three distinct bargaining units. Three distinct applications for certification were filed concurrently with this application for review:

[4] Air Line Pilots Association, International (ALPA) is seeking to represent the pilots at Air Georgian (file 31860-C).

[5] Canadian Union of Public Employees (CUPE) is seeking to represent the flight attendants employed by Air Georgian (file 31862-C).

[6] Unifor is seeking to represent a unit comprised of employees in maintenance, administration and in the operation control centre (file 31861-C).

[7] Those three applications for certification are in fact displacement applications; however, the incumbent trade union, OREA, is not opposing the applications and in fact, is facilitating the process by coordinating the applications. These applications for certification can then be described as “friendly raids”. Pursuant to its authority under section 16(i) of the *Code*, the Board ordered that votes be conducted in the three applications and that the ballots be sealed pending the determination of the application for review of the bargaining unit structure.

[8] Given that all these applications are interrelated and affect the same group of employees, the Board has decided to consolidate the four matters and consider them together.

[9] ALPA, CUPE and Unifor have also applied for intervenor status in each other’s application for certification and each has applied for intervenor status in the application for review. Since the Board has decided to consolidate these matters, all three unions have standing in the proceedings.

II. Background and Facts

[10] The facts presented by the parties in their written submissions are largely uncontested. At the time of the original certification in 1998, the bargaining unit included 75 employees. The majority of the bargaining unit members were pilots and Air Georgian did not employ flight attendants at the time.

[11] OREA and Air Georgian have a collective agreement in place effective from November 1, 2013 to December 31, 2016. The parties have negotiated the renewal of their collective agreement four times since the original certification, without a work stoppage. The agreement provides for the general terms and conditions of employment for all employees in the unit and includes separate appendices that are applicable to four classes of employees, namely pilots, maintenance, administration and flight/operation control centre.

[12] At the time of the original certification, Air Georgian only operated flights out of Pearson. It opened two additional bases in Calgary, Alberta, and Halifax, Nova Scotia, in 2011, and subsequently closed the Halifax base in 2014. Up until 2014, Air Georgian’s fleet consisted of

14 Beechcraft 1900 aircraft. This aircraft can seat up to 19 passengers and its flight span is limited to between 1400 to 1900 miles.

[13] As a result of an amendment to the Capacity Purchase Agreement between Air Canada and Air Georgian in December 2013, Air Georgian's fleet now consists of 18 Bombardier Canadian Regional Jets (CRJ)–100 which can seat 50 passengers and fly up to 2300 miles. With this additional capacity, Air Georgian now flies to 26 destinations in Canada and the United States of America, compared to the previous eight regional destinations.

[14] The acquisition of the CRJs required Air Georgian to hire flight attendants as part of the crew in accordance with the *Canadian Aviation Regulations*. As a result of the company's expansion, there are currently 73 flight attendants and 236 pilots that are included in the bargaining unit and the overall size of the bargaining unit has now grown to approximately 400 employees.

[15] In January 2014, OREA and Air Georgian executed a letter of understanding (LOU) in which they agreed to terms and conditions of employment for the flight attendants and CRJ pilots. On July 20, 2015, OREA and Air Georgian agreed to a review of the existing certification order to reflect the current operations and include crews working at airports other than Pearson, including the operating hub at the Calgary International Airport.

[16] There are currently 14 pay classifications in place at Air Georgian: the pilots have two pay classifications, maintenance is divided into five pay categories; administration has three classifications; flight/operation control is divided into three classifications; and flight attendants have a single category in the current LOU.

III. Parties' Positions

[17] OREA argues that the single bargaining unit structure that is currently in place does not permit the different groups of employees to negotiate terms and conditions of employment that address their specific concerns and interests. According to the union, the fact that the pilots comprise more than half of the bargaining unit leads to a situation where their interests overshadow those of all other groups and become the predominant focus of the employer in its overall direction of the workforce. In that context, the union submits that the other employees in the bargaining unit are prohibited from advocating for their own interests and goals. There is also lack of interest from employees in groups other than pilots to participate in union activities since they have limited voice.

[18] OREA also provided copies of a number of grievances that have been filed in 2015 and 2016 with respect to scheduling issues, which in its view, demonstrate the conflict of interest that exists by having the crew schedulers included in the same bargaining unit as pilots and flight attendants. It dismisses the employer's assertion that this is a conflict between the union and management as all grievances are carried by the union on behalf of the members in the unit. It asserts that the issue in dispute emanates from the conflict between the schedulers and the other groups because of their role in the assignment of work to pilots and flight attendants.

[19] The union further submits that the pilots do not share a community of interest with other members of the bargaining unit and points to the different working conditions, schedules, a pay scale that is related to the type of aircraft they fly and internal hierarchy. There is also no mobility between the pilots and other categories of employees.

[20] OREA provided a summary of the bargaining unit structures that exist at various airlines, including Porter Airlines, Canadian North, First Air, Air Inuit, West Wind Aviation, Wasaya Airways LP and Bearskin Airlines that are similar or smaller than Air Georgian in the size of their fleet. At all these airlines, the pilots form a distinct bargaining unit. Where flight attendants and other groups of employees sought collective representation, these groups also form distinct bargaining units. None of the 15 airlines enumerated by the union have an all-employee unit.

[21] Air Georgian submits that all these airlines have a greater number of employees, however, no specific numbers were provided. It also points out that in five cases, there is only one bargaining unit in place, that of pilots.

[22] The employer contests the union's assertion that the interests of the various groups have not been addressed at the bargaining table because the pilots' interests have taken precedence. It states that it is not aware of any instance where employees in the bargaining unit were not fairly represented by the union.

[23] It asserts that the LOU that was negotiated to provide for the terms and conditions of employment for the pilots and flight attendants for the new CRJ aircraft is demonstrative of the parties' ability to successfully negotiate terms that address the interests of different groups within a single bargaining unit. According to the employer, there is no evidence that the different groups have been prevented from pursuing their distinctive issues and interests within the current structure.

[24] In response to the scheduling grievances raised by the union as an example of conflict within the bargaining unit, the employer states that these only show a potential conflict between OREA and management with respect to the rules in the collective agreement. In the employer's view, the proposed fragmentation into three bargaining units would result in a multiplicity of proceedings to resolve issues in dispute. The employer argues that the union has not presented any evidence to demonstrate that the parties are not able to address labour relations issues within the current structure.

[25] Further, the employer asserts that the fragmentation of the unit into three would be administratively difficult for a small airline like Air Georgian as it would impose additional burden and costs. It suggests that such a structure could lead to greater labour relations uncertainty and risks, in particular for the smaller units. It argues that the creation of a separate unit for the pilots will further exacerbate the power imbalance to the detriment of minority employee groups as there would no longer be a statutory obligation on a pilots unit to fairly consider or advocate for non-pilot employees.

[26] Air Georgian argues that the Board generally favours broader bargaining units that include the largest number of employees and that, in this case, the union has not provided valid labour relations reasons for reviewing the existing unit or demonstrated how the bargaining unit structure is no longer appropriate.

IV. Analysis and Decision

[27] Section 16.1 of the *Code* provides that the Board may determine any matter before it without holding a hearing. Despite the fact that the employer has suggested that a hearing would be appropriate in this case, the Board finds that the documents on file are sufficient to enable it to render a decision without holding a hearing.

[28] Section 18.1 of the *Code* provides the Board with a broad power to review bargaining units because of changed circumstances:

> **18.1(1)** On application by the employer or a bargaining agent, the Board may review the structure of the bargaining units if it is satisfied that the bargaining units are no longer appropriate for collective bargaining.

[29] In deciding whether to review a bargaining unit structure, the Board assesses the effectiveness of the current bargaining structure and seeks to balance the divergent interests at play in order to ensure that the bargaining unit structure leads to effective bargaining and

harmonious labour relations. The applicant bears the onus of demonstrating that the existing unit structure is no longer appropriate and that there is a valid labour relations purpose for reviewing the existing bargaining units.

[30] In *Rogers Cablesystems Limited*, 2000 CIRB 51, the Board indicated that compelling reasons were necessary to review the bargaining unit structure pursuant to section 18.1:

> [31] Under the new provisions of section 18.1, it is not sufficient to show that the remedy requested is more appropriate than what currently exists; there must be compelling reasons why the bargaining structure is no longer appropriate and warrants interference. …

[31] In *Canadian Broadcasting Corporation,* 2003 CIRB 253, the Board was asked to reconsider a decision in which the Board had decided to review the bargaining unit structure. In this reconsideration decision, the Board discussed the threshold that has to be met and the rationale for its intervention in bargaining unit configuration:

> [67] In its analysis, the majority members of the initial panel first confirmed that the burden of proof rests with the party who asserts that the bargaining unit structure is no longer appropriate. With respect to the nature and content of this onus, the initial panel determined that section 18.1(1) of the *Code* did not necessarily impose a "high threshold" or a high burden of proof. At this stage, it is useful to repeat the passages of the initial panel's decision in its review of relevant factors with respect to the application of section 18.1(1) of the *Code*, and which are under scrutiny in the present reconsideration application.
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> > [114] As it must generally do in assessing the appropriateness of bargaining units under the *Code*, the Board must take a broad and balanced view of the relevant factors in determining if bargaining units are no longer appropriate under subsection 18.1(1). The new section should not be viewed as narrowly remedial and designed to react only to serious problems as had been the case when reviews were conducted under section 18. The parties and the Board should be prepared to address such problems and situations as arise in a flexible manner aimed at ensuring effective industrial relations and sound and constructive labour management and collective bargaining practices. **The Board should not refuse to address problems with inappropriate bargaining units until the problems grow serious or completely intolerable, if it is apparent that the bargaining units are no longer appropriate to the extent that effective industrial relations have been significantly impaired.**
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> > [115] This broader interpretation of the threshold requirement for undertaking a bargaining unit review has already been reflected in the Board's application of the threshold test for issuing a single employer declaration under section 35 of the *Code*. The shift in that test came about because of the introduction of the new statutory scheme. However, even prior to the statutory change, the predecessor Board had realized the necessity for a broader approach. The Board described that evolution in *Landtran Systems Inc. et al.*, [2002] CIRB no. 170.
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> > …

> [116] In some cases, the changes giving rise to the need for restructuring may make the need to restructure bargaining units obvious. In other circumstances they may be more subtle, but no less compelling. In either case, the Board must undertake to consider the existing bargaining unit structure, the evidence before it and the submissions of the parties as to why or why not the units may no longer be appropriate, and make the necessary assessment bearing in mind the relevant statutory considerations and context. **What is required, however, is not that the Board apply an artificially stringent or narrow test, but that it make a sound determination based upon all of the relevant considerations. Viewed in its context, and the following of a careful consideration of the matters relevant in the specific circumstances, the application of section 18.1(1) must ask whether in consideration of all relevant factors, the bargaining units in question are no longer appropriate to the extent that statutory consequences provided by sections 18.1(2) to (4) should apply.** The initial decision whether or not to initiate a bargaining unit review is required by subsection 18.1(1) to be made by the Board. Once it is made, the matter is to be referred to the parties to attempt agreement.
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> (pages 59–61; emphasis added)

[32] The Board went on to conclude that the threshold test to be met for it to engage in a review of bargaining units remained unchanged. However, the Board has considerable latitude in its assessment of all the circumstances present to determine whether it is satisfied that the current structure is no longer appropriate:

> [74] A careful analysis of the decision under review brings the present panel to the conclusion that the initial panel's interpretation of the applicable test pursuant to section 18.1 of the *Code* has not been altered. The applicable test is still whether the Board is satisfied that the bargaining units are no longer appropriate for collective bargaining. However, the initial panel has elaborated further to state that it is not necessary to wait for serious or completely intolerable problems before the Board can be satisfied that the bargaining units are in effect no longer appropriate and that, in proceeding in such a review, the Board will take a broad and balanced view of all relevant factors.

[33] In conducting a review pursuant to section 18.1(1), the Board has broad discretion to redefine the structure of existing bargaining units to ensure that they remain appropriate and conducive to productive labour relations. In its analysis, the Board will consider and weigh different factors, including the collective bargaining background and climate, the stability of labour relations, the community of interest among the employees, the level of mobility between employment categories, employee wishes, working conditions and administrative efficiency.

[34] There is no doubt that this Board and its predecessor has expressed a preference for larger and more comprehensive bargaining units, however, it has also cautioned that this approach is not to be interpreted to mean that there is a presumption in favour of broader-based units.

[35] It is well understood that the Board, as with provincial labour relations boards, is reluctant to fragment an existing all-employee bargaining unit unless there are compelling reasons to do so. It is not sufficient to argue that another structure would be more appropriate but, rather, there must be facts and circumstances that lead the Board to conclude that its intervention is required to ensure a structure that will provide for effective and constructive labour relations.

[36] Based on its experience with collective bargaining in the airline industry, the Board has recognized the divergent interests of pilots, flight attendants and other groups. In *AirBC Limited* (1990), 81 di 1; 13 CLRBR (2d) 276; and 90 CLLC 16,035 (CLRB no. 797), the Board was dealing with a scenario that closely resembles the one that is currently before this Board. In that case, the Board was seized with three applications for certification (displacement applications) as well as an application for review of the bargaining unit structure. The Board made the following comment:

> ... However, in spite of the weight of the jurisprudence and other writings favouring the concept of broader-based bargaining, many of which are very scholarly to say the least, the fact remains that the determination of appropriate bargaining units is not a question of law, it is a factual determination that is dependent upon the particular facts and circumstances of each case. The most important consideration being the community of interests of the employee groups. Accordingly, notwithstanding the apparent persuasiveness of the preponderance of jurisprudence against fragmentation, this panel of the Board concludes that it is in the best interests of labour relations at AirBC to establish a bargaining unit pattern which reflects the practice in the airline industry. This pattern will, in our respectful opinion, best balance the powers of the employer with the powers of the various occupational groups of employees who will be able to bargain directly with their employer about their specific community interests. It also takes into account, in an indirect way, the wishes of the employees which is fundamental to the whole spirit of the *Code*.
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> (pages 7–8; 282; and 14,296–14,297)

[37] Although that particular case precedes the enactment of section 18.1 of the *Code*, the recognition in the industry that there are divergent interests between the pilots, the flight attendants, the dispatchers and other groups is very relevant to the analysis and determination of whether compelling reasons exist to review an existing bargaining unit structure.

[38] Certainly, in the case of an application for certification of a newly organized group of employees, the Board will usually favour factors that allow employees to access collective bargaining rights even if the resulting unit is not ideal from the employer's perspective. Conversely, where the parties have an established collective bargaining relationship, the Board is not so concerned about access to collective bargaining rights, but rather, will give consideration to the employees' exercise of those rights and the employer's ability to operate its business efficiently (*Sécur Inc*., 2001 CIRB 109).

[39] The circumstances at Air Georgian have changed significantly since the Board issued the certification order in 1998. At that time, there were 75 employees, consisting mainly of pilots. The company operated out of one base at Pearson and the company flew 19-passenger aircraft. There were no flight attendants as part of the job categories at Air Georgian.

[40] The situation is quite different today. The single bargaining unit is five times the size it was when it was originally certified. Since 2014, the company added a different type of aircraft to its fleet and now hires flight attendants as part of its crew. It now flies to 26 destinations across Canada and the United States.

[41] The Board accepts that there is currently no evidence of collective bargaining failure. However, it is also the case that the collective agreement that is currently in place was negotiated prior to the major expansion that the company experienced in 2013-2014. The Board is of the view that, in circumstances such as those that are present here, it should not wait for the collective bargaining process to become dysfunctional in order to intervene to promote sound labour relations.

[42] Further, the Board is unable to overlook the context and circumstances in which this application for review was filed. Employee wishes have been expressed by the different groups of employees to be represented separately in their collective bargaining with their employer. The three applications for certification that were presented concurrently with this application for review demonstrates a desire by the pilots, the flight attendants and the base employees to seek distinct representation. The incumbent union supports those applications and itself admits to the difficulty in representing the divergent interests of these groups.

[43] The Board must then reconcile the desire of the employees to be represented separately within units that share a strong community of interest with the general preference against the fragmentation of an existing bargaining unit. The Board was seized with a similar question when a group of employees within the technical and maintenance unit at Air Canada sought to carve out a bargaining unit for the maintenance function. Although, in that case, the Board declined to further divide this particular bargaining unit within the overall structure, it made the following statement:

> [49] Nevertheless, the Board is not oblivious to the need to sever smaller units under certain circumstances. In *AirBC Limited*, *supra*, the Board found the fragmentation to be appropriate and subsequently acknowledged the appropriateness of five bargaining units at the employer airline instead of the three existing units. More recently, in *TVA Group Inc*., 2000 CIRB 67,

the Board acknowledged its preference for larger bargaining units in that industry, but nevertheless stated that not all situations will align well with that policy:

> [83] While the Board favours an all-employee unit or the creation and maintenance of larger bargaining units, the Board will nevertheless create less than all encompassing units or fragment an existing employee complement where there are compelling reasons to do so. The factors that favour smaller units include a diverging community of interests, geographical factors, specific statutory provisions, the likelihood that a larger unit will not be viable, and an interest in enabling employees to obtain representation.
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> (page 24)

(*Air Canada*, 2005 CIRB 341)

[44] The Board recognizes that a bargaining unit structure that provides distinct units for pilots, flight attendants and base employees is in line with the approach and practice in the industry, even amongst the small airlines. The Board notes from its records that when it certified Unifor to represent the pilots at Sunwing in 2008, the unit comprised 108 pilots. It also certified CUPE in 2012 to represent a unit of 680 cabin crew at Sunwing. The Board certified a unit of 58 pilots at Pascan in August 2014. At Air Inuit, the Board certified Teamsters Canada for two bargaining units that consisted of 34 pilots and 12 flight attendants respectively.

[45] The diverging community of interests between these groups at Air Georgian is supported by the lack of job mobility between them, the different working conditions and pay structure and the heavy regulatory environment that govern each function. The fact that flight attendants were not a distinct group of employees when the Board originally issued the certification order at Air Georgian is also significant as it did not have the opportunity to assess the appropriateness of a unit that included this category of employees. In the Board's view, there is a strong community of interest argument in favour of separate and smaller bargaining units in this case.

[46] The employer points to the all-employee unit that the Board recently certified at Northern Air Solutions Inc. in 2015, to argue that the Board is not necessarily persuaded by the industry practice. The Board notes however that, in that case, it was dealing with a first application for certification for a group of unrepresented employees. In addition, the employer, an air ambulance service, was a very small operation with only two aircraft as part of its fleet. The Board gave considerable weight to the employees' wishes to access collective bargaining and ultimately certified a bargaining unit that encompassed less than 30 employees and consisted of pilots, maintenance workers and paramedics. These were the same considerations at play when the Board initially certified an all-employee unit of 75 employees at Air Georgian.

[47] The Board is mindful that workplaces do evolve and that it must be prepared to react to ensure that the employees can effectively exercise their right to collective representation. The Board retains the authority to define and redefine bargaining units to reflect new realities and ensure employees continue to have a meaningful way to exercise their right to collective bargaining in the face of organizational changes. In doing so, the Board is guided by the objectives of the *Code* which entails the encouragement of free collective bargaining and the establishment of a framework for employees to exercise sufficient countervailing power to that of the employer to enable them to effectively bargain their terms and conditions of employment.

[48] In this case, the Board is satisfied that the current bargaining unit structure is no longer appropriate to ensure the viability of the single all employee unit and the stability of labour relations in the long term. The applicant union pointed to a number of issues, including the new and much larger constituencies that have emerged within the unit since the initial certification order was issued. It also explained the difficulty of managing grievances that underline a true conflict between the roles and responsibilities of two distinct groups within the same bargaining unit. The submissions have raised sufficient grounds and pointed to a number of developing issues that convinced the Board that its intervention is warranted to review the bargaining unit structure that is currently in place. As stated in *Canadian Broadcasting Corporation*, *supra*, and considering the unique circumstances of this case, the Board is of the view that it should not wait until the labour relations situation becomes intolerable or completely dysfunctional to review the unit and intervene to define a structure that reflects the evolution of the business at Air Georgian. In this case, the Board believes it important to act proactively at this stage to ensure the employees are able to continue to exercise their rights to collective representation in a meaningful way.

[49] In circumstances where the Board concludes that a bargaining unit structure is no longer appropriate, it would normally ask the parties to attempt to reach agreement on a new structure pursuant to section 18.1(2). Parties are usually given a set period of time within which they are to report back to the Board indicating whether they have reached agreement, failing which the Board determines the new bargaining unit structure. This makes sense when multiple units exist and the parties are asked to consolidate and reconfigure a complex structure.

[50] In the instant case, the existing structure involves a single unit. The incumbent bargaining agent has expressed a desire to be replaced as the bargaining agent for the unit as presently constituted and, with its support, three new unions have solicited the support of the employees

in the unit. Further, the Board determined that it was appropriate to consolidate the four applications and to consider as a whole the three certification applications that were filed concurrently with the application for review. The three unions that have filed the applications for certification (ALPA, CUPE and Unifor) do not have an existing relationship with the employer and the incumbent union may no longer represent any of the employees in the future. In these unique circumstances, it appears impractical and simply makes no labour relations sense to ask these parties to negotiate a new structure. Rather, the Board finds it appropriate to accept the applications for certification that have been filed by ALPA, CUPE and Unifor as an alternative to asking the parties to discuss a new bargaining unit structure and to divide the existing all employee unit into three distinct units.

[51] The Board concludes that it is appropriate in this context to consider the certification applications that were filed concurrently with the application for review as an alternative to asking the parties to discuss the structure of bargaining units and to define a bargaining structure that is in line with the practices in the industry and which aligns with the wishes of the employees as expressed by the three applications for certification.

[52] For all the reasons expressed above, the Board grants the application for review and determines that the new bargaining unit structure will be composed of three bargaining units as follows:

a. All pilots employed by Air Georgian Limited, excluding supervisors, those above the rank of supervisor, Crew Chief, Chief Pilot, Maintenance Director, Operations Director, Flight Operations Manager, Production Manager, Training Manager, Charter Coordinator, Contract Liaison, Lead Hand, Flight Safety Officer and Controller;
b. All employees of Air Georgian Limited employed in In-Flight Services, excluding In-Flight Supervisors, Managers, and those above these positions;
c. All employees of Air Georgian Limited, excluding pilots and In-Flight services employees, supervisors and those above the rank of supervisor, maintenance director, operations director, flight operations manager, production manager, training manager, charter coordinator, contract liaison, lead hand, flight safety officer and controller.

[53] These three distinct units continue to be represented by OREA.

[54] As result of the Board's conclusion, the Board will now direct the Board's Returning Officer to arrange for the counting of the ballots that were sealed in the three related applications for certification to determine which union will represent the employees in each unit.

[55] This is a unanimous decision of the Board.

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Ginette Brazeau
Chairperson

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André Lecavalier
Member

_____
Gaétan Ménard
Member