IN THE MATTER OF AN INTEREST ARBITRATION

BETWEEN:

Air Canada

and

Canadian Airline Dispatchers Association

Before:	William Kaplan Sole Arbitrator
Appearances	
For Air Canada:	Hugh Wright McInnes Cooper Barristers & Solicitors
For CALDA:	Denis W. Ellickson Caley Wray Barristers & Solicitors

A hearing in this matter was held in Mississauga on August 27, 2014.

Introduction

There is only one issue in dispute in this interest arbitration: determination of the appropriate employer contribution rate for the recently negotiated New Hire Defined Contribution Pension Plan ("NEW HIRE DC Plan"). The parties to this proceeding are Air Canada, Canada's largest domestic and international full service airline, and CALDA, the certified bargaining agent for flight dispatchers. There are 73 employees in the bargaining unit, but this interest arbitration only covers employees hired after ratification of the 2011-16 collective agreement (February 21, 2012).

The recitals to the Arbitration Agreement giving rise to this proceeding state that in agreeing to establish the NEW HIRE DC Plan, the parties "sought, among other things, to address the long term sustainability of the Air Canada pension plans and the objective of a dignified and secure retirement for all employees." In Air Canada's view, its proposal providing for a 100% match by the employer of an employee's contribution (3% to 6%) should be awarded ("the basic contribution rate"). In CALDA's submission, its proposal, providing for that same match augmented by the following additional contributions ("the supplemental contribution rates") should be awarded:

Two years of Continuous Service on the 1st day of the month:	37.5%
Five years and over of Continuous Service on 1st day of month:	75%

Both parties filed detailed written submissions. The case proceeded to a hearing in Mississauga on August 27, 2014.

CALDA Submissions

CALDA's submissions began with a review of the historical context noting that for many years it has worked with management and provided economic relief in particular with respect to the 2003 1.3 billion solvency deficit faced by Air Canada in respect of its many defined pension plans (a situation that has now changed). In addition, wage rollbacks and other concessions were agreed to in May 2003, and then again the following year. This collective bargaining context, CALDA asserted, was critical: the union was repeatedly advised by Air Canada that concessions were imperative to the survival of the company and that all of Air Canada's unions would be agreeing to the same deal – that no union would receive a better deal – but if one did, that CALDA would receive the same benefit. In 2009, as was the case in 2003 and 2004, CALDA, and the other Air Canada unions, agreed to further concessions: an extension of the collective agreement and its rollover with no wage increases or other improvements. All of this history was material to the 2011 round that led to the present dispute.

In 2011, Air Canada returned to the bargaining table, again with all of its unions. In CALDA's submission, Air Canada, in accordance with its now well-established historical practices, stated to each of its unions that no one group would do better than any other; that the same wage increases would be negotiated, the same concessions sought. Among the concessions being sought was a NEW HIRE DC Plan. CALDA agreed. In due course, the parties entered into and ratified a collective agreement providing for arbitration of the terms and conditions of the NEW HIRE DC Plan should they not agree. They were able to agree on all aspects of it except for the quantum of the employer's contribution.

Air Canada sought the introduction of a NEW HIRE DC Plan not just from CALDA, but from all of its unions. UNIFOR rejected the request and went on strike. In the face of back-to-work legislation, it submitted the pension part of its dispute to final offer arbitration. Air Canada proposed a NEW HIRE DC plan with graduated matching contributions up to a maximum of 5% of an employee's earnings. UNIFOR proposed a hybrid, a combination NEW HIRE DC-Defined Benefit Plan ("NEW HIRE DC-DB Plan"). The NEW HIRE DC-DB Plan plan was awarded. In the case of CUPE, a CIRB decision awarded that union the equivalent to the UNIFOR NEW HIRE DC-DB Plan. The IAMAW refused to agree to a NEW HIRE DC Plan. Pursuant to legislation, the collective agreement was settled by final offer interest arbitration. A NEW HIRE DC Plan was not awarded (although a MEPP was).

Like CALDA, ACPA, representing the pilots and first officers, agreed to a DC Plan. It had two components: the basic contribution rate (Air Canada's proposal in this case): employee contributions of 3% to 6% of salary with 100% match by the employer, and the supplementary contribution rates (identical to what CALDA is seeking along with the basic contribution rate): an increasing scale of employer contributions topping out at 10.5% for an employee contributing the maximum 6%. The Air Canada-ACPA tentative agreement was rejected by ACPA membership. Legislation referred the dispute to final offer selection arbitration. The employer's NEW HIRE DC Plan arbitration proposal (initially agreed to by ACPA containing both the basic and supplemental contribution rates) was awarded.

In CALDA's submission, the principles of interest arbitration – most importantly replication of free collective bargaining – led to a finding in favour. The obvious comparators were Air Canada's other unions; in particular, ACPA. At no time, did these parties ever look to other employers. Air Canada was the leader, and the only other Tier 1 carrier was non-unionized Westjet. Accordingly, the parties always considered results reached by Air Canada and its other unions, and that, of course, did not include outcomes imposed on managers who had no right to collectively bargain.

CALDA's proposal in this proceeding was virtually identical to both what the employer agreed upon with its pilots, and what was then awarded. The CALDA proposal also had the added virtue of being identical in terms of the overall percentages/contribution rates in the awards settling the disputes between Air Canada and UNIFOR and CUPE. As well, and unlike the hybrid plans imposed in those cases, the CALDA New HIRE DC Plan gave the employer 100% cost certainty and limited liability. Moreover, in addition to agreeing to the NEW HIRE DC Plan, CALDA also agreed to significant amendments to its DB Plan, with concomitant savings for Air Canada, not to mention an extension of the wage grid generating additional savings. There was no reason why new hire CALDA employees should not get the same pension treatment as new hire ACPA members and every reason why they should. For all of these reasons, and others, CALDA asked that its proposal be awarded.

Air Canada Submissions

In Air Canada's view, the most important interest arbitration criterion to consider was replication of free collective bargaining. That criterion was informed by examining results reached not just by an employer with its other unions and employee groups, but within the industry as a whole. A consideration of that criterion led, Air Canada argued, to a finding that its proposal, whereby employees could elect contribution levels between 3% and 6%, and Air Canada would match, was to be preferred to that advanced by CALDA. This was, in effect, the most appropriate result in the circumstances and the one that replicated the most likely result in 2011 had the parties negotiated, or had the dispute had run its full course, rather than proceeded to interest arbitration.

The fact that CALDA, and other unions, had historically agreed to concessions was not, in Air Canada's view, a determinative factor. Those concessions were agreed to in everyone's interest in order to preserve the airline in the face of severe economic difficulties that threatened the survival of the company as a whole. It was not a basis for awarding an increased pension contribution. The same observations could be made, and were made, with respect to any commitments made about wage increases and bargaining outcomes. Bargaining units were different, and so too were bargaining results including pension arrangements.

In determining an appropriate interest outcome, an arbitrator had to consider other negotiated settlements as well as benchmarks and objective economic criteria. None of the other Canadian airlines where CALDA had representation rights were making contributions that were in excess of 5% (Effective January 2015, JAZZ would match at 6% for dispatchers with eleven years of service). At Air Transat, for example, matches were limited at 3%. At Air Canada, a dispatcher could receive matching increases at 6% with no service requirement. For this reason alone, Air Canada argued, its proposal should be awarded.

In further support of its submissions, however, Air Canada argued that with the exception of the pilots and first officers, CALDA members were the highest paid unionized employees at Air Canada. CALDA did not, however, compare to the pilots in terms of work duties and general compensation. While there was an economic justification for the pension proposal that was eventually awarded with the pilots – and relevant industry comparators in the United States – there were none anywhere for what CALDA sought when similar employee groups were examined. Dispatchers, as important and valuable as they were, did not receive the same terms and conditions of employment, including pension contribution rates, as pilots. Economic data further established that in terms of all DC Plans, a 6% match was at the high end of employer contributions. The new hybrid plans were not a useful comparison. What was relevant, were the arrangements in place for Air Canada managers: they received a maximum of a 6% match in a DC Plan after 15 years of service. This was to be contrasted with the new hires at CALDA who could immediately receive the maximum match.

It was significant, in Air Canada's submission, that CALDA agreed to halve off this one issue to interest arbitration. That reflected, Air Canada asserted, that this was not an issue upon which it would have been willing to either sacrifice other gains or enter into a work stoppage. It was also extremely important to consider the economic situation at the time the NEW HIRE DC Plan was agreed upon. The pension deficit was out of control; the very sustainability of the airline in question. The replication exercise was a historical one. While it was true enough that the pension funds were currently operating at surplus, when the NEW HIRE DC Plan was negotiated the reverse was true and that was the context, including all of the other economic pressures the airline was then subjected to (as outlined by Air Canada in its written submissions), that had to be considered.

For all of these reasons, and others, Air Canada asked that its proposal be awarded. It was the one that most closely replicated the result likely to have been reached in free collective bargaining. It was justified based on the replication theory and both relevant internal and external comparator groups. It was consistent with the recitals in the arbitration agreement not to mention interest arbitration criteria considered more generally. It maintained an affordable approach that supported Air Canada's competitive position externally while ensuring an even and fair playing field with its other unions. Air Canada asked for an order in its favour.

Decision

Having carefully considered the submissions of the parties, I am of the view that the outcome that would most appropriately replicate free collective bargaining, and the one that best gives effect to all of the recitals in the arbitration agreement, including the one quoted above, is the proposal advanced by CALDA. This proposal, as noted above, was initially agreed upon by Air Canada with ACPA, although following a failed ratification vote, was imposed by arbitration after it was proposed by Air Canada in that proceeding. In any event, it is my view, for these reasons, and for the reasons that follow, that it best replicates free collective bargaining. (The pension arrangements with UNIFOR, CUPE and IAMAW are not easily comparable, with the possible exception of IAMAW and its MEPP. However, what is arguably relevant are total employer pension contributions over time, and the fact that in two of the new plans there is a DB portion. Economic uncertainty because of the absence of a cap on liability remains, a factor which, if anything, would seem to favour CALDA given its agreement to a true DC Plan that directly "addresses the long term sustainability of the Air Canada pension plans".)

The collective bargaining context is critical. It is not disputed that Air Canada made it clear through successive rounds that no one union would be unfairly advantaged compared to the rest. This does not mean, of course, wage harmonization as wage rates reflect market forces. Rather, the undertaking, in a multi-union work place, is essential for orderly and fair collective bargaining. Not only did CALDA agree to the NEW HIRE DC Plan concession, it was the first union to do so, potentially setting the stage for similar replicated collective bargaining outcomes.

The fact that the other unions, except ACPA, did not voluntarily agree to a NEW HIRE DC Plan is not material to the value of this voluntary agreement in potential pattern setting. Moreover, in the case of all of the other unions, the collective agreements were eventually imposed. CALDA's settlement is a true expression of free collective bargaining and its value to the employer was enormous for many different reasons. Agreeing to a DC plan when the status quo is DB is the Holy Grail of union concessions in a mature collective bargaining relationship; the subject of many long and often intractable disputes and never given up lightly. The economic and other value to an employer is enormous. While decided by arbitration, ACPA's NEW HIRE DC Plan was also initially agreed upon, and that is another example, albeit less persuasive because it was not ratified, of an outcome that was achieved in the bargaining process.

As CALDA noted in its November 27, 2012 letter to Air Canada rejecting the airline's proposal (the same one made in this case for the basic contribution only): "The purpose of agreeing to a DC Pension Plan was not to give Air Canada a savings in total salary, in fact, which was never asked for by the Company, the purpose was lift the burden created by the liabilities of a Defined Benefit Pension Plans. CALDA has been progressive in helping the company meet their objectives. We have met our side of the agreement and we expect that Air Canada will help us build a DC Pension plan that will relieve Air Canada from its liabilities but still provide the security for its dedicated Flight Dispatchers." As Air Canada noted in its brief, "fairness among employee groups has…been an important guiding principle in collective bargaining since 2003….It should persist at this time" at 17).

The fact that CALDA and Air Canada agreed to arbitrate contribution rates failing agreement can hardly be advanced in support of a submission that one or the other party did not consider this issue of overriding importance. A default dispute resolution mechanism on a single and often important outstanding issue in collective bargaining precluding a settlement is, experience indicates, normative. It is hardly a basis for either party to suggest that the issue was relatively inconsequential. The fact that the additional contributions being sought would only kick in over time – not immediately – further reduced the pressure in the system and made attractive a later arbitration default.

What ultimately matters is what the parties would have most likely agreed upon had collective bargaining run its course. It is not persuasive that Air Canada, having achieved voluntary agreement on a NEW HIRE DC Plan, which it could then try to replicate with its other unions, would not have agreed to the supplemental contributions it did agree upon and, indeed, at arbitration, proposed with ACPA. The number of covered CALDA employees – new hires – is *de minimis*. Air Canada relied on this agreement in its other bargaining, and it was an important part of a package that included other concessions. What cannot be accepted is the assertion that Air Canada, having indicated through successive rounds that there would be rough equality of treatment, would then agree upon the supplemental contribution rates with ACPA but deny them to CALDA.

CALDA members may not have struck over this issue; but it is equally inconceivable that Air Canada would have locked them out. The fact that CALDA members make less money than pilots and first officers has nothing to do with anything. DC plans for similar employee groups and in the industry generally – external comparators as demonstrated, for example, in the Mercer data – are obviously relevant and, as urged by Air Canada, were considered but have not been found determinative given the bargaining history and the importance usually attributed to free collective bargaining outcomes and results of an employer, this employer, with its own unions, in particular, ACPA. Likewise, terms and conditions imposed on management cannot serve as a replication template in free collective bargaining, unless, of course, the parties agree upon its relevance. In this case, they do not.

As Arbitrator Burkett noted in the CAW arbitration, "the awarding of a DC plan for new hires into this bargaining unit where all members of the bargaining unit have previously been part of the Employer's DB pension plan would constitute a major breakthrough." The voluntary agreement between Air Canada and CALDA for the NEW HIRE DC Plan was a breakthrough *for Air Canada*. When the current collective agreement expires there will, CALDA asserts, only be one employee entitled to both the basic and supplemental contribution rates that it is seeking in this arbitration. Upon expiry, there will obviously be another opportunity should the parties wish to renegotiate contribution rates.

At the end of the day, in its negotiations with the most relevant and persuasive comparator, Air Canada agreed to the basic contribution rate that it is offering here and the supplemental contributions CALDA seeks. As set out in this award, there are a myriad of reasons in support of CALDA's proposal that far outweigh the submissions on Air Canada's behalf. Accordingly, the CALDA proposal is awarded.

Conclusion

At the request of the parties, I remain seized with respect to the implementation of this award.

DATED at Toronto this 5th day of September 2014.

"William Kaplan"

William Kaplan, Sole Arbitrator