Court File No. 97-CV-135179

ONTARIO COURT (GENERAL DIVISION)

B E T W E E N :

PATRICK BERRY, JAMES DELUCE, JEFFREY KARELSEN, ROBERT JAMES SIMERSON and ERNEST ZURKAN

Plaintiffs

- and -

CHRIS PULLEY, TOM FRASER, LARS T. JENSEN and JAMES GRIFFITH

Defendants

AMENDED STATEMENT OF DEFENCE

1. The defendants admit the allegations contained in paragraphs 4, 5, 9, and 14(i) of the statement of claim.

2. The defendants deny the allegations contained in paragraphs 7, 8, 10, 11, 12, 13, 14, 14(ii), 14(iii), 14(iv), 14(v), 14(vi), 14(vii), 14(viii), 14(ix), 14(x), 15, 16, 17, 18, 19, 20, and 21 of the statement of claim.

3. The defendants have no knowledge in respect of the allegations contained in paragraphs 2 and 3 of the statement of claim.

THE CANADIAN AIR LINES PILOTS ASSOCIATION

4. At all material times up to February 1, 1997 the Canadian Air Lines Pilots Association ("CALPA") was an unincorporated association whose primary purpose was to engage in collective bargaining for airline pilots.

5. Prior to February 1, 1997 CALPA was certified under the *Canada Labour Code* to represent various bargaining units of pilots, including a separate bargaining unit at each of the following airlines: Air Canada, Air Nova, Air Alliance, Air Ontario, AirBC and NWT Air. The last five of those airlines were regional airline companies that at all material times were subsidiaries of Air Canada.

6. On November 14, 1995 CALPA was displaced by the Air Canada Pilots Association ("ACPA") as the exclusive bargaining agent for Air Canada pilots. Thereafter, CALPA had no right to pursue collective bargaining for any terms of employment at Air Canada.

7. On February 1, 1997 CALPA merged with the U.S.-based pilot union, Air Line Pilots Association ("ALPA"). After that date, CALPA no longer existed in any capacity and ALPA became the successor bargaining agent under section 43 of the *Canada Labour Code* for each of the pilot bargaining units then represented by CALPA, including the unit of Air Ontario pilots.

8. This action concerns the application of CALPA's merger policy to six of its separate bargaining units, namely the units at Air Canada and each of its five regional subsidiary airlines.

9. The CALPA merger policy has traditionally been applied only where two airlines have actually merged their operations, such that the two pilot bargaining units were intermingled and it was necessary to determine the relative seniority rights of the combined pilot group with respect to a single flying operation.

10. In the case of Air Canada and its subsidiary regional airline companies, their operations were not merged into a single flying operation, and their pilot bargaining units were not intermingled so as to require a determination of relative seniority rights within a combined pilot group.

RELEVANT PROVISIONS OF CALPA CONSTITUTION AND POLICY

Status of Administrative Policy

11. The merger policy was not part of the CALPA Constitution, but was contained in Section IV of CALPA's Administrative Policy. CALPA's Administrative Policy was not binding. As stated in the Administrative Policy, the contents of the Policy were to be considered, depending on the circumstances, as either "firm directives" or "desirable

goals which, for one reason or another, are incapable of being realized at any particular time".

Merger Policy Applied Only to CALPA Bargaining Units

12. Article 1(a) of the CALPA merger policy made it a condition precedent to the declaration of a merger that each of the airlines covered by the declaration be a "member airline", i.e. that the pilots employed by each affected airline be represented in collective bargaining by CALPA.

Role of Master Executive Councils

13. At all material times, CALPA's constitution provided for a separate group of elected representatives for each of its bargaining units. This group was called the Master Executive Council ("MEC"). Each MEC was the highest governing authority within CALPA in matters affecting the members of its bargaining unit. In all matters, each MEC was required to determine and act on the wishes of the members in its own bargaining unit, not the wishes of CALPA members in other bargaining units.

14. The CALPA Constitution and Administrative policy expressly preserved the right of pilot members in each bargaining unit to voice their wishes in matters concerning merged

seniority and collective bargaining, and it expressly obliged their MEC and merger representatives to act in accordance with those wishes.

15. By its terms, the CALPA merger policy established an adversarial process in which each MEC and its merger representatives advocated seniority rules that advanced the interests of the pilots in their own bargaining unit, and opposed rules that threatened those interests. Nowhere did that policy or the constitution require that any CALPA member, any MEC member or any merger representative voice support for a seniority arrangement that was against the interests of his or her bargaining unit.

16. Under Articles 1(a) and 1(c) of the merger policy, both the Air Canada MEC and the Air Canada merger representatives were responsible for acting on behalf of Air Canada pilots only.

17. Under Article 3(d) of the merger policy, the Air Canada MEC was required to put any negotiated proposed merged seniority list to a vote among the Air Canada membership unless the MEC itself concluded that exceptional circumstances existed.

18. Under Section III, Subsection A, Article 10 of the Administrative Policy, the Air Canada MEC had to subject every tentative collective agreement (including any agreement in which Air Canada agreed to accept a merged seniority list) to a ratification vote among

the Air Canada membership. The Air Canada MEC was specifically empowered to recommend rejection of any tentative agreement.

19. Under Section III, Subsection B, Article 5(a) of the Administrative Policy, CALPA could not have called a strike to back a proposal that a merged seniority list be included in the Air Canada collective agreement, unless a majority of the Air Canada pilots first voted to support such a strike.

Allocation of Political Power in CALPA

20. Under CALPA's Constitution, decision-making power was allocated primarily by bargaining unit, regardless of its size.

21. At the time of the President's March 1991 merger declaration, the Air Canada pilots made up about two-thirds, and the combined pilots of Air Canada's five regional subsidiaries made up about one-third, of the total pilot group covered by the merger declaration. Nevertheless, under CALPA's Constitution the representatives of Air Canada pilots had significantly less voting power than did the representatives of the smaller regional pilot group.

22. The CALPA Board of Directors included the Chairman of each MEC. The number of votes allocated to each MEC Chairman bore no relationship to the size of the bargaining

unit represented by him. As a result, the NWT Air MEC Chairman, who represented a bargaining unit of about 35 pilots, had one vote, while the Air Canada MEC chairman, who represented a bargaining unit of about 1600 Air Canada pilots, had two votes.

23. The Chairmen of the five Air Canada regional airline MEC's combined had five votes on the Board of Directors. They could outvote the Air Canada MEC Chairman even though he represented a pilot group that was twice the size of their combined constituency.

24. Notwithstanding their limited voting power within CALPA, the Air Canada pilots were required to contribute almost 50% of CALPA's national revenue.

Requirement for Support of Members

25. Under the CALPA merger policy, the merger process was initiated by the declaration of the President. It was an implied condition that the declaration be supported by a majority of the pilots in each bargaining unit covered by the declaration.

Prior Assent of Affected Employers

26. The end product of the CALPA merger policy was a union collective bargaining proposal that would require the employing airlines to accept: 1) a single seniority list fashioned

by CALPA, and; 2) a common collective agreement that would treat those employers, in combination, as a single employer. The extent to which the CALPA merger process could result in changed terms of employment depended not on the completion of the process under CALPA's merger policy, but on the willingness of the employers involved to accept the union's proposals in collective bargaining governed by the *Canada Labour Code*.

27. Accordingly, Article 1(b) of the CALPA merger policy required, as a precondition to the continuation of the merger process, that immediately following the President's declaration of a merger, CALPA would secure from each affected airline employer its agreement in advance that it would accept in subsequent collective bargaining the merged seniority list that was still to be produced under the union's merger process.

Rules Governing Merged Seniority List

28. Under Article 1(e) of the merger policy, seniority lists were required to be integrated "by balancing the equities brought to the merger by the respective pilot groups" through the application of several enumerated objectives. One enumerated objective was to "maintain pre-merger pay and standard of living". Another was to "minimize changes to career potential". Another was to "avoid windfall gains to either group at the expense of the other". In total, the enumerated objectives were designed to prevent a merger from

eroding existing benefits, and to avoid the use of a merger as an opportunity for one pilot group to gain in seniority at the expense of another pilot group.

Mandatory Steps Following Completion of Proposed Merged Seniority List

29. Under the merger policy, the final proposed seniority list was to be produced either by negotiations among the merger representatives of the affected bargaining units, or by the order of an arbitrator.

30. Article 7 of the merger policy required the President to convene a meeting of the affected MEC's to discuss how to pursue the implementation of the final proposed seniority list. This meeting was to take place following the production of the final list, and before the list was proposed to the employer in collective bargaining.

31. Section III, Subsection A, Article 28 of the CALPA Administrative Policy required that in attempting to negotiate a merged seniority list into a collective agreement, CALPA also had to negotiate protective clauses and/or compensation for pilots adversely affected by the implementation of the merged seniority list.

Power to Cancel a Declared Merger

32. Under section 1(f) of the CALPA merger policy, the President had the power to "dissolve" a declared merger "in the event of a change in circumstances".

Union Disciplinary Procedure

33. There was no provision in the CALPA Constitution or Administrative Policy whereby the union or any member could recover damages from a member for breaching the Constitution or Administrative Policy. Instead, Article II, Sections 7 to 9 of the Constitution established an internal union disciplinary process under which members could be charged, tried and convicted of specified charges, and subjected to disciplinary action up to and including expulsion.

34. Article II, Section 7(a)(viii) of the CALPA Constitution made it an offence for any CALPA member to initiate legal action against another member before exhausting all remedies provided in the Constitution.

SIGNIFICANT EVENTS IN THE MERGER PROCESS

35. In December 1986, CALPA's President declared an earlier merger between Air Canada and two of its subsidiary regional airlines. Air Canada notified CALPA that it did not consider a merger to have occurred. CALPA cancelled that merger process.

36. On or about November 23, 1990, the MEC Chairman for the Air Canada unit decided to request that the then-CALPA President, Captain R.J. McInnis, issue a merger declaration covering Air Canada and its five regional subsidiary companies. Unbeknownst to Captain McInnis, the Chairman of the Air Canada MEC had deliberately refrained from polling the Air Canada pilots to determine whether they supported a merger declaration.

37. On March 1, 1991 Captain McInnis issued the merger declaration at issue in this action. At that time, CALPA did not represent in collective bargaining the pilots of two of the airlines covered by the declaration, namely Air Alliance and NWT Air, as required by Article 1(a) of the merger policy.

38. Captain McInnis issued the March 1991 declaration under the misapprehension that the request of the Air Canada MEC Chairman indicated that a majority of Air Canada pilots supported the merger declaration.

39. In violation of Article 1(b) of the merger policy, CALPA failed to obtain, from any of the airlines covered by the declaration agreement, an advance commitment that all questions of pilot seniority would be determined by CALPA under its merger policy.

40. In May 1993, the CALPA merger representatives of two of the pilot groups, Air Canada and NWT Air, agreed on a proposed merged seniority list for the pilots of those two airlines. The proposed merged list was ratified in a vote by the Air Canada MEC. When CALPA attempted to negotiate that proposed merged list into the Air Canada collective agreement, Air Canada refused, for reasons unrelated to the wishes of Air Canada pilots.

41. In May/June 1994, following the merger declaration, the Air Canada MEC polled the Air Canada pilots to determine their support for the merger process. An overwhelming majority voted not to proceed with the proposed merger.

42. When the CALPA President learned of the Air Canada pilot poll, he decided to delay the merger process until the November 1994 CALPA convention, to give the representatives of the affected bargaining units an opportunity to explore alternatives. However, the CALPA Board of Directors, acting under the political control of the minority regional pilots, overruled that decision.

43. On March 28, 1995 arbitrator Picher issued an award that set out basic rules under which a merged seniority list was to be constructed. The March award did not contain the final seniority list that, under the merger policy, was to have been proposed in collective bargaining. That seniority list was set out in Mr. Picher's final award issued on November 7, 1995.

44. Following the issuance of the March 1995 Picher award, CALPA's President, again acting under the control of the CALPA Board of Directors and in opposition to the wishes of the majority Air Canada pilots, proposed that Air Canada accept as part of the Air Canada collective agreement a merged seniority list still to be constructed in accordance with that award.

45. Air Canada did not accept that proposal.

46. Through the spring and summer of 1995, Air Canada pilots formed a new union, the Air Canada Pilots Association ("ACPA"). By July 15, 1995 they had gathered the support of a majority of Air Canada pilots for ACPA to displace CALPA as their bargaining agent. Part of ACPA's campaign, well-known to CALPA, was based on the undemocratic structure of CALPA, particularly as revealed by its determination to pursue a merger process opposed by most Air Canada pilots.

47. In September 1995 certain Air Canada pilots loyal to CALPA, including the defendants Chris Pulley and Tom Fraser, caused CALPA to hold a special convention in an attempt to change CALPA's voting and financial structures, and its merger policy, so as to be acceptable to Air Canada pilots and to weaken support for ACPA. The Air Ontario pilots, through their MEC, threatened to sue any CALPA member who entertained any change that might detract from CALPA's pursuit of a merged seniority list. No meaningful change in CALPA's structure was accomplished at the convention.

48. On November 7, 1995 arbitrator Picher issued the final proposed seniority list. At the time, CALPA and Air Canada were engaged in collective bargaining for a new collective agreement. Apart from questions of seniority, there remained many other unresolved bargaining issues between CALPA and Air Canada.

49. The November 7, 1995 proposed seniority list, if implemented, would have had a serious adverse impact on over two hundred Air Canada pilots. As of that date, CALPA had not developed, let alone proposed, any contract proposals to protect or compensate those adversely affected pilots, as required by the Administrative Policy.

50. At no time following the November 7 award did CALPA convene a meeting of the affected MEC's as required by Article 7 of the merger policy. Nor did CALPA propose to Air Canada that the November 7, 1995, seniority list be adopted in collective bargaining.

51. By an order dated November 14, 1995, the Canada Labour Relations Board certified ACPA as the exclusive bargaining agent for Air Canada pilots, following a representation vote that ACPA won by a large majority.

52. On November 14, 1995, CALPA expelled all Air Canada pilots from its membership.

53. CALPA then purported to notify both ACPA and each Air Canada pilot that they had a subsisting duty to pursue the implementation in collective bargaining of the Picher seniority list. As the new exclusive bargaining agent of those pilots, ACPA rejected this theory.

54. In a grievance arbitration award dated September 16, 1996, arbitrator Claude Foisy, Q.C. rejected CALPA's arguments that ACPA and/or Air Canada were bound by the proposed Picher seniority list.

55. At all times from 1989 to the present, the Air Canada collective agreement has given, to all pilots of Air Canada's regional subsidiaries who are qualified to be Air Canada pilots, an opportunity to be hired as Air Canada pilots in preference to candidates from other sources.

56. Many Air Ontario pilots who are members of the proposed plaintiff class have taken advantage of that opportunity, have been hired by Air Canada and have earned more than

they would have if the Picher seniority list had been inserted into the collective agreement.

57. Other Air Ontario pilots, including the plaintiffs, have declined to take advantage of the preferential hiring arrangement at Air Canada, and instead have attempted by various means to force the insertion of the Picher list into the Air Canada collective agreement.

Letters of Understanding 17 and 18

57(i) The Defendants deny the relevance of paragraphs 14(i) to 14(xi) of the Amended Statement of Claim.

57(ii) The negotiation by CALPA of Letters of Understanding (LOU) 17 and 18 took place prior to the President's March 1991 merger declaration, and thus before the commencement of the merger process at issue in this case. Those negotiations took place during the earlier merger process described in paragraph 35 of this Amended Statement of Defence, which process was cancelled by CALPA, for reasons unrelated to LOU 17 or 18, prior to the President's March 1991 merger declaration.

57(iii) In any event, the Defendants dispute the significance of commitments made by elected CALPA representatives (including those on the Air Canada MEC) to

begin or continue CALPA's internal merger process. Notwithstanding any such commitments, the Air Canada pilots retained their right under CALPA's Constitution and policies to voice their wishes, to dissent from decisions made by CALPA representatives, and to try to convince CALPA's President to stop the merger process. They also retained their right under the *Canada Labour Code* to change bargaining agents if CALPA was not responsive to their wishes.

57(iv) In any event, paragraphs 14(v) to 14(x) of the Amended Statement of Claim misstate the nature and effect of LOU 17 and LOU 18.

57(v) LOU 17 recognized the need of Air Canada to enhance its market position by entering into "feeder" arrangements with regional airlines. It was designed to allow, and did allow, Air Canada to transfer a significant amount of flying then performed by Air Canada to its regional subsidiary airlines, including Air Ontario.

57(vi) In particular, LOU 17 authorized Air Canada to transfer any of its existing routes to the regional airlines, so long as it first consulted with CALPA and the transfer did not result directly in the lay-off of any Air Canada pilot.

57(vii) To protect the integrity of the Air Canada pilot bargaining unit, LOU 17 established some limits on the size of aircraft (measured by number of seats and payload) that could be employed by the regional airlines so long as they remained "feeders" to Air Canada. Those limits were established to prevent Air Canada, under the guise of transferring its regional flying, from also transferring the longer distance flying that Air Canada was already performing.

57(viii) In the case of Air Ontario, the limits were set so as to allow Air Ontario not only to keep all of its existing aircraft and routes, but also to expand its fleet and route structure significantly.

57(ix) Following the inclusion of LOU 17 in the CALPA/Air Canada collective agreement, Air Ontario and its pilots benefitted from a major transfer of flying from Air Canada. There was no material transfer of flying from Air Ontario to Air Canada.

57(x) As a result, Air Ontario rapidly expanded in terms of the size of its revenues, its aircraft fleet, its pilot complement, and the work opportunities available to those pilots.

57(xi) This growth at Air Ontario continued even during a recession in the early 1990's, during which Air Canada itself lost revenue and laid off a significant number of its own pilots.

57(xii) LOU 17 was and is a provision commonly found in the pilot collective agreements of major airlines in North America, including those which ALPA and CALPA have negotiated. Such provisions are commonly called "scope" provisions.

57(xiii) Scope provisions were originally introduced by ALPA in the United States; LOU 17 was modelled after those provisions. A similar scope provision was also negotiated by CALPA in its collective agreement with Air Canada's major competitor, Canadian Airlines International.

57(xiv) With respect to LOU 18, it required Air Canada to give to all Air Ontario pilots preference of hire into the Air Canada pilot bargaining unit, which preference is referred to in paragraphs 55 to 57 of this Amended Statement of Defence.

57(xv) LOU 18 provided that regional pilots taking advantage of its preferential hiring provisions would, upon entrance to the Air Canada bargaining unit, start at the bottom of the Air Canada seniority list. This arrangement was consistent with the policy of both CALPA and ALPA that upon the transfer of a pilot from one of its bargaining units to another, the pilot always starts at the bottom of the seniority list.

57(xvi) Neither LOU 17 nor LOU 18 affected any term or condition of employment applying to pilots while employed in the Air Ontario pilot bargaining unit. The Defendants therefore deny that these provisions affected any pilots other than those pilots employed by Air Canada, or that the negotiation of these provisions was outside the exclusive jurisdiction of the CALPA Air Canada MEC.

57(xvii) The Defendants state that any interference by the CALPA Board of Directors or the Air Ontario MEC in the negotiation of LOU 17 and 18 was itself improper and in violation of the CALPA constitution.

RELATED PROCEEDINGS UNDER THE CANADA LABOUR CODE

58. Section 35 of the *Canada Labour Code* gives the Canada Labour Relations Board (CLRB) the discretion to declare that two or more related employers under common control or direction operating multiple related businesses are to be treated as a single employer operating a single business for all purposes related to collective bargaining.

59. Section 18 of the *Canada Labour Code* gives the CLRB the power to consolidate bargaining units.

60. By applying its own internal merger policy to Air Canada and its five regional subsidiary corporations, CALPA was attempting by private means to bring about the same result, for pilot employees only, as would obtain if Air Canada and its subsidiary regional

airlines were declared a single employer under section 35 of the *Code*, and the six pilot bargaining units were combined into one bargaining unit under section 18 of the *Code*.

61. On or about March 20, 1996 CALPA filed an application under sections 35 and 18 of the *Canada Labour Code* for a declaration that Air Canada and its five regional subsidiaries are a single employer operating a single airline business for collective bargaining purposes. The applicant also seeks the creation of a single pilot bargaining unit and a single pilot seniority list.

62. On February 1, 1997 ALPA replaced CALPA as the applicant in that proceeding, which has yet to be determined by the Canada Labour Relations Board.

Court Has No Jurisdiction

63. The defendants state that this Honourable Court has no jurisdiction over this action because:

(a) sections 35 and 18 of the *Canada Labour Code* provide the only means by which employees can seek a merger of bargaining units and seniority lists;

(b) the *Canada Labour Code* was intended by Parliament to be a complete code of rights with respect to collective bargaining, leaving no room for civil actions over a union's ability or inability to achieve a bargaining objective; and

(c) at common law, as reflected in section 4(1) of the *Trade Unions Act*, R.S.C. 1985, c. T-15, the courts have no jurisdiction to entertain any legal proceeding instituted with the object of recovering damages for breach of an agreement between members of a trade union concerning the conditions under which they will be employed.

Statutory Right to Dissent and to Change Bargaining Agents

64. The defendants state that the *Canada Labour Code*, the sole source of CALPA's power to pursue collective bargaining, also protects the democratic right of union members to dissent when their bargaining agent acts against their interests. Only when such dissent is allowed can bargaining agents fulfil their statutory duty to ascertain, and attempt to reconcile, the competing interests among employees in a bargaining unit.

65. Even if the CALPA Constitution or Administrative Policy had expressly prohibited the voicing of dissent (which is denied), the defendants state that such prohibitions would have been void as against public policy.

66. Under the *Canada Labour Code*, all of the Air Canada pilots in the proposed defendant class had the statutory right to withdraw their support from CALPA and to support its replacement by a different bargaining agent with different bargaining objectives. The Air Canada pilots exercised that right when they supported the displacement of CALPA by ACPA.

67. The defendants state that this civil action is an attempt to punish Air Canada pilots for having exercised their statutory right to change bargaining agents.

68. If the CALPA Constitution and Administrative Policy were interpreted in the manner advocated by the plaintiffs, it would have a chilling effect on employees wishing to challenge undemocratic practices within their union, and wishing to withdraw their support from unions that do not respond. The defendants state that the CALPA Constitution and Administrative Policy ought to be interpreted so as to be consistent with the public policy underlying the *Canada Labour Code* and all other modern labour legislation in Canada.

CALPA Merger Policy Had No Contractual Force

69. The defendants deny that the CALPA merger policy had any contractual force as between members of CALPA.

70. With respect to paragraph 11 of the Statement of Claim, the defendants deny that a union constitution is a series of contracts between individual members such that one sub-class of members can sue another sub-class for alleged breaches of the constitution.

71. In any event, the CALPA merger policy was not part of its constitution but was merely an internal union guideline or goal.

Preconditions to Merger Process Not Met

72. The defendants state that the merger process leading to the Picher arbitration award was invalid for failure to fulfil three conditions precedent under the merger policy:

(a) the implied condition that no merger declaration would be made unless a majority of pilots in the Air Canada bargaining unit supported it;

(b) the requirement in Article 1(a) of the merger policy that all airlines covered by the declaration be "member airlines" represented in collective bargaining by CALPA; and

(c) the requirement in Article 1(b) of the merger policy that immediately following the declaration, each of the affected airline employers agree in advance to be bound by the merged seniority list still to be fashioned.

73. The defendants state that in the absence of the fulfilment of those conditions precedent, the plaintiffs have no claim based on any alleged violation by the defendants of the CALPA merger policy or constitution.

No Deprivation of Benefits of Merger Policy

74. In any event, the plaintiffs were not deprived of any benefit of the CALPA merger policy. The process continued until it produced a proposed seniority list that, if adopted in collective bargaining by Air Canada, would have merged the pilot seniority lists of Air Canada and its regional subsidiary airlines.

75. The plaintiffs' failure to acquire seniority rights at Air Canada resulted from the fact that CALPA did not collectively bargain the arbitrated seniority list into the Air Canada collective agreement. The CALPA merger policy, an internal union document, did not create any right to have Air Canada agree to merged seniority in collective bargaining.

76. The defendants therefore state that even if they had breached any contractual obligation to the plaintiffs (which is denied), and even if the conditions precedent to the completion of the merger process had been fulfilled (which is denied), the plaintiffs had no right under the CALPA constitution or merger policy to any seniority rights exercisable against Air Canada.

No Causal Link Between Alleged Breaches of Contract and Alleged Damages

77. Even if all Air Canada pilots had consistently voiced support for implementation of the Picher seniority list, Air Canada would not have accepted inclusion of that list in its pilot collective agreement.

78. Even if Air Canada had been inclined to negotiate the Picher seniority list into its pilot collective agreement (which is denied), CALPA would have had insufficient time to negotiate it prior to CALPA's decertification on November 14, 1995.

No Contractual Obligation to Support Merger Process

79. The plaintiffs' claim is based on the theory that all CALPA members had a contractual obligation to remain silent when their union acted in a manner that was against their wishes and their interests. There was no such obligation under the CALPA Constitution or Administrative Policy.

80. The MEC of the Air Canada pilots consisted of elected CALPA representatives who were responsible for determining and acting on the wishes of the Air Canada pilots, not the wishes of other pilot groups, during both the merger process and any subsequent attempts to negotiate a merged seniority list into the Air Canada collective agreement.

81. The defendants therefore deny that the CALPA Constitution or Administrative Policy created any obligation to support CALPA's attempt to negotiate a seniority list that was opposed by a majority of the members in their own bargaining unit.

Claim for Damages

82. The defendants state that by its terms, the CALPA Constitution never contemplated that one member had the right to sue another for damages arising from alleged violations of the Constitution or Administrative Policy. Rather, the internal union disciplinary process in the CALPA Constitution was intended to contain the sole sanctions for political dissent by CALPA members.

83. The plaintiffs could have, but did not, cause disciplinary charges to be laid against any member of the proposed defendant class for any alleged breaches of the CALPA Constitution or Administrative Policy.

84. The defendants state that the plaintiffs herein have breached Article II, Section 7(a)(viii) of the Constitution by commencing this action without first having caused disciplinary charges to be laid against the proposed defendant class members.

85. The defendants state that by failing to take advantage of the preferential hiring arrangements at Air Canada, the plaintiffs have failed to mitigate their alleged losses arising from CALPA's inability to negotiate a merged seniority list at Air Canada.

86. The defendants state that in light of Article 1(e) of the merger policy, the damages claimed herein could never have been foreseen as arising from the deprivation of a merged seniority list, and as such are too remote.

87. The defendants deny that the plaintiffs have sustained the damages they allege, or any damages, and put them to the strict proof thereof.

Appropriateness of Class Proceeding

88. The defendants state that the proposed plaintiff class is not an appropriate class under the *Class Proceedings Act, 1992.*

89. The proposed plaintiff class includes then-CALPA members with the following disparate interests: Air Ontario pilots who had applied for employment at Air Canada but had been rejected for failure to meet its medical, education or experience requirements; Air Ontario pilots who have since been hired by Air Canada and have made more compensation that they would have made had the Picher seniority list been included in the Air Canada collective agreement; Air Ontario pilots who for personal reasons would

have exercised their position on the merged seniority list to bid for the highest-paying assignments at Air Canada; and Air Ontario pilots who would have bid for lower-paying assignments for lifestyle reasons.

90. The proposed plaintiff class also includes CALPA members who, as of March 28, 1995, were employed by Air Canada but on lay-off status, and who were simultaneously employed at Air Ontario during their lay-off from Air Canada. Those pilots are also members of the proposed defendant class, and would in effect be suing themselves.

91. The defendants state that the proposed defendant class is not an appropriate class under the *Class Proceedings Act, 1992.*

92. The proposed defendant class includes members of the Air Canada pilot bargaining unit with the following disparate interests: CALPA members who supported the merger process; CALPA members who did not voice their opinion and may have supported, opposed or been indifferent to the merger process; CALPA members who voiced their opposition to the merger process but took no active steps to delay or stop it; CALPA members who attempted to convince their union to delay or cancel the merger process in order to prevent the loss of CALPA's bargaining rights at Air Canada, without which CALPA would be unable to negotiate any terms of employment at Air Canada; and CALPA members who openly opposed the merger in the course of exercising their statutory right to organize and gather support for a new union.

93. The proposed defendant class also includes a group of CALPA "Executive Active members" who were employed by Air Canada but were excluded from collective bargaining due to their managerial duties. Such members were subject to all CALPA policies except those specifically applying to "Active Members". The CALPA merger policy was not restricted to "Active Members".

94. Those "Executive Active Members" all held positions on the CALPA/Air Canada pilot seniority list. Among them were members of the Air Canada bargaining team that was responsible for responding on behalf of the employer to CALPA's proposed merged seniority list.

95. The defendants state that a class action is not the preferable vehicle for the plaintiffs' claims, as it would be necessary to have discovery against virtually every member of both the plaintiff and defendant classes.

96. The defendants state that this action ought to be dismissed with costs on a solicitor and client basis.

Date: July 9, 1998

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