

2022 CarswellNat 677
Canada Arbitration

WestJet and ALPA (Conversion to Short Call Reserve), Re

2022 CarswellNat 677

**IN THE MATTER OF AN ARBITRATION UNDER THE
CANADA LABOUR CODE AND A COLLECTIVE AGREEMENT**

WestJet, An Alberta Partnership ("WestJet") and Air Line Pilots Association, International (the "ALPA")

James T. Casey Member

Heard: February 1, 2022

Judgment: March 24, 2022

Docket: None given.

Counsel: Marc Delorme, for ALPA

Tom Moutsatsos, for WestJet

Table of Authorities

Cases considered by James T. Casey Member:

Borowski v. Canada (Attorney General) (1989), [1989] 3 W.W.R. 97, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231, 92 N.R. 110, 75 Sask. R. 82, 47 C.C.C. (3d) 1, 33 C.P.C. (2d) 105, 38 C.R.R. 232, 1989 CarswellSask 241, 1989 CarswellSask 465 (S.C.C.)

Halton District School Board and OSSTF (Nero), Re (2016), 2016 CarswellOnt 2456, 267 L.A.C. (4th) 329 (Ont. Arb.)
Owen Sound (City) and Owen Sound Professional Firefighters' Assn. (10th Street Bridge-Contracting Out), Re (2021), 2021 CarswellOnt 975, 324 L.A.C. (4th) 339 (Ont. Arb.)

Thames Emergency Medical Services Inc. v. O.P.S.E.U., Local 147 (2006), 149 L.A.C. (4th) 431, 2006 CarswellOnt 11579 (Ont. Arb.)

Toronto (City) and CUPE, Local 79 (Rawoof), Re (2019), 2019 CarswellOnt 8164 (Ont. Arb.)

Zehrs Markets v. U.F.C.W., Local 1977 (2009), 182 L.A.C. (4th) 182, 2009 CarswellOnt 5090 (Ont. Arb.)

Statutes considered:

Canada Labour Code, R.S.C. 1985, c. L-2

Generally

Regulations considered:

Aeronautics Act, R.S.C. 1985, c. A-2

Canadian Aviation Regulations, SOR/96-433

Generally

James T. Casey Member:

I. Introduction

1 Given the very nature of the airline industry, the scheduling by airlines of pilots and other flight staff is an inherently complex exercise. Planes are flying around the world and around the clock. The timing of flights and scheduled shifts may be disrupted by delays occasioned by weather, delays in incoming flights, and mechanical issues. Unfortunately, in the current era there have also been massive disruptions in flight scheduling caused by the Covid-19 pandemic.

2 The desire of airlines for significant flexibility in the scheduling of pilots needs to be balanced against the needs of pilots for a reasonable degree of predictability of shift schedules to balance their work with their personal lives and to ensure sufficient rest and recovery time. And of course, the system of scheduling pilots for flights needs to comply with the complex web of airline regulations established by Transport Canada. Given this context, the system for scheduling pilots is a focus of collective bargaining with detailed provisions in airline collective agreements.

3 WestJet, an Alberta Partnership ("WestJet") is an airline headquartered in Calgary, Alberta flying to destinations throughout North America, Central America, the Caribbean, and Europe. The Air Line Pilots Association, International ("ALPA") is the bargaining agent for the Pilots employed by WestJet.

4 WestJet Pilots may be assigned a Regular Line which is a monthly schedule or they may be assigned a Reserve Schedule. Pilots on a Reserve Schedule are used to fill-in for pilots who are unable to fly a particular flight assignment. The Collective Agreement establishes two types of reserve-Long Call Reserve ("LCR") and Short Call Reserve ("SCR") with different advance notice and response requirements. WestJet adopted a practice whereby for operational reasons it would contact a Pilot on a Day Off and advise them that their status was changing from LCR to SCR. In doing so WestJet relied on a provision in the Collective Agreement addressing conversion from LCR to SCR. ALPA took the position that this practice violated the Collective Agreement and was inconsistent with Transport Canada Regulations. On January 23, 2020 ALPA filed a policy grievance. The matter proceeded through the grievance process and was ultimately referred to arbitration. In the meantime, new Canadian Aviation Flight and Duty Regulations were being developed by Transport Canada to be implemented effective December 12, 2020. As a result of these new regulations, WestJet and ALPA entered into a Letter of Understanding which came into effect January 13, 2021 extensively amending the reserve provisions in the Collective Agreement and eliminating the specific provision relied upon by WestJet to contact Pilots on a Day Off and change their status from LTR to SCR. In essence, the Letter of Understanding established a substantially modified method of scheduling Pilots on reserve.

5 As a result of the Letter of Understanding, WestJet brings a preliminary application to have the policy grievance dismissed on the basis that it is moot. WestJet argues that the language in the Collective Agreement previously relied upon by WestJet has been changed; a new system of scheduling reserve Pilots has been introduced; and while WestJet takes the position that its practice was compliant with the Collective Agreement, WestJet intends to compensate those Pilots who were deducted Credit Hours as a result of its previous practice.

6 ALPA argues that WestJet's application to dismiss for mootness should be denied. ALPA argues that whether the previous scheduling practice was compliant with the Collective Agreement and the Regulations is an extremely important issue for the membership and that an answer to that question should be provided through arbitration. ALPA also argues that it is seeking additional remedies not covered by WestJet's plan to compensate the few Pilots who were docked Credit Hours. ALPA notes that many of its members simply complied with the scheduling that flowed from being changed from LCR to SCR because they thought they had no choice, so a declaration is very important to ALPA.

7 For the reasons set out below, I grant WestJet's application to dismiss the grievance on the basis that the matter has become moot and there is no compelling labour relations reason to hear the grievance on its merits. This decision is subject to the condition that WestJet either already has or, if not, will promptly restore the Credit Hours for those Pilots who have had Credit Hours deducted as a result of WestJet's practice.

II. The Context of the Application to Dismiss for Mootness

8 The following is an overview of some of the pertinent Collective Agreement provisions as they existed at the time of the Grievance i.e. prior to the adoption of Letter of Understanding 5 which amended the reserve provisions. The reserve system negotiated by the parties comprises 9 pages of detailed provisions.

9 Pilots may be assigned a Regular Line which is defined as a monthly schedule that is comprised of Pairings, known absences (eg. Vacation, training, leaves of absence, etc.) and Days Off (Article ii-1). "Pairings" is defined as the activities associated with

a flight or series of flights, including overnights, from the first Report Time to the last Release Time. In essence, a Pairing is a flight or sequence of flights to which a Pilot is assigned (Article ii-1).

10 The Collective Agreement provides that during negotiations WestJet indicated a need for a reserve system for operational reasons and regulatory compliance (opening paragraph of Article 10). The reserve system is used for staffing purposes if a Pilot assigned to a Pairing as part of their monthly schedule is unable to work that shift. Pilots on reserve are assigned to work those shifts. Reserve Lines are constructed for Pilots who have not been awarded or assigned a Regular Line and are to contain blocks of Days Off (Article 10-1.02). A Reserve Line is defined as a monthly schedule that is comprised of Reserve Blocks, Non-Flying Activities, and Days off (Article ii-1). "Reserve Blocks" is defined as a series of consecutive reserve days within a Monthly Scheduling Period (Article ii-1). A "Reserve Availability Period" ("RAP") is defined as a period of time during which a flight crew member on reserve is available for callout to report for flight duty (Article ii-1).

11 There are two types of reserve: Long Call Reserve ("LCR"; see Article 10-5.06) and Short Call Reserve ("SCR"; see Article 10-5.07). All reserve Pilots are required to be awarded LCR at the start of the Monthly Scheduling Period (Article 10.5.06(a)). There are a number of differences between LCR and SCR with respect to the respective rights of WestJet and Pilots including times when Pilots can be contacted and expected response times.

12 The Collective Agreement provides that a reserve pilot on LCR may be converted to a SCR (Article 10.5.06 (h)). Some of the provisions relevant to the conversion from LCR to SCR are set out below:

"10-5 RESERVE DUTY

10-5.01. Every reserve Pilot shall be required to be available by phone and respond to contact by the Company while on reserve duty.

...

10-5.06 Long Call Reserve ("LCR")

...

g) Converting from LCR to Short Call Reserve ("SCR") - A reserve Pilot on LCR may be converted to an SCR. If the reserve Pilot has been given an Assignment, the Company may convert any remaining days in their LCR block to SCR at the time the Pilot is given the Assignment;

h) Crew Scheduling may convert LCR to SCR between twenty-four (24) and forty-eight (48) hours prior to the commencement of the original LCR assignment period. A Pilot will be notified of this change through the Crew Notification System (CNS). A Pilot is expected to acknowledge the conversion of LCR to SCR via the CNS or via phone;

i) Once an LCR Pilot is given an Assignment or is converted to SCR the Pilot shall be on minimum rest of no less than twelve (12) hours or the Rest Period as indicated in 5.06(f) above, and shall not be required to be on-call for the Company until the start of the Assignment or their next RAP; ...,"

13 The Crew Notification System or "CNS" referenced in Article 10-5.06(h) is a computer application that is used to post scheduling and other information and communicate with crew members.

14 In certain circumstances for operational reasons WestJet would want to convert a Pilot on LCR to SCR. WestJet would use the CNS to issue a notice to Pilots on Days Off 24 to 48 hours in advance of their original LCR assignment. The notice would specify that the Pilot's LCR was being converted to SCR. Pilots who did not acknowledge the conversion and who as a result were then not assigned to Pilot an aircraft were coded as either "unavailable" or a "no show pairing" and would be deducted Credit Hours which affected their overall compensation. (In the balance of this decision this practice of WestJet as described in this paragraph is referred to as the "Practice").

15 ALPA took the position that the Practice violated the Collective Agreement filing a Policy Grievance on January 23, 2020 which states in part:

"This grievance arises due to the improper conversion of Pilots from Long Call Reserve (LCR) to Short Call Reserve (SCR) while on days off.

The Company is routinely attempting to convert Pilots assigned LCR to SCR while those Pilots are on a Day Off. When a Pilot assigned LCR does not receive a notification of this change, and only receives the notice at the original contact period for his LCR, the Company routinely codes that Pilot as unavailable, and removes the associated pay for the day, if the Pilot is not able to report for duty at their Base within two hours.

This practice is further exacerbated by the Company's attempt to circumvent the twelve hour rest requirement for a conversion of LCR to either an Assignment or SCR. This practice eliminates the time in which a Pilot not at his Base would be able to travel to his Base and attain the required rest before his Assignment.

The Collective Agreement describes a series of logical steps in Section 10-5.06 Long Call Reserve, which begins with the requirement that, 'a) All reserve Pilots will be awarded LCR at the start of the Monthly Scheduling Period;' Point b) then describes the contact period as being '...from 0600 to 2230 (PBT)'. Point i) states that, 'Once an LCR Pilot is given an Assignment or is converted to SCR the Pilot shall be on minimum rest of no less than twelve (12) hours.'

In order to avoid providing the rest requirement in Section 10-6.06 I), the Company appears to be relying on section 10-5.06h), which states:

'Crew Scheduling may convert LCR to SCR between twenty-four (24) and forty-eight (48) hours prior to the commencement of the original LCR assignment period. A Pilot will be notified of this change through the Crew Notification System (CNS). A Pilot is expected to acknowledge the conversion of LCR to SCR via the CNS or via phone'

While this provides an option for conversion from LCR to SCR, it relies on the Pilot receiving and responding to the notification, and contains only an expectation, rather than a requirement, that the Pilot acknowledge such a conversion during time free from duty or a rest period. In essence the Company may attempt to convert a Pilot between 24 to 48 hours as contemplated in 10-5.06(g) and (h), but may not be able to make two way contact with the Pilot in order to do so.

The Collective Agreement requires a Pilot to be available by phone during, but not before, the Reserve Availability Period (RAP), as described in Sections 10-5.01 and 10-5.04 of the Collective Agreement.

Section 10-1-.02 of the Collective Agreement further clarifies this point by stating, in part, '...No reserve Pilot is obligated to respond to any Company attempt of Assignment outside of their RAP period.'

16 ALPA also relied on the [Canadian Aviation Regulations](#) and new prescriptive flight rules that were to take effect in 2020 on Time Free From Duty. The Grievance goes on to state:

"The Association asserts that with no requirement to contact the company, a Pilot cannot be obligated to be aware of a change in the schedule made during the Pilot's days off or Rest Period. Specifically, a Pilot who does not respond to a conversion from LCR to SCR while on a Day Off or rest period should not be subject to discipline. The company's practice of removing Pay constitutes unreasonable discipline, and as such violates Section 33-1 JUST CAUSE."

17 In its May 20, 2020 response to the Grievance WestJet denied the grievance and took the position that the Practice was in accordance with the Collective Agreement. WestJet relied on Article 10-5.06 stating as follows:

"In accordance with the collective agreement provision 10-5.06(g), First the Company may convert a Reserve Block from Long Call Reserve (LCR) to short call reserve (SCR) and a Pilot is expected to acknowledge the conversion:

Crew Scheduling may convert LCR to SCR between twenty-four (24) and forty-eight (48) hours prior to the commencement of the original LCR assignment period. A Pilot will be notified of this change through the Crew Notification System (CNS). A Pilot is expected to acknowledge the conversion of LCR to SCR via the CNS or via phone;

The Company and ALPA have worked together through the Scheduling Review Committee (SRC) as is our shared obligation through article provision 10-11.01 and have aligned on the following FAQ answer as posted on the Reserve Microsite:

NEW Is it possible for Crew Scheduling to convert all LCR and SCR so a pilot doesn't work a LCR block?

Yes, if Crew Scheduling determines that more SCR is required to sustain operations, they can convert LCR to SCR 24-48 hours prior to the start of the scheduled LCR block.

Additionally, the SRC meeting notes on November 13, 2019 state:

10-5 Reserve Duty

This section contains multiple references regarding when a pilot must be available for call out. Discussion regarding use of phone or CNS for conversion from LCR to SCR. Language in 10-5.06(h) permits a crew member to accept a conversion in their own time prior to the RAP with the understanding that the pilot will be available for the RAP call out window as assigned in the conversion."

18 On May 27, 2020 ALPA referred the Grievance to arbitration.

19 Transport Canada had been working to develop new Canadian Flight and Duty Regulations that would affect, among other issues, the specifics of how Pilots could be scheduled for flight duty and the rest periods that airlines were required to provide. These new Regulations were to take effect December 12, 2020. As a result, WestJet and ALPA began to meet to bargain amendments to the Collective Agreement to ensure that the system of reserve scheduling for WestJet Pilots was consistent with the new Regulations. As explained in the recitals to Letter of Understanding No. 5:

"In anticipation of Transport Canada implementing new Canadian Aviation Flight and Duty regulations on December 12th, 2020, the Parties have had discussions surrounding these amendments. The parties wish to align on a shared understanding on how these regulations will interact with the Collective Agreement."

20 WestJet and ALPA entered into Letter of Understanding No. 5 effective January 13, 2021 which is entitled "Amendment of Canadian Aviation Flight and Duty Regulations" ("LOU No. 5"). LOU No. 5 introduced a new provision on LCR and made many substantive amendments to the reserve provisions in Article 10. With respect to the previous Article 10-5.06 (h) which WestJet relied upon to justify its Practice, all of Article 10-5.06 was repealed and replaced with the following:

"10-5.06 Long Call Reserve ("LCR"):

- a) Long Call Reserve will have a Reserve Availability Period (RAP) from 06:00-20:00 PBT;
- b) The Company will attempt to make LCR assignments no less than forty-eight (48) hours in advance of Report Time. Assignments made to an LCR Pilot do not have to depart within a Pilot's RAP;
- c) The first day of LCR: Assignments that are given for the first day of an LCR sequence, shall be assigned to a Pilot's schedule by 1700 (PBT), the day prior to the first day of the LCR sequence;
- d) A pilot on LCR shall respond within thirty (30) minutes of initial contact from the Company;
- e) Once assigned a Pairing, an LCR Pilot shall report for duty no later than the specified period listed below:

- i. If any Pilot is called between 0600-1400 PBT, then the earliest Report Time shall be twelve (12) hours later.
 - ii. If any Pilot is called between 1401-1700 PBT, then the earliest Report Time shall be 0500 PBT the following day.
 - iii. If any Pilot is called between 1701-2000 PBT, then the earliest Report Time shall be 0900 PBT the following day.
- f) A Pilot on LCR may only be converted to SCR if previously assigned a pairing, and only two (2) days or less remain within their Reserve block. Notwithstanding 10-7.01, the converted Pilot's SCR RAP must remain the same as their original LCR RAP; and
- g) Once an LCR Pilot is given an Assignment the Pilot shall be on minimum rest of no less than twelve (12) hours or the Rest Period as indicated in 10-5.06(e) above, and shall not be required to be on-call for the Company unless the start of the Assignment or their next RAP; and
- h) On the last day of a block of Reserve days, if the LCR Pilot is not given an Assignment by 0900 Permanent Base Time, the Reserve Pilot will automatically be released from their RAP. A Pilot may be released earlier by the Company."

With respect to the conversion from LCR to SCR, a new process and new restrictions are established in Article 10-5.06 (f).

III. Summary of Arguments

21 A summary of the major arguments advanced by WestJet is as follows:

1. In defending the Grievance, WestJet relied upon the provisions in Article 10-5.06 (h) which contemplates that LCR can be converted to SCR and which explicitly provides that a Pilot "is expected" to acknowledge the conversion of LCR to SCR via the CNS or via phone. WestJet took the position that being "expected" in substance means that a Pilot is required to acknowledge the conversion. ALPA took the position that while notification could be provided there was no obligation on a Pilot to receive this notification.
2. Due to LOU No. 5, the language relied upon by WestJet in Article 10-5.06(h) is no longer present in the Collective Agreement. A new system of reserve provisions has been bargained and implemented by WestJet and ALPA.
3. With respect to ALPA's reliance on the rest period provisions as part of its interpretation, these provisions have also been amended.
4. With respect to ALPA's reliance on the Regulations, the Regulations were subsequently amended and the parties negotiated substantial amendments to the Collective Agreement to ensure that the reserve scheduling system at WestJet "meshed" with the new Regulations.
5. As a result, this is a classic case of mootness in which a subsequent intervening event has removed the live controversy between the parties.
6. The Grievance was filed on January 23, 2020. In March of 2020 the global Covid-19 pandemic resulted in the suspension of most air travel and later the drastic reduction in the number of flights by WestJet and other airline companies. The new system for reserve as set out in LOU No. 5 was implemented effective January 13, 2021. Given the limited number of flights between January 23, 2020 to January 13, 2021, WestJet has only identified 3 Pilots who were coded "unavailable" or as a "no show pairing" due to not acknowledging the conversion from LCR to SCR. As a result, while WestJet takes the position that it fully complied with the Collective Agreement, WestJet is prepared to make these Pilots whole by restoring

the Credit Hours that were deducted. Consequently, WestJet argues that there are no outstanding remedial issues that need to be addressed.

7. WestJet reviewed the principles in *Borowski* and labour arbitration decisions that have applied the conceptual framework to find that a grievance should be dismissed due to mootness. WestJet argues that where the live controversy has disappeared and there are no other outstanding remedial issues, arbitrators have generally found that a union's desire to obtain a declaration is an insufficient reason to proceed with a hearing on the merits.

22 A summary of the major arguments advanced by ALPA is as follows:

1. ALPA takes the position that WestJet's practice not only contravened the Collective Agreement but was inconsistent with the Regulations that address duty-free time and rest periods. If a Pilot is on a Day Off, they should not be required to pick up the phone.

2. This is an important issue for ALPA's membership especially since non-compliance with the Regulations raises safety issues.

3. If there is no decision that WestJet was not complying with the Collective Agreement and Regulations, then what is to prevent WestJet from disregarding the Regulations again?

4. In the context of a mootness argument, arbitrators recognize that companies and unions that are party to a collective agreement are in an ongoing relationship and as a result, arbitrators exercise their discretion to dismiss a grievance for mootness cautiously and sparingly.

5. Many of ALPA's members acknowledged the reassignment from LCR to SCR because they felt pressured by WestJet to do so. A declaration by the arbitrator will communicate to the membership that their rights are being respected through the arbitration process.

6. With respect to remedies, WestJet should not be able to prevent a ruling on the Grievance by making a decision shortly before the arbitration to pay-off a few employees who had hours deducted. If they can prevent the arbitration from proceeding by doing so, what is to prevent them from not complying in the future and doing the same thing?

7. With respect to the remedy claimed of adding 50 hours to the allotment of WestJet paid hours for ALPA business, this is to compensate ALPA for the time it has had to spend on this issue assisting Pilots with all their concerns about the Practice.

8. Remedies available for a policy grievance are not restricted to declarations as to whether there has been a breach of the collective agreement. In appropriate cases an arbitrator could award damages as part of the remedies in a policy grievance.

23 A summary of the major arguments advanced by WestJet in reply is as follows:

1. With respect to ALPA's issue that the Practice raised questions of safety, ALPA's claim is that a Pilot should not have to acknowledge a conversion from SCR to LCR while on a Day Off. This minor interruption to a Day Off does not raise issues of rest or fatigue or safety.

2. WestJet takes the position that it was fully compliant with the Regulations. However, the fact that the parties negotiated new Collective Agreement provisions and adopted a new system that would be congruent with the new Regulation makes the whole issue moot.

3. There is no present, live controversy about the interpretation of the Collective Agreement or whether the Practice complied with the Regulations.

4. The case law establishes that in analogous circumstances arbitrators have found that the Union's desire for a declaration provided insufficient reason to proceed to adjudicate the merits.

5. ALPA's request to add hours to the "union time off" provisions would be akin to awarding costs to ALPA which is virtually never done by arbitrators unless there is a provision in the collective agreement permitting costs to be awarded.

6. With respect to ALPA's claim to restore deducted hours based on premium pay, there is no basis to do so since premium pay is only provided under Article 21.7 in specified circumstances and none of the circumstances apply here.

IV. Analysis

24 The analysis of the issues is organized as follows:

A. Principles concerning mootness

B. Is the substance of the dispute moot?

C. Should I exercise my discretion to hear the case despite it being moot?

A. Principles concerning mootness

25 The underlying principles of the doctrine of mootness were addressed by the Supreme Court of Canada in [Borowski v. Canada \(Attorney General\)](#), 1989 CanLII 123 (SCC), [1989] 1 SCR 342 at p. 353:

"The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.

The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the 'live controversy' test. A court may nonetheless elect to address a moot issue if the circumstances warrant."

26 With respect to the factors that should be considered in determining whether to exercise the discretion to hear a moot case, the Supreme Court of Canada in [Borowski](#) stated that such factors included: whether there would be an adversarial context if the case is heard that will ensure all the issues are fully argued; and whether there are special circumstances that make it worthwhile to apply scarce judicial resources to hear the case. Special circumstances could include cases where the Court's decision might have some practical effect on the rights of the parties notwithstanding that it would not have the effect of determining the controversy which gave rise to the action. Cases which are of a recurring nature but brief in duration might constitute special circumstances. In addition, there may be cases where a judicial determination is in the public interest due to the general importance to the public of the issues.

27 To summarize, the doctrine of mootness requires a consideration of two questions:

1. Is there a present live controversy between the parties at the time of the arbitration such that a decision would have a practical effect on the rights of the parties or has the matter become academic?

2. If there is no live controversy between the parties, should the arbitrator nonetheless exercise their discretion to hear the case?

28 This conceptual framework has been widely adopted and applied in labour arbitration. However, in the case of mootness objections in labour arbitration, it is important to consider the objection in the context of the existence of an ongoing relationship between an employer and a union. As a result the doctrine of mootness must be applied with some caution: David M. Brown, Donald J. Brown & Adam Beatty, *Canadian Labour Arbitration*, 5th ed. (Toronto: Thomson Reuters Canada, 2006, loose-leaf) at chapter 2:80; *Owen Sound (City) and Owen Sounds Professional Firefighters' Assn (10th Street Bridge-Contracting Out) (2021) 324 L.A.C. (4th) 339 (Sheehan)* at para. 26.

29 A number of cases illustrate the application of the doctrine of mootness to dismiss a grievance at a preliminary stage without a hearing on the merits. In *Toronto (City) and Canadian Union of Public Employees, Local 79* (2019) CarswellOnt 8164; [2019] O.L.A.A. No. 140 (Parmar) the grievance alleged that the City had violated the collective agreement by placing the grievor in the informal stage of an attendance management program. Subsequent events transpired that resulted in the grievor being placed in the informal stage of the program regardless of the City's previous decision. As a result, the City sought to have the grievance dismissed based on mootness. The arbitrator concluded that the matter was moot. Regardless of what decision the City had previously made, the grievor would still be at the informal stage of the absenteeism program so subsequent events had made the matter academic. The arbitrator considered whether they should exercise their discretion to hear the case nonetheless. The arbitrator concluded that there was no labour relations purpose in determining the current grievance because it would not provide any future assistance on this issue to the parties. As a result, the arbitrator granted the employer's objection based on mootness and dismissed the grievance.

30 In *Thames Emergency Medical Services Inc. v. O.P.S.E.U*(2006) 149 L.A.C. (4th) 431 (Knopf) three grievances were filed alleging arbitrary, discriminatory, slanderous, and defamatory conduct by management. The grievor believed that the actions of management arose out of the fact that he had raised health and safety concerns in the workplace. The employer had originally made a demand for reimbursement for damaged equipment but subsequently withdrew the request. An offending paragraph in a letter had been withdrawn and no action was taken against the Grievor in relation to an incident report. The only outstanding matter was the grievor's request for an apology. The arbitrator commented as follows at para. 13 and 14:

"The purpose of arbitration is to provide an expeditious and open forum to hear and resolve allegations that cannot be resolved by the parties. However, it must also be remembered that arbitration is the 'court of last resort' for the resolution of workplace grievances. The purpose of arbitration is to resolve matters which have not or cannot be resolved by the parties themselves. It should not be a substitute for workplace resolution.

Further, where the essential nature of the grievance has been addressed prior to arbitration, there is no point in holding a hearing. What can be served by putting the parties to the time and expense of a hearing that will result, at best, with a declaration that the employer should do what it has already done? Arbitration is a remedial device, designed to put the grievor in a position s/he would have been in if the collective agreement had not been violated. If the grievance or complaint has already prompted the employer to take the action that the grievor was seeking, then the issues raised by the grievance are moot. Further, if a grievance or a complaint is brought to management's attention, and management responds in an appropriate way, there is no point to proceed to arbitration. The purpose of arbitration is to enforce substantive rights and/or correct a continuing problem. If the problem has been remedied, no purpose can be served by holding a hearing."

31 The arbitrator noted that the only remedy the grievor sought that had not been voluntarily agreed to by the employer was an apology. Arbitrator Knopf agreed that while it may be within an arbitrator's remedial authority to order an apology, such a result is rare and apologies are unusual unless there are particularly egregious or continuing violations of the collective agreement. The arbitrator concluded that no labour relations purpose could be served by the time, expense, and difficulties that would ensue with a hearing into the merits and dismissed the grievance.

32 In *Owen Sound (City) and Owen Sounds Professional Firefighters' Assn (10th Street Bridge-Contracting Out)*(2021) 324 L.A.C. (4th) 339 (Sheehan) a bridge had been closed due to construction. As a result of the closure the employer had implemented staffing and deployment measures for responding to firefighting calls. The union took the position that these measures violated provisions of the collective agreement relating to bargaining unit work. By the time the arbitration proceeded the bridge had been reopened and the measures taken by the employer were no longer in force. The employer took the position that the matter was moot. The arbitrator noted that the fact that only a declaration was being sought was not in and of itself justification to decline to hear a matter. However, in this case the fact scenario giving rise to the grievance was not going to potentially arise again anytime soon, if ever, for the parties. A decision with respect to these grievances would provide little guidance with respect to any future dispute about the interpretation of the applicable clauses of the collective agreement. There were no tangible remedial issues to address and as a result the grievances were dismissed based on mootness.

33 In *Halton District School Board and OSSTF (Nero)* (2016) 126 L.A.C. (4th) 329 (Raymond) the employer directed that the grievor attend an independent medical examination. A grievance was filed alleging that the direction to take the IME was not in accordance with the collective agreement. The grievor did not attend the IME and eventually went on long-term disability leave. The employer was no longer seeking that the grievor attend an IME. The employer brought a preliminary application to dismiss the grievance on the basis that the grievance was moot. The arbitrator found that the substance of the grievance was whether the grievor was required to attend an IME or whether such directive violated the collective agreement. Given that the grievor never attended the IME and given that the employer had withdrawn its directive to attend an IME, the arbitrator concluded that there was no present live controversy which affected the rights of the parties. The dispute was considered purely academic with the arbitrator seeing no reason to exercise their discretion to hear the matter, nevertheless. The grievance was dismissed.

34 In *Zehrs Markets v. U.F.C.W., Local 1977*(2009) 182 L.A.C. (4th) 182 (Solomatenko) the grievor had been terminated. A grievance was filed. The employer reinstated the grievor and provided compensation for lost wages. The employer argued that the discharge grievance was moot and should be dismissed. The arbitrator agreed finding that there was no labour relations purpose to continue the proceedings in order to potentially declare the company had violated the collective agreement.

B. Is the Substance of the Dispute Moot?

35 As noted earlier in this decision, the dispute arose because of WestJet's "Practice": in certain circumstances for operational reasons WestJet would decide to convert a Pilot on LCR to SCR. WestJet would use the Crew Notification System ("CNS") to issue a notice to Pilots on Days Off 24 to 48 hours in advance of their original LCR assignment that their LCR was being converted to SCR. Pilots who did not acknowledge the conversion and who were then not assigned to pilot an aircraft were coded as either "unavailable" or a "no show pairing" and would be deducted Credit Hours which affected their overall compensation.

36 The controversy addressed by the Grievance has two aspects: compliance with the Collective Agreement and whether WestJet's interpretation of the Collective Agreement is consistent with the Canadian Aviation Flight and Duty Regulations.

37 In the Grievance dated January 23, 2020 ALPA relied on the context of the entire system of LCR in the Collective Agreement to argue there was no obligation on Pilots to respond to the conversion from LCR to SCR and that Pilots could not be financially penalized for failing to do so. In the Grievance ALPA relied on the wording of Article 10-5.06(h), the rest requirement in 10.5.06 (j), and the provisions that address when a Pilot must be available for contact and when they must not be contacted (Article 10-5.01; 10-5.05; and 10-10.02). ALPA also took the position that the Practice was inconsistent with the Regulations concerning "Free Time From Duty".

38 With respect to the interpretation of the Collective Agreement, WestJet relied primarily on the language in Article 10-5 to justify its practice. In particular, it relied on the language in Article 10-5.06 (h) that indicates that Crew Scheduling may convert LCR to SCR 24 to 48 hours prior to the commencement of the original LCR and that a Pilot is expected to acknowledge the conversion of LCR to SCR via the Crew Notification System or by phone. WestJet also relied on Article 10-5.01 that indicates every reserve Pilot shall be required to be available by phone and respond to contact by WestJet while on reserve duty. If the

matter is advanced to a consideration of the merits, WestJet intends to take the position that being notified of a conversion from LCR to SCR does not interrupt the rest period required by the Regulations.

39 Effective January 13, 2021 WestJet and ALPA agreed in LOU # 5 to extensive amendments to the Collective Agreement implementing a new system of LCR and conversion of LCR to SCR. As indicated in the recitals to LOU # 5, the reason for amending the Collective Agreement was the new Canadian Flight and Duty Regulations that came into effect on December 12, 2020. The motivation for amending the Collective Agreement was that the "parties wish to align on a shared understanding on the how these regulations will interact with the Collective Agreement." LOU # 5 substantially amended the key provisions relied upon by the parties including the provisions on conversion from LCR to SCR and minimum rest periods. The key elements of the Collective Agreement language relied upon both of the parties have been dramatically altered. As a result, there is currently no live controversy between the parties on the interpretation of the LCR conversion provisions because the key relevant Collective Agreement provisions have been rescinded and replaced with a different system with different language. The controversy between the parties about the correct interpretation of the Collective Agreement provisions concerning LCR and conversion to SCR has become moot due to subsequent events, in this case LOU # 5.

40 With respect to the dispute between the parties as to whether WestJet's Practice was in contravention of the Regulations, the objective of LOU # 5 as explained in the Recitals was to ensure that there was a mutual understanding of the impact of the new Regulations on the Collective Agreement provisions. By implication, the parties obviously wanted to adopt a revised system that was compliant with the new Regulations. Whether WestJet's former practice in converting from LCR to SCR was compliant with the Regulations as they then were has become moot. There are new Regulations, new Collective Agreement provisions and a new system in place. There is no current live controversy between the parties regarding the interpretational issue as to whether WestJet's former practice was compliant with the Regulations.

41 Even though there is no live controversy concerning the interpretational issues arising from the interplay between WestJet's former Practice, the Collective Agreement provisions, and the Regulations, an adjudication of the issues on the merits might still have a practical impact on the rights of the parties if there are substantive outstanding remedial issues.

42 The remedies sought in the Grievance are as follows:

"The following relief is requested:

- 1) A declaration that the Company has violated the Collective Agreement;
- 2) An order requiring the Company to comply with the Collective Agreement;
- 3) An order requiring the Company to make whole each affected Pilot since November 1, 2019, and specifically that each such Pilot shall receive 4.5 Credit Hours, at Premium Pay, for each day the Pilot was incorrectly coded as unavailable;
- 4) An order requiring the Company to cease the practice of converting LCR to SCR in advance of a Reserve assignment, without a Flight Attendant preceding the SCR Assignment;
- 5) The company shall add fifty (50) Company Paid Hours to the AFR bank referenced in Section 5-3.02 ALLOTMENT OF FULL TIME AFR;
- 6) Any other equitable relief an arbitrator may find appropriate."

43 Nothing in this preliminary decision addresses whether the Grievance would or would not succeed. However, if the Grievance was upheld, then the requested declaration in (1) would indicate that WestJet's former Practice was not in compliance with the Collective Agreement. However, as noted below, a declaration by itself would not affect the rights of the parties in any practical way and would not provide any useful guidance to the parties given the new system that has been agreed upon.

44 The requested directive in (2) that WestJet comply with the Collective Agreement has become moot even if the Grievance were to succeed because of the new system that has been implemented.

45 With respect to the request for a compensation order in (3), WestJet indicates that it has only identified a few Pilots who had had Credit Hours deducted for not responding to notification of the change from LCR to SCR. WestJet indicates that it intends to compensate these Pilots for the Credit Hour deduction arising from its previous Practice. This is the type of compensation order one would expect to be made if the Grievance proceeded to a hearing on the merits and the Grievance succeeded. The Grievance seeks an order that each affected Pilot receive 4.5 Credit Hours at Premium Pay rather than regular pay. Article 21.7.03 identifies 5 circumstances where Premium Pay is triggered, none of which apply in the current case. I cannot see any grounds in which Premium Pay would be awarded even if the Grievance were to succeed.

46 With respect to the request for a cease and desist order requested in (4), given that a new system has been implemented and the Practice has ceased, I cannot see any grounds in which a cease and desist order would be made even if the Grievance succeeded.

47 With respect to the request in (5) to add 50 hours to the "AFR Bank", Article 5 establishes the system of Association Flight Release ("AFR") which is to ensure that designated Pilots are available to transact ALPA business. The system provides for certain amounts of paid AFR and provisions for ALPA to reimburse WestJet for AFR in excess of designated limits. Article 5-3.02 establishes a bank of 2200 hours to be used for ALPA business with ALPA reimbursing WestJet for hours in excess of 2200 (this is in addition to the hours addressed in Article 5-3.01). At the hearing into the preliminary objection based on mootness, ALPA explained that the 50 hours is intended to compensate ALPA for the time that it has been required to spend on the general issue of WestJet's Practice. The costs of the arbitration process are to be borne equally by the parties (see Article 35-3.01 of the Collective Agreement and Canada Labour Code RSC 1985, c. L-2, s. 63). An order to add 50 hours to the AFR would be akin to a cost award in favour of ALPA for the time it spent dealing with labour relations issues as part of its role as the exclusive bargaining agent for Pilots. Even if the Grievance was to succeed, I cannot see any basis on which such an order would be made given the facts and context of this case.

48 With respect to the general request for relief in (6), ALPA submits that an arbitrator can in appropriate cases order damages in a policy grievance. Even if the Grievance was to succeed, I cannot see any basis on which such an order would be made given the facts and context of this case.

49 In summary, given the agreement of WestJet to compensate the affected Pilots, the only realistic outstanding potential remedy is a declaration that WestJet violated the Collective Agreement. Is this a sufficient reason to proceed with the arbitration on the merits? This is the issue to which I now turn as part of the analysis as to whether I should exercise my discretion to the hear the merits of the case despite it being moot.

C. Should I exercise my discretion to hear the case despite it being moot?

50 As set out in *Borowski*, an adjudicator has the discretion to hear a case on the merits even if the matter has become moot. One of the special circumstances identified by the Supreme Court of Canada that might justify hearing a moot case is where a decision might have some practical effect on the rights of the parties notwithstanding that it would not have the effect of determining the controversy which gave rise to the action. I do accept that in the context of labour arbitration it is necessary to be cautious in applying the doctrine of mootness due to the existence of an ongoing relationship between the parties.

51 In the current case, the parties have agreed upon a new system for LCR and new provisions relating to conversion from LCR to SCR. The language of the key provisions in the Collective Agreement has been very substantially changed. Given that the Grievance is based on language that is no longer in effect, any decision on the merits is highly unlikely to provide any useful guidance in any future dispute under LOU # 5 about LCR and conversion to SCR under the new provisions. Similarly, any decision on the merits is highly unlikely to provide any useful guidance on whether WestJet's current practice in converting LCR to SCR is compliant with the Regulations because the Grievance is based on a previous practice in the context of very different Collective Agreement language. LOU # 5 was entered into because both WestJet and ALPA wanted to ensure that the reserve

system was compliant with the new Regulations. However, a decision on the merits would provide no guidance to the parties on the new Regulations or how the new Collective Agreement provisions are to mesh with the new Regulations. In essence, through the negotiation of the new system in LOU # 5, the parties were able in a proactive and productive fashion addressed the issue as to whether WestJet's system was compliant with the Regulations. They did this by negotiating a new system as set out in the new Collective Agreement provisions to mesh with the new Regulations. As has been stated: "If the problem has been remedied, no purpose can be served by holding a hearing": [Thames Emergency Medical Services Inc. v. O.P.S.E.U\(2006\) 149 L.A.C. \(4th\) 431 \(Knopf\)](#) at para. 14.

52 ALPA argues that even though WestJet has agreed to reimburse the Pilots, it wishes to obtain a declaration since the issue of conversion of LCR to SCR is of importance to the general membership especially because the Grievance raised issues of Pilot rest. I understand that this general issue is important to ALPA and the membership. If the Grievance were to succeed (which is unknown) then this would I presume be viewed as a vindication that ALPA's interpretation was correct and ALPA would believe that the importance of WestJet complying with the Collective Agreement and Regulations had been emphasized. However, in the case law reviewed under "Principles concerning mootness", the desire by a union for a declaration, without more, was insufficient reason to proceed in the absence of any other compelling labour relations reason to proceed.

53 ALPA also argues that if WestJet's preliminary objection in this case succeeds and there is a dispute about the interpretation or application of the new LCR provisions, then WestJet could avoid arbitration by simply reimbursing shortly before arbitration Pilots who lost Credit Hours. Of course, these parties are able to routinely resolve many matters and disputes. However, if there is no resolution between the parties in a future dispute, I do not agree that upholding WestJet's preliminary objection in the current case would provide WestJet with a way to avoid arbitration in future cases. Any objection based on mootness would have to be based on the factual context as it then existed. However, I make a few observations in order to address ALPA's argument. If there was an ongoing dispute between the parties about the proper interpretation and application of the LCR provisions as amended by LOU # 8, then there would be a present live controversy. A declaration whether WestJet had violated the Collective Agreement would in all likelihood have a practical impact on the parties' rights. As a result, in all likelihood the matter would not be considered to be moot even if WestJet had compensated the affected Pilots since there would remain a dispute about the current language. In those circumstances resolving the dispute would have a practical effect on the parties' rights and would provide practical guidance for the future.

54 Against ALPA's desire for a declaration, I must weigh the fact that the interpretational issues have disappeared by reason of the re-negotiation of the LCR provisions as a result of the new Regulation. There are no outstanding substantive remedial issues. A ruling on the merits would in all likelihood not provide any useful guidance to the parties in any future disputes about the new LCR system. A hearing on the merits will require a significant expenditure of time, resources, and effort when the real focus should be on ensuring that the new LCR system and the conversion to SCR is working well for WestJet, ALPA and the Pilots. Given these circumstances I do not consider there to be any compelling labour relations reason to proceed with a hearing on the merits. To use the language from the Supreme Court of Canada in [Borowski](#) at p. 353: "...if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot." That is what has happened in this case. Accordingly, I grant WestJet's application to dismiss the Grievance due to mootness subject to the condition bellow.

55 At the hearing into the issue of mootness, WestJet indicated that it intended to restore the Credit Hours deducted from affected Pilots as a result of WestJet's former Practice. If WestJet had not been prepared to take this remedial action, I would not have granted the application to dismiss for mootness because there would have been substantive outstanding remedial issues. Therefore, my granting of the application to dismiss the Grievance is made subject to the condition that WestJet either already has or, if not, will promptly restore the Credit Hours to the affected Pilots.

V. Conclusion

56 The substance of the dispute as set out in the Grievance has become moot due to the parties negotiating new Collective Agreement provisions and WestJet's willingness to compensate affected Pilots who had Credit Hours deducted as a result of WestJet's previous practice. While I have the discretion to hear a case that is moot if there are special circumstances, given

all the facts of this case I decline to do so. There are no outstanding substantive interpretative or remedial issues. A ruling on the merits would not provide the parties with any guidance on how to deal with any future disputes about the new system of LCR as set out in the revised provisions of the Collective Agreement or the new Regulations. There are no compelling labour relations reasons to adjudicate the case on its merits. As a result, I grant WestJet's application to have the Grievance dismissed based on mootness. This order is subject to the condition that WestJet either already has or, if not, will promptly restore the Credit Hours of the affected Pilots. I retain jurisdiction to deal with any issues arising from my decision including whether this condition has been fulfilled.