Financial Services Tribunal

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Toronto ON M2N 6L9

Tribunal des services financiers

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Fax/Télécopieur

Date: **July 11, 2014**

To/A:
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From/De:
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No. of Pages (including this page)/Nombre de pages (y compris cette page): 40

MESSAGE: Re: P0521-2013
Navistar Canada Inc. Non-Contributory Retirement Plan, Reg. No. 0351684

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July 11, 2014

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Dear Counsel:

Re: FST File # P0521-2013
Navistar Canada Inc. Non-Contributory Retirement Plan, Reg. No. 0351684

Enclosed is a copy of the Tribunal's Reasons for Decision dated July 11, 2014.

Yours truly,

Rhonda Booth
Registrar

Encl.

FINANCIAL SERVICES TRIBUNAL

Citation: Navistar Canada Inc. v. Ontario (Superintendent Financial Services), 2014 ONFST 8
Decision No. P0521-2013-2
Date: 2014/07/11

IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990, c. P.8, and the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, C. 28;

AND IN THE MATTER OF a Notice of Intended Decision of the Superintendent of Financial Services dated March 7, 2013, to Make Orders under sections 77.3(1)(a) and (b) and 87 of the *Pension Benefits Act* relating to the Navistar Canada Inc. Non-Contributory Retirement Plan, Registration Number 0351684;

AND IN THE MATTER OF a Hearing in accordance with subsection 89(8) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8.

B E T W E E N:

NAVISTAR CANADA INC.

APPLICANT

and

SUPERINTENDENT OF FINANCIAL SERVICES

RESPONDENT

and

UNIFOR (formerly CAW-CANADA) AND ITS LOCALS 127 AND 35

ADDED PARTY

BEFORE:

Florence A. Holden
Vice-Chair of the Tribunal and Chair of the Panel

Jeffrey Richardson
Member of the Tribunal and Member of the Panel

Patrick Longhurst
Member of the Tribunal and Member of the Panel

APPEARANCES:

For the Applicant – Sheila Block, Mitch Frazer and Alex Smith, Torys LLP

For the Superintendent of Financial Services – Mark Bailey and Deborah McPhail

For the Added Party Unifor and its Locals 127 and 35 (formerly CAW-Canada and its Locals 127 and 35) – Lewis N. Gottheil

DATES HEARD:
April 11, 14 and 15, 2014

REASONS FOR DECISION

I. INTRODUCTION

[1] This matter comes to us as a Request for Hearing filed by the Applicant, Navistar Canada Inc. ("Navistar") with respect to a Notice of Intended Decision by the Acting Deputy Superintendent, Pensions of the Financial Services Commission of Ontario dated March 7, 2013 (the "Notice"), to make certain orders in respect of the Navistar Canada Inc. Non-Contributory Retirement Plan (the "Plan"). The Notice would require Navistar to partially windup the Plan effective July 28, 2011, and to include certain Plan members in the partial windup who ceased to be employed at Navistar's assembly plant in Chatham, Ontario after June 30, 2009, and including those Plan members who retired or voluntarily severed their employment with Navistar between June 30, 2009 and July 28, 2011. The Notice further required the partial Plan windup report to include the value of certain benefits under the Plan as described below.

[2] The first issue to be determined by the Tribunal was decided at a previous hearing held on October 10, 2013, namely: Does the Superintendent and the Tribunal have the jurisdiction to rule on the applicability of the 0.9 banked pensionable service credit under section 7.03(b)(iii) of the Plan? The Tribunal unanimously ruled in the affirmative. Its reasons may be found in our decision dated November 4, 2013 (*Navistar Canada Inc. v. Ontario (Superintendent Financial Services)*, 2013 ONFST 13).

[3] The following additional issues were previously agreed to by the parties and the Tribunal:

a. Should members who retired or severed their employment during the period June 30, 2009 to July 28, 2011 be included in the partial windup group? We note with respect to this issue that the parties agreed to this partial windup date but this remains a finding of fact by the Tribunal based on the evidence before us.

b. Is a Plan member required to physically return to work from lay off or sick leave in order to be entitled to the credited service enhancements set out in section 7.03(b)(iii) of the Plan?

c. Are members who terminated prior to July 28, 2011 and met all the eligibility requirements for entitlement to the special early retirement benefit in section 1.03 of the Plan (the "SER Benefit"), other than the consent of the Applicant, entitled to the SER Benefit pursuant to sections 40(2) and 74(7) of the *Pension Benefits Act*, Ontario ("the Act")?

d. Are Plan members whose combination of age plus years of continuous employment or membership in the Plan equals 55 years or more on the effective date of Plan partial windup, entitled to the SER Benefit, once the member has met all eligibility requirements under section 1.03 of the Plan, except the consent of the Applicant?

e. Given the answers to issues (a) to and including (d), what remedy, if any, should be granted by the Tribunal?

[4] We will briefly summarize the positions of the parties, which we will further explore below.

[5] The Superintendent's position is that the Tribunal should make orders to:

a. declare a partial windup of the Plan effective July 28, 2011;

b. require that Navistar prepare and file a partial windup report that:

i) covers all members who ceased to be employed from a commencement date to be determined by this Tribunal but which the Superintendent says should be from June 30, 2009 up to and including July 28, 2011;

ii) credits any eligible member affected by the partial windup with credited service under section 7.03(b)(iii) of the Plan; and

iii) provides any member affected by the partial windup who has 55 points in years of age plus years of continuous employment or membership in the Plan with the SER Benefit in section 1.03 of the Plan;

c. require that Navistar provide proof to the Superintendent that the pensions or commuted value of the pensions for all members who are not affected by the partial windup and are entitled to credited service under section 7.03(b)(iii) of the Plan have been re-calculated to include these benefits;

d. require that Navistar provide proof to the Superintendent that the pensions or commuted value of the pensions for all members who are not affected by the partial windup and who are entitled to the SER Benefit in section 1.03 of the Plan have been re-calculated to include these benefits.

[6] Unifor generally supports the Superintendent's position with the exception that it submits that the partial windup group should include all Plan members who ceased employment from November 5, 2008 to July 28, 2011.

[7] Both the Superintendent and Unifor support the view that the Superintendent and the Tribunal has jurisdiction under both subsections 77.3(1)(a) and (b) of the Act to order a partial plan windup on the facts of this case. These sections grant the Superintendent the power to require the partial windup of a pension plan if under (a) a "significant number of members.... cease to be employed by the employer as a result of the discontinuance of all or part of the business of the employer or as a result of the reorganization of the business", or under (b) "if all or a significant portion of the business carried on by the employer at a specific location is discontinued".

[8] Navistar's position is that:

a. Only subsection 77.03(1)(b) of the Act applies and that the business was not discontinued until July 28, 2011 (the "Closure Date"). The Applicant maintains that the

Superintendent cannot rely on subsection 77.03(1)(a) as a concurrent basis for declaring a partial plan windup. Navistar contends that the only meaningful evidence of a decision to close the Plant under subsection 77.03(1)(b) could be made by a decision of the board of directors and that decision was not made until August 8, 2011, with retroactive effect to July 28, 2011. The Applicant also strenuously argued that the layoffs and new terms of employment proposed in 2009 during collective bargaining negotiations were not a reorganization resulting in terminations of employment.

b. Only those employees who were "on roll" as of the Closure Date (i.e. July 28, 2011) are eligible to participate in the partial windup of the Plan. By "on roll", Navistar meant employees actively at work and including those previously on layoff or disability who retained recall rights on that date. Employees who were severed or retired before July 28, 2011 are all to be excluded from the partial windup of the Plan as they were not "employees" within the meaning of subsection 77.3(1)(b) of the Act. Navistar suggests these prior terminations and retirements be excluded since the members ceased employment for reasons other than the facts giving rise to the partial windup under subsection 77.3(1)(b) of the Act; those members received generous severance packages; and further that they signed releases in favour of Navistar. Navistar suggests that the Tribunal narrowly interpret and apply only the provisions of subsection 77.3(1)(b) of the Act to the facts of this case, thereby excluding the Plan members laid-off in 2009 who subsequently terminated or retired before July 28, 2011. Navistar argues that their exclusion should be on the basis that their retirements and terminations lacked a direct nexus to the event of Plant closure in 2011 and further that subsection 77.3(1)(a) of the Act has no application to the facts in this case.

c. The 0.9 years of banked service credit under section 7.03(b)(iii) of the Plan only applies to members who physically returned to work, and thus is not applicable for any members on layoff or sick leave who did not return to work. For this argument Navistar relies on its position that the Plan language is ambiguous and that in interpreting the Plan provisions, the Tribunal should apply Navistar's past administrative practice which it stated was to require a return to work for members on lay-off (but not those on disability). The Applicant further argues that its past administrative practice was done with the knowledge and consent of Unifor and should apply to all members on layoff.

d. The provisions of subsections 40(3) and 74(7) of the Act do not apply with respect to the SER Benefits under section 1.03 of the Plan for members who terminated service prior to July 28, 2011. Navistar relies on the application of conditions set out in Exhibit "C" to the Plan to exclude SER Benefits to all former employees who terminated prior to July 28, 2011, and further suggests that members who were laid-off and terminated or retired prior to June 29, 2009 should be excluded from the partial windup group in any event.

[9] Finally, we offer comment on an issue that we identified on several occasions as not being before us, namely that of the characterization of the collective bargaining process between Navistar and the then CAW. Many inferences were made by Navistar as to the nature of the bargaining process, including whether the CAW had in the past alleged "bad faith" versus "hard bargaining" by Navistar. No party pled bad faith bargaining in these proceedings, and certainly even if they had, the Tribunal exercises no jurisdiction to make any findings of fact or law in respect to such a labour dispute. No concurrent labour dispute with respect to the bargaining process or in respect of the pension matters before us exists to our knowledge. Our jurisdiction is exercised only with respect to the issues outlined before us in these proceedings.

The behaviour of the parties during bargaining is immaterial to the issues before us except as it constitutes evidence of the discontinuance or reorganization of the business of the employer and of the administration of the Plan.

II. THE DECISION

[10] Having considered all of the evidence and submissions before us, we find that a partial Plan windup exists under both subsections 77.03(1)(a) and (b) of the Act, effective July 28, 2011. The Plan members included in the windup group shall include all employees "on roll" as at July 28, 2011 and those employees who terminated or retired from February 1, 2009 through and including July 28, 2011.

[11] Further we have determined that Plan members who were on layoff or disability and who otherwise met the requirements of section 7.03(b)(iii) of the Plan should be granted the 0.9 years of banked credited service, such additional credited service not to go beyond the later of the individual's termination date or the effective windup date of July 28, 2011.

[12] Further all Plan members who terminated prior to July 28, 2011 and met all the eligibility requirements for entitlement to the special early retirement benefit in section 1.03 of the Plan (the "SER Benefit"), other than the consent of the Applicant, are entitled to the SER Benefit pursuant to subsections 40(2) and (3) of the Act, if certain conditions are met as described below.

[13] All Plan members whose combination of age plus years of continuous employment or membership in the Plan equals 55 years or more on the effective date of Plan partial windup, would also be entitled to the SER Benefit, once the member has met all eligibility requirements under section 1.03 of the Plan except the consent of the Applicant, pursuant to subsections 74(1.3) and (7) of the Act.

[14] Our findings of fact and analysis follow.

III. THE FACTS

[15] Based on all of the evidence before us and as otherwise stipulated by the parties, the Tribunal found the following facts relevant to this decision:

a. Navistar Canada Inc. ("Navistar") owned and operated a heavy truck assembly plant located at 508 Richmond Street in Chatham, Ontario, Canada (the "Plant").

b. Navistar also owned and operated a facility in Burlington, Ontario. No assembly was done at the Burlington location.

c. In 2008 the Plant produced heavy duty Class 8 trucks, namely ProStar and Lonestar products. The Chatham Plant was the only Canadian assembly location and one of two assembly plants in the North Eastern market for Navistar, Inc., the other being in Springfield, Illinois.

d. Most employees of Navistar who worked at the Plant were members of the National Automobile, Aerospace, Transportation and General Workers Union of Canada, more commonly referred to as the Canadian Auto Workers union (the "CAW") Locals 35 and

127. The CAW subsequent to the commencement of its application for and grant of full Party status on June 20, 2013, merged with the Communications, Energy and Paperworkers Union of Canada and is now known as Unifor.

e. Navistar sponsors the Navistar Canada Inc. Non-Contributory Retirement Plan (the "Plan"), a defined benefit plan covering former employees at the Plant who are represented by the CAW, as well as CAW-represented employees employed at Navistar's Burlington, Ontario facility. The Plan was formerly known as the International Truck and Engine Corporation Canada Non-Contributory Retirement Plan and is registered with the Financial Services Commission of Ontario ("FSCO"). The registration number of the Plan is 0351684.

f. Navistar and the CAW were parties to two separate collective agreements. The CAW and its Local 127 and Navistar were parties to a collective agreement governing hourly production workers and related skilled trades; and the CAW and its Local 35 and Navistar were parties to a collective agreement governing office and clerical workers (together, the "Collective Agreements"). The Collective Agreements both expired on or about June 30, 2009 (the "Expiry Date").

g. The Plan was incorporated into the collective agreements by reference as Exhibit "A" to a Pension Agreement entered into on June 23, 2004 between the then International Truck and Engine Corporation Canada and the CAW. The Plan is also referenced within the Collective Agreements in Article 19, paragraph 480(a)(iv). No evidence was led as to the succession of Navistar to International Truck and Engine Corporation Canada, but Navistar's counsel conceded that Navistar is the Plan sponsor and employer for the purpose of these proceedings.

h. The Plan was closed to new members effective September 8, 2003.

i. Navistar Canada Inc. is a wholly-owned subsidiary of Navistar, Inc. a publically-listed corporation. The Tribunal was not provided with any corporate details of the ownership structure, but Navistar's counsel conceded its wholly-owned subsidiary status. However, it was clear to us from the evidence of both of Navistar's witnesses, Mr. Barry Morris and Mr. Henry VanVroenhoven, and the many internal documents placed before us in evidence, that the Chatham location was considered part of the Navistar Truck Group and that certain members of Navistar, Inc.'s executive and senior management group were well aware of, directed and were heavily engaged in decisions concerning Chatham operations and negotiations during 2008-2011. A number of these same Navistar, Inc. executives were signatories to the existing collective agreements. Board references we find were references to the board of directors of Navistar, Inc. although we understand that there is also a Canadian board of directors.

j. We accept the uncontradicted evidence of Mr. Morris, a senior corporate labour relations director for Navistar, Inc., that the company's truck production in North America and elsewhere was severely impacted by the general worldwide economic downturn in 2007-2008. The truck industry in particular was hit by a combination of factors including the credit crisis, fluctuating exchange rates, higher fuel prices, high production costs, and changing freight delivery patterns, which ultimately resulted in fewer truck orders. He testified that as a long haul truck facility in Chatham, fewer orders meant fewer jobs. Headcount would rise and fall with the economy. He also noted that competitors were

relocating to the SouthWest (SW) corridor, by which he meant Mexico and SW U.S.. In 2005 Navistar, Inc. opened a non-unionized facility in Escobedo, Mexico to build heavy trucks including the ProStar Day cab line also built in Chatham.

k. We also understood from Mr. Morris' testimony that reorganization strategy decisions about Chatham were largely decisions of Navistar, Inc. Internal draft documents suggest that Navistar's board of directors were informed of the "strategy and direction of the Heavy Business" as early as October 20, 2008. Much of the material before us (some 265 documents) related to operational and organizational discussions in 2008-2009 between senior management within Navistar, Inc. who guided the outcome and only three key Chatham managers: Mr. Todd Armstrong, Human Resources Manager; Ms. Catherine Day, Plant Controller and Mr. Craig Holmes who became the Plant Manager in 2009. Navistar chose to not call these three Navistar individuals as witnesses.

l. Mr. VanVroenhoven was hired by Navistar in May 2007 in a labour relations capacity, located then in Chatham and he reported to Mr. Armstrong. By his own testimony he was not involved in any contingency planning for labour disputes and appears to have a limited role in bargaining. He described his role in respect to the collective bargaining process in 2009 as identifying changes to the collective agreement needed to implement the "new" restructuring plan and to review the market re wages. He was not copied on most of the documentation before us, but seemed generally aware of the thrust of negotiations. Since production ceased in 2009, he seems primarily to be involved in Plan administration and continuing human resource responsibilities for the remaining 15 Plan members in Burlington and other offices in Canada.

m. In response to the severe changes in economic conditions and enterprise-wide costs, we find that by the spring of 2008, Navistar, Inc. was developing a reorganization strategy for Chatham's future. Mr. Mórris testified that the goal consisted of a much smaller regional facility with a wider range of production but no guaranteed minimum production commitment, and an initial workforce of about 100 employees (down from the then 1,100). The documents which best express these intended outcomes are found in a number of documents filed with the Tribunal.

   i. Mr. Morris identified a timeline that he advised had been prepared and he received in mid-May of 2008 which indicated that "At some point in mid to late 2008 could move sleeper cabs and build day cabs only at CAP (Chatham Plant). (Limited labour content) RIF (Reduction in force) would result." The timeline indicated that sleeper cabs at the Plant in May of 2008 constituted 75% of production, day cabs only 25%. It also indicated a one year closure notification to be given June 30, 2008, which Mr. Morris testified was not given at that time. We note separate emails which indicate as early as May 2008 that closure of the Plant was under consideration.

   ii. At the same time, Todd Armstrong circulated to Mr. Morris an email with a planned June 2008 communication to Plant workers from the former Plant Manager Suk Singh, which acknowledged the transfer of ProStar day cabs production to Escobedo in Mexico. One reason given was to limit Plant production to one shift rather than two and another reason given was the need for cost controls. Mr. Morris conceded, in questioning, that it was more cost effective to build in Escobedo depending upon where the product was headed.

However it is clear from the many documents before us that the transfer of production to Escobedo was planned by Navistar, Inc. for both the SW market and as a contingency plan to move Chatham ProStar production there, and Lonestar cab production to Garland, Texas in the event that a work interruption occurred on the Expiry Date of the Chatham Plant Collective Agreements whether by strike, lockout or closure. The evidence also suggests that although there was a need for continued truck production that could have gone to Chatham in mid-2008, a decision was made within Navistar, Inc. to move it to Escobedo by the fall of 2008. Internal memos suggest that production costs were significantly lower in Mexico. We find that layoffs were not solely related to a reduction in truck demand but also reflect a desire for restructuring to reduce production costs.

iii. Another document is an email string beginning July 22, 2008 between various Navistar and Navistar, Inc. management that questions the implications of partial windup related to an anticipated decline to 20-35 units of primarily day cab production per day at Chatham. One email dated July 24, 2008 from David J. Minnick, who Mr. Morris identified as his then boss, states: "These are the most likely/optimal paths to glean the synergy of relocating the hood and sleeper cab suppliers. For simplicity sake we could just assume this is effective June 2009." Mr. Morris was copied on the email and testified that this was not the strategy that was followed in negotiations but conceded that he could not identify any other strategy in any other documents before us or by memory. Further notwithstanding Mr. Morris' contention that closure was not part of the contingency planning around the end of the collective agreements, we find that same email string clearly indicates that closure was part of the planning by Navistar. In fact as a recipient of those emails, he would have been aware of senior management's question: "How soon could we close?"

n. Navistar not surprisingly sought advice in 2008 from its actuarial and third party plan administrator, Morneau Sobeco, on the windup and severance considerations involved with lay-off. In particular, Navistar created demographic member data to estimate the costs related to those employees who may be eligible for retirement allowances "in the event of a restructuring that creates permanent job losses". Seeking advice and costing estimates is a reasonable business response in our view to the changing economic conditions but we can also reasonably infer that Navistar was well aware that its reorganization strategy would result in permanent job loss, as Morneau Sobeco warned that "if the terminations are spaced over a number of different periods, so that on their own they do not individually represent a large percentage of the membership, they could be aggregated if they relate to the same event to determine if a partial wind-up has occurred." An internal email dated January 12, 2009 from Mr. Armstrong to David Minnick attached an age and service report produced on August 7, 2008 for those retirement eligible at June 30, 2009 who were also eligible for a retirement allowance "in the event of a restructuring that creates permanent job losses". Of 911 active employees, 242 were already age 55 or older with 10 or more years of service; 126 had 30 years or more of service.

o. By October 15, 2008, the CAW was aware of rumours of closure, with production moving to Escobedo and Springfield and directly queried US management who dismissed the CAW's concerns on October 23, 2008 as "rumours or speculation", even though its own

earlier draft discussion documents discuss closure as an option. A request for early bargaining was not directly responded to by Navistar.

p. On November 5, 2008, a day after giving the CAW formal notice that closure of the Plant was being considered, we find that Navistar issued a layoff notice to Plant employees that announced a change in the production schedule and anticipated layoff of up to 500 CAW-represented employees and an additional number of unrepresented employees. On the evidence, we find in fact 470 members of Local 127 and 29 members of Local 35 were laid off effective February 1, 2009. The best evidence before us was that of this group, 343 (of 786 at the end of 2008) were Plan members from Local 127, none of whom ever were recalled or returned to work and 140 (18%) subsequently terminated their employment or retired. Mr. VanVroenhoven indicated that several were severed by Navistar. The communications also indicated that Navistar gave formal notice to the CAW that closure of the Plant was being considered.

q. In a Key Dates and Milestones document produced by Navistar, Inc. on December 5, 2008, months in advance of bargaining, reference is made to a likely January additional significant layoff, notice of terminations and schedule changes in March and a closure effective on the Expiry Date. Navistar's witness, Mr. Morris testified that this document was to be used for planning union discussions. Mr. Morris testified on cross-examination that with the exception of an "early close option" which he professed to not understand, that the other actions contemplated were carried out by Navistar, all except the actual closure on the Expiry Date. Instead the Plant employees were put on permanent layoff on the Expiry Date. Production was ramped down to zero by the Expiry Date. Mr. Morris again conceded that no other options were explored by Navistar, Inc. or Navistar. We find on the evidence before us that, in fact, no other reorganization options were considered by Navistar during or subsequent to the cessation of collective bargaining, other than the single strategy generally described in subparagraph 15(v) below.

r. We note also a December 5, 2008 internal email on which Mr. Moore was copied, and which read in part: "June 30 – Lock out takes place unless closing agreement reached prior to expiration. Plant production has been ramped down to 0 prior to June 30, 2009."

s. We also find that on January 5, 2009, a second round of layoffs took place of up to 199 employees. The effective date of the layoff was March 1, 2009. The rationale given was the same as previously stated: "We must adjust our build schedule to the overall low order intake. This additional schedule reduction is being driven by ongoing market and economic conditions and our internal requirements to cost competitively utilize our capacity." However as capacity had already transferred in part to Mexico, the reduction in future orders to be built in Chatham was dictated in our view by Navistar and Navistar, Inc. and formulated before that date. At this time, 168 Plan members from Local 127 and 16 Plan members from local 35 were laid off. We had limited evidence from Mr. VanVroenhoven that of this group 78 (or roughly 10% of the membership at the end of 2008) terminated their employment or retired.

t. We find that under the terms of the then Collective Agreements and related letter agreement No. 80, the parties had agreed to a minimum daily production schedule of 35 units.

u. Effective February 1, 2009, and coincident with the first round of layoffs, the line rate was reduced to 35 units a day: the minimum required under the existing Collective Agreements (down from 115). The notice advised the members that: "Once we set the line rate, any remaining daily orders will be built in Escobedo." We accept Mr. Morris' testimony that it was more probable than not that any additional unit production needed if business improved would likely be in Mexico. The strategy to only build 35 units in Chatham he agreed was going forward in February 2009.

v. Navistar, Navistar, Inc. and the CAW had a pivotal bargaining meeting on March 18, 2009 during which Navistar's bargaining team outlined its reorganization strategy. Mr. Morris attended that meeting. He testified that an Executive Summary document and Message Points and Flow Document were used to convey the messages to the CAW of a *monumentally different, radically different and smaller* structure in Chatham (in the words of Navistar) needed to keep a presence in Chatham. We summarize the key points here:

   1. Future production would no longer be model specific. Day cabs only.
   2. Trim and paint functions would be eliminated.
   3. There would be no minimum or maximum production requirements. The initial production level will be 10-12 units per day.
   4. Material delivery would be by third parties.
   5. Job classifications would be severely reduced reflecting a much 'flatter' organizational structure.
   6. Management would have the right to assign work based on availability and skill, in the creation of a 'flexible' workforce.
   7. Elimination of certain existing benefits.
   8. Limited use of contract workers for volume increases.
   9. A regional customer base.

   To implement this approach, Navistar identified desirable contract changes that would change the collective bargaining process, such as the elimination of strikes or lockout at the end of the collective agreement.

w. We accept the testimony of Mr. Morris that these key changes remained the bargaining mandate for Navistar through 2009-2011. In addition, we find that there was a plan to centralize certain functions, namely accounting, engineering and IT processes which were largely transitioned by June 2009, as per Mr. VanVroenhoven's testimony in this regard and as reflected in Navistar's May 5, 2009 bargaining notes. It is clear to us on the full evidence before us, that Navistar had clearly articulated a restructuring strategy and was implementing it by February 1, 2009. The substance of these bargaining proposals was communicated to and known by the membership through bargaining updates by the CAW, and by Navistar via information hotline messages and the media.

x. By early April 2009 we find that the CAW understood that work was being moved to Mexico and possibly to Springfield and that a permanent closure was possible.

y. On April 2, 2009, Navistar sent a Notice to the CAW to commence bargaining for new collective agreements. Formal negotiations between Navistar and the CAW began on May 4, 2009.

z. On April 2, 2009, the Plant Manager posted a notice of indefinite layoff to all members of the CAW Local 127 and Local 35 commencing on the expiration of the Collective Agreements on June 30, 2009. No agreement was reached for new collective agreements and on June 29, 2009 all remaining 522 CAW Local 127 and Local 35 members at the Plant were placed on indefinite layoff. Based on the seniority listing provided to us we have determined that all were Plan members.

aa. During the collective bargaining discussions held May 7-9, 2009, no serious alternative proposals were proposed by or accepted by Navistar. In Mr. Morris' own words: the objective was to "continue the plant but only on the basis proposed". We refer to Navistar's opening remarks document of May 4, 2009 which reads in part: "With that said, what we'll be presenting is pretty much the option that can keep a presence here. There are other options that don't maintain a presence here." Draft contingency plans were to utilize capacity at three of Navistar's facilities in the U.S. and Mexico, which we understand to be the Escobedo, Springfield and Garland locations.

bb. Mr. Morris conceded that it was the strong view of the CAW that the proposed reorganization would not be ratified by the members and that view was clearly communicated to Navistar. We find that no vote was put to the members on the proposal, the contents of which were generally made known to the membership. Navistar was aware that members were concerned about closure in early April of 2009.

cc. On June 13, 2009, the Ministry of Labour issued a "no board" report at the request of Navistar and following a meeting with the conciliator on May 19, 2009.

dd. A request by the CAW was made for a 90-day extension of contract negotiations and mediation and was refused by Navistar in June, 2009.

ee. On June 17, 2009 the CAW had advised Navistar of a commitment not to strike at the Expiry Date. This commitment to continued bargaining was also reflected in member communications. We find no evidence before us of a strike or threatened strike as at the Expiry Date.

ff. On or about June 29, 2009, Navistar advised the CAW that Navistar did not intend to reconfigure or resume production at the Plant until new collective agreements were reached. All production at the plant ceased and never resumed.

gg. In July of 2009, the CAW advised its members that there were no plans to return to the bargaining table at that time.

hh. Since July 1, 2009, Mr. VanVroenhoven testified that at least 138 additional Plan members on layoff retired and 43 voluntarily took severance packages.

ii. It appears from Navistar's own operating statistics that it produced 2067 units in August 2008, dropping to 420 units in February 2009, and dropping to zero by July 2009. There was no production at the Plant after June 2009.

jj. Both the number of employees and members of the Plan as at year end during the period 2008 to 2011 declined substantially. The number of members of the Plan as at year end during the period 2008 to 2011 is as follows:

Year	Chatham	Burlington
2007	815	15
2008	786	15
2009	671	15
2010	612	15
2011	558	15

We further find that relying on an internal document prepared by Navistar in August 2008, the total number of on roll employees was 992 (804 hourly, 74 salaried represented, and 114 managerial) dropping to 36 (all managerial staff) by July 2009.

kk. On the evidence before us, we find that the restructured Plant, if it continued under the new terms proposed by Navistar, would employ approximately 100 employees. We grant no credibility or weight to claims by Mr. Morris of a possibility of up to 165 employees, as he could not point to any document before us or otherwise substantiate that number. In fact, as per Mr. Tom Hennigan's (the then VP, Labour Relations at Navistar Inc.) internal email of May 26, 2009: "Right now the plan is to try to get a very small plant. That is the proposal on the table and we will ride with it past the deadline if needed." In an email to the President of Navistar, Inc. Mr. Hennigan on May 8, 2009 advised of active numbers of less than 100. We find that even if a new agreement were to have been ratified after the Expiry Date, based on seniority rights the vast majority of Plant employees (and Plan members) had no reasonable prospect of recall at June 28, 2009 and that was true for most of them by February 1, 2009. In any event we find a significant number of employees on layoff no longer retained recall rights at the Closure Date. At the very least according to Mr. VanVroenhoven the number of active Plan members reduced from 830 to 558.

ll. At the expiry of the collective agreements, while the parties continued to have discussions around a closure agreement, Navistar stripped the Plant of its assembly operations. We accept the evidence of Mr. Morris that a re-start of the Plant would have taken considerable expense and 3-6 months or more to re-tool and re-train employees for different product lines. Even if a collective agreement had been reached by the Expiry Date or shortly thereafter, in our view, the Plant was not in a state of readiness so as to immediately resume production.

mm. The CAW requested, and was granted access to the Plant between the Expiry Date and the Closure Date to ensure no production took place.

nn. We acknowledge Mr. VanVroenhoven's testimony that post June 2009, Navistar severed at least another 43 employees from among the 558 on roll at the Expiry Date.

oo. While certain evidence was led as to the possibility for Chatham of future military truck production, we were not presented with any compelling evidence in our view to support a finding that this was a credible or likely possibility. Consequently we give it no weight in assessing the likely revival of production numbers and employees in Chatham even if a collective agreement had been reached. We accept Mr. Morris' testimony that no request for proposal in relation to military truck production was in fact issued, the Plant lacked

government security clearances for such work, and he confirmed that it was conceded by Navistar, Inc.'s President, Troy Clark in an address to the CAW that even if the prospect of military production did exist, it would "not solve Chatham's problem".

pp. Negotiation sessions between Navistar and the CAW continued beyond the Expiry Date on November 18, 2009, December 9, 2009, February 16, 2010, August 19, 2010, September 29, 2010, January 20, 2011, March 8, 2011, May 5, 2011, and May 19, 2011. In addition, there were a number of phone calls and e-mails between the parties which supplemented negotiations.

qq. Navistar made minor concessions regarding retiree eligibility for post-retirement medical benefits in March, 2010 but required consenting members to agree to a cessation of Credited Service as at June 29, 2009. Navistar consented to a two-week window from March 29 to April 8, 2010 for members with 30 or more years of credited service under that plan who agreed to retire. The agreements included a general release of all claims against Navistar relating to their "employment and termination thereof". Mr. VanVroenhoven testified that approximately 26 Plan members retired under this agreement out of a possible January 2009 estimate of 123 employees that would be eligible. Similar releases were set out in agreements reached with other individual members in January 2011, May 2011, the latter half of 2012 and the first half of 2013.

rr. On January 20, 2011, Navistar, Inc. removed its reorganization proposal from consideration and all negotiations ceased.

ss. In May of 2011, recommendations were made to the Navistar, Inc.'s board of directors to close the Plant.

tt. On July 28, 2011, Navistar notified the CAW that the Plant would be closed permanently (the "Closure Date"). At this time, there were approximately 558 employees left "on roll" with recall rights.

uu. Laid off employees possessed a right of recall under the law after the Expiry Date. A number of employees retired or chose to sever their employment between the Expiry Date and the Closure Date as indicated above. The evidence presented was inconclusive as to the exact number but it could be as high as 181.

vv. A small number of employees who chose to retire received entitlements to post-employment health benefits. An indeterminate number of employees who severed their employment signed letter agreements with Navistar at the time of the cessation of their employment.

ww. The August 8, 2011 Board resolutions and minutes ratifying the Closure and partial windup of the Plan were not put before us, but Navistar's own counsel conceded they were signed with retroactive effect to July 28, 2011 and involved both the Board of Directors of Navistar and of Navistar, Inc. Senior management involved in the negotiations kept the Navistar, Inc. Board apprised of negotiations before the Closing Date as evidenced by internal memos and draft reports put before us.

xx. With respect to Plan members who were laid off prior to July 28, 2011 and who subsequently voluntarily terminated employment, were severed or retired, we find Mr.

VanVroenhoven evasive in his replies to the question as to how many were given reduced pensions and not granted SER Benefits under section 1.03 of the Plan. Surprisingly for an HR professional he seemed to lack a basic understanding of what constituted a reduced pension under the Plan terms, so therefore could not or would not affirm how many Plan members retired with unreduced versus reduced pensions.

yy. His evidence was equally unpersuasive as to Navistar's past practices, if any, with respect to the application of the 0.9 years of credited service under section 7.03(b)(iii) of the Plan. He lacked any personal involvement in this aspect of Plan administration prior to 2010. His understanding of past company practice he advised came from verbal advice received from his former boss, Todd Armstrong, who was not called as a witness by the Applicant. In reviewing past termination calculations for employees who had been on layoff in preparation for this hearing, based on the sample documents before us, Mr. VanVroenhoven advised that staff manually adjusted calculations if a member did not return from layoff and reduced their credited service accordingly. The member's annual pension statements however reflected the 0.9 year of additional credited service at least until 2011 when the 2010 statements were issued.

zz. Navistar unilaterally added a paragraph to the annual member statements that reads: "While on layoff, should you leave the employment of the company due to either termination, retirement or the expiration of your recall rights, the credited service will be adjusted to reflect credit to the point of layoff." We find that this statement was only added to the annual statements after the Closure Date by the Applicant. In fact, Mr. VanVroenhoven conceded that he only became aware of that language in preparing for this hearing. We find no evidence that the addition of this statement was brought to the attention of the CAW or to Plan members who were still seeing the additional credit on their annual statements. We were not presented with any evidence that the CAW knew of or consented to such a practice, if in fact there was such a practice.

aaa. We accept Mr. VanVroenhoven's evidence that the CAW would not have been copied on member annual statements or individual statements on retirement or termination. We further accept his evidence that he also found no evidence of any agreement by the CAW of such a practice in company files. Consequently we find that if such an administrative practice did exist before 2011, the CAW, now Unifor, did not consent to such a practice. Nor would the Plan members have known about Navistar's intention to interpret the Plan provisions in this manner, although any contest as to Plan administration could have been referred to the joint administration Board as provided for in Exhibit B to the Plan text.

bbb. Mr. VanVroenhoven conceded that he could not point to any Plan requirement or other documentation prior to 2010 that reflected any requirement for Plan members on layoff to return to work in order to be entitled to the additional service under section 7.03.(b)(iii). He had no explanation of an internal memo dated November 20, 2002 from a former colleague, Kathy Sherring, then Manager, Human Resources regarding 2002 negotiations around the 0.9 credited service issue. That memo made no reference to any return to work requirement for members on layoff who could otherwise retire on full pension with 29.1 years of credited service in the event of permanent layoff or plant closure. Based on the evidence before us, we find that Navistar did not demonstrate a clear and consistent practice of administering the Plan to require a return to service from layoff at least before the Closure Date.

ccc. We note for completeness, that we accept Mr. VanVroenhoven's evidence that no employees on sick leave or disability (for any reason) were required to return to work in order to get the additional service credit.

ddd. Although no oral evidence was tendered on the point, we note that in Navistar's internal documents reviewing severance liabilities related to the Plan on January 13, 2009, approximately 588 of 1132 for Local 127, and 58 of 101 Local 35 local populations (including 382 already on layoff at that date), would have been eligible for severance under the *Employment Standards Act* after 35 weeks in a 52 week period, but would have to terminate and give up recall rights in order to obtain the severance. Mr. VanVroenhoven conceded on cross-examination that the numbers laid off (499, 199 and 499) were cross-over points under the *Employment Standards Act* whereby notice requirements changed.

eee. Navistar provided samples of severance letters prepared by Navistar and signed by Plan members. We find based on the testimony of Mr. VanVroenhoven that these letters were in respect of members who took the early retirement window offered and retired in May of 2010, prepared as a without prejudice or precedent document and arguably inadmissible. Certainly the waivers filed were all dated after July 2011 and after notice of the windup had been given by Navistar.

IV. THE LAW AND ANALYSIS

[16] The discontinuance of a registered pension plan and distribution of its assets, in whole or in part, otherwise known as a plan windup may occur for a number of reasons. A windup may also be initiated by a number of parties; the employer or plan sponsor, the plan administrator, or the Superintendent. The Superintendent's authority to order a partial plan windup is discretionary, and following investigation of the facts, "can properly weigh the equities in the balance of the exercise of that discretion".[1] On the facts above we find no good reason exists to not exercise this discretion as the statutory criteria for partial windup in our view are satisfied.

[17] As noted previously, the Applicant has agreed that a partial Plan windup has occurred based on the closure of the Plant, but takes the position that the Superintendent's only exercise of authority to declare the partial windup on the facts is under subsection 77.03(1)(b) of the Act based on the discontinuance of the business on July 28, 2011.

[18] The Superintendent's position is that both subsection 77.03(1)(a) and (b) of the Act applies to the facts of this case. Unifor agrees. So does the Tribunal.

[19] The provisions of subsection 77.03(1) of the Act are as follows:

"The Superintendent by order may require the partial windup of a pension plan,

(a) if a significant number of members of the pension plan cease to be employed by the employer as a result of the discontinuance of all or part of the business of the employer or as a result of the reorganization of the business of the employer;

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[1] *Imperial Oil Limited. v. Ontario (Superintendent of Financial Services)* (2002), 35 C.C.P.B. 221, at para 22 (Ont. FST).

(b) If all or a significant portion of the business carried on by the employer at a specific location is discontinued;

(c) If part of the employer's business or part of the assets of the business are sold, assigned or otherwise disposed of and the person or entity who acquires the business or assets does not provide a pension plan for the members of the employer's pension plan who become employees of the person or entity;

(d) the liability of the Guarantee Fund is likely to be substantially increased unless the pension plan is wound up in part;

(e) if any of the circumstances described in clauses 69(1)(a), (b), (c) or (h) exists; or

(f) any other prescribed event or prescribed circumstances."

Subsection 69(1) of the Act (which was not argued before us) permits the Superintendent to windup a Plan where:

"(a) there is a cessation or suspension of employer contributions to the pension fund;

(b) the employer fails to make contributions to the pension fund as required by this Act or the regulations;

(c) the employer is bankrupt within the meaning of the *Bankruptcy and Insolvency Act* (Canada);

...

(h) in the case of a multi-employer pension plan,

(i) there is a significant reduction in the number of members; or

(ii) there is a cessation of contributions under the pension plan or a significant reduction in such contributions…".

Issue (a):

[20] In the event of a partial plan windup, on the effective date of the partial windup the Ontario Plan members are accorded immediate vesting, and the ability to "grow in" to early unreduced pension entitlements offered under the Plan; these additional rights form the core of issues (a), (c) and (d) as outlined in paragraph 3 above. The increase in Plan liabilities related to these partial plan windup rights are closely related to the size and nature of the windup group and various factors such as interest rates at the effective date of the windup. Navistar would like us to narrowly define the windup group to only include those members who were "on roll" (active or disabled) as at July 28, 2011 and to exclude all former Plan members who terminated or retired prior to that date.

[21] We also accept that the Act is remedial legislation and as such recognizes that partial windup "evinces a special solicitude for employees affected by plant closures"[2] and in particular, for "older employees with appreciable amounts of service" in the pension plan. The purpose of the windup provision of the Act is to provide added benefits and protections to employees affected by a discontinuance or reorganization of business where they may not otherwise be eligible for them. On the facts of this case of the 911 active employees as of June 30, 2009, at least 242 or 27% of the active workforce was already age 55 or more with at least 10 years of service and roughly half of that group were age 65 or with over 30 years of service. Precisely the type of employee the Act is intended to protect.

[22] All parties are agreed that the events of the closure of the Plant with retroactive effect to July 28, 2011 constitute the partial or whole discontinuance of a business under subsection 77.3(1)(b). We agree. However we also find on the facts of this case that subsection 77.3(1)(a) also applies. In our view there is nothing in the Act or law that prohibits the Superintendent from applying more than one provision of subsection 77.3(1) of the Act to the particular facts of any case. In fact subsection 77.3(1)(b) of the Act has been applied in conjunction with subsection 77.3(1)(a) in other cases before the Tribunal.[3]

[23] Navistar argued in its oral reply submissions that under subsection 77.3(1)(b), there is also an implied requirement that a termination of employment take place coincident with and directly connected to the discontinuance of the business to define the partial windup group, relying on *Imperial Oil Ltd. v. Ontario (Superintendent of Financial Services)*.[4] In that case the Tribunal was considering the windup of a successor company under the provisions of subsection 69(1)(d) and (e) of the Act (now subsections 77.3(1)(a) and (b)). The Tribunal stated:

> "While clause (e) of subsection 69.1 of the Act does not refer explicitly to cessation of employment (although clause (d) does), this must be the necessary result of the discontinuance of business at a specific location before the Superintendent can order a windup under clause (e). If there is a discontinuance of business without any loss of employment, say where all the employees are transferred to a new location, it seems self-evident that the Superintendent would not be authorized to order a windup of the pension plan in relation to those employees."

[24] Navistar relies on this paragraph for arguing that the Superintendent only has jurisdiction under subsection 77.3(1)(b) and that prior terminations were not directly connected to the closure in July 2011. We disagree. First, the decision does not in our view require the Superintendent to choose only one provision under section 77.3 to operate. Second, the Act does not in fact refer to terminations that are a direct result of the discontinuance. For example, it could easily be interpreted to refer to termination of plan membership as in the case where employment continues without a successor pension plan. If we were to accept the second part of this argument, then any employee forced to seek work elsewhere while on permanent layoff and in rough economic circumstances should not be afforded the protection of the Act even

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[2] *Firestone Canada Inc. v. PCO*, [1990] 1 O.R. (3d) 122, at paragraph 17; *GenCorp Canada Inc. and Superintendent of Pensions for Ontario et al* [1998] O.J. No. 961 (C.A.) at para 16; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* [2004] 3 S.C.R. 152 at para 38.
[3] *McDonnell Douglas Canada Ltd. Salaried Plan*, May 19, 1999, XDEC-44(PCO).
[4] *Imperial Oil Ltd. v. Ontario (Superintendent of Financial Services)*, 2002, 35 C.C.P.B. 221 at paragraph 25.

when, as on the fact of this case, no reasonable or likely prospect of reinstatement existed. We cannot accept that this would be the intended consequence of such a narrow interpretation of the Act given the purpose of the legislation.

[25] Even if we accept the argument that the termination of employment is a necessary correlation to the business discontinuance under subsection 77.3(1)(b), the *Imperial Oil* case referred to above does not go so far in our view as to preclude a finding of fact that terminations of employment prior to or after the effective date of the discontinuance are related to and the result of that discontinuance. In any case, the facts in this case are easily distinguishable from the facts in *Imperial Oil.*

[26] We agree with the submissions of the Superintendent that many partial windups take place over an extended period of time and affect both members who ceased to be employed on the effective date and members who ceased to be employed on dates prior to or subsequent to the effective date. Consequently the commencement and end dates of the windup serve to capture those members impacted by the windup and correspondingly establish the rights, benefits and obligations of the relevant parties. The Closure Date does not draw a hard line between inclusion in the partial windup group and exclusion of anyone who terminated or retired before that date.

[27] While the parties have agreed to July 28, 2011 as the effective date of the partial windup it is a date of convenience for valuation purposes. We think that it is necessary to explore whether the related events prior to July 28, 2011 led to a loss of employment by a significant number of Plan members as a basis for triggering their inclusion in the partial windup group under subsection 77.3(1)(a).

[28] First though it is important to consider under subsections 77.3(1)(a) and (b) what the terms "discontinuance" and "reorganization" mean. Discontinuance in the application of its "ordinary" meaning would certainly contemplate a cessation of the business as on the event of the July 28, 2011 closure. Reorganization however has a broader connotation. As prior case law has indicated, the Superintendent is not limited to the same meaning of "reorganization" as given in corporations' legislation.[5] In our view he Superintendent may look more broadly at company statements made in annual reports, press releases, speeches, employee bulletins and letters and other communications to determine whether there have been changes in the way the company does business. We have considered a large number of similar documents in determining the facts in this case.

[29] In *Marino v. Ontario (Superintendent of Financial Services)*[6] this Tribunal made the following observations, at page 65:

> "We hold that "a reorganization", as it is used in Section 69 of the PBA connotes among other things, a group of intended events occurring as a result of some form of deliberate guidance, and therefore, that to establish a "reorganization" within the meaning of that section of the PBA, it must at least be established that the guiding mind had, at the

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[5] *Stelco Inc. v. Ontario (Superintendent of Pensions)*, [1994] 115 D.L.R. (4th) 437 at page 438-9; affirmed 126 D.L.R. (4th) 767 (C.A.).

[6] *Marino v. Ontario (Superintendent of Financial Services)* (2007) 67 C.C.P.B. 51, paragraph 31; affirmed at *Marino v Ontario (Superintendent of Financial Services* (2008), 67 C.C.P.B. 86 (Ont. Div. Ct.).

beginning, at least a rough sense of what the organization would look like at the end of the process, of the approximate duration of the process, and of the route that would be followed to get to the end. We do not suggest that unexpected requirements to respond to unexpected events will be fatal to finding the existence of a single reorganization, but a deviation from a path implies the existence of a path."

[30] Again, in *Marino v. Ontario (Superintendent of Financial Services)* at paragraph 26 the Tribunal observed:

"Although there is no "bright line" test established with respect to the meaning of "reorganization" as found in Section 69(1)(d) of the PBA, the meaning is wider than that where the word is used in statutes dealing with formal corporate reorganizations. For purposes of the section, reorganization involves "a major change in the way in which the employer carries on its business", Stelco Inc. v. Ontario (Superintendent of Pensions), (July 7, 1993).... **It is not fatal to the characterization as a "reorganization" that the process of carrying out this "major change" takes place over an extended period of time."** In Imperial Oil Limited v. Ontario (Superintendent of Pensions) (1996), 15 C.C.P.B. 31....the process found to be a single reorganization occurred over a period of three years and five months." (emphasis ours).

[31] This is consistent with the Financial Services Commission of Ontario policy on windups, which states:

"The effective date of windup may not be obvious in some circumstances, such as where there are a series of terminations of employment related to a downsizing. In such instances, the administrator or agent is encouraged to submit a written proposal supporting the selection of both the effective date of windup and the time period during which the termination of a member will result in the member being included in the windup. . .

If there has been a series of staggered layoffs prior to and/or after the windup date, the administrator or the administrator's agent should submit a written proposal to identify which group of employees, including those who may have been terminated prior to the windup date and/or may terminate after the windup date, will be entitled to be included in the windup."[7]

[32] Terminations of employment may or may not be coincident with a closure or business discontinuance. While organizations such as Navistar have the right to reorganize their operations in response to changing economic (and other) conditions, they cannot do so with impunity. Subsection 77.3(1)(a) does not speak only to an involuntary termination of employment but to cessation of employment as a result of a reorganization, that on these facts we find took place over an extended period of time. We find that Navistar planned and executed a reorganization strategy that could only result in a monumentally different, radically different and smaller structure in Chatham (in their words), reducing from approximately 1,100 to 100 employees. As noted in the facts above, it never deviated from its strategy in any meaningful

[7] Financial Services Commission of Ontario Policy W100-102, "Filing Requirements and Procedure on Full or Partial Wind Up of a Pension Plan", effective December 9, 2004, sections 1.2.1 & 1.2.3.

fashion and it was well aware that the CAW would not agree to the strategy. It was not a reorganization that could take place in a day. It was also not a reorganization or closure that was the result solely of CAW's refusal to agree to Navistar's new terms, as Navistar repeatedly tried to allege. It is the fact of the reorganization via the actions of Navistar that are of legal significance. We find that the result of its actions, namely the planned layoffs, closure of the Plant and resulting terminations of employment and indeed a partial Plan windup, were foreseeable by Navistar and formed part of its planning.

[33] From an employee's perspective it would not have been lost on them in November of 2008 that the vast majority of them would be without jobs, even if the CAW had been able to persuade its members to ratify the agreement on the terms Navistar had proposed and new collective agreements entered into by June 2009. Certainly the permanent and unprecedented closure and layoff of all remaining employees would have brought the impending reality home by June 2009. We find that the permanent layoffs in June of 2008 were serious and out of the usual course of the employer's business. With the announcement of permanent closure the events of reorganization were already in place and terminations in our view were the 'result' of that reorganization, not merely related to it.

[34] The CAW's Bargaining Update #7 dated July 2009 attached a letter from National President Ken Lewenza to Mr. Dan Ustain (Navistar, Inc.'s then President) that states in part:

> " ...your current proposal... would see 1100 of the current workers in the facility left on the street, on permanent lay-off, with no chance of recall..."

In our view, employees would certainly have been able to anticipate likely job loss and possible plant closure as a result of the reorganization. The bargaining strategy of Navistar was a deliberate plan by Navistar that would change the way it did business in Canada. It's reorganization of its business in Canada is a subsection 77.3(1)(a) event that resulted in a significant number of Plan members whose employment ceased as a result of the reorganization. In our view the execution of the related strategy by senior executives of Navistar and Navistar, Inc. as outlined in our findings of fact is evidence of reorganization by the company. As demonstrated in the documents before us including memos related to board presentations, we find that the board of directors and senior executives of Navistar and Navistar Inc. were aware of the actions of its bargaining group.

[35] The closure was simply the final step in the reorganization, the timing of which was controlled by the Applicant.

[36] In this case, a number of terminations and resulting changes in Plan membership took place on both an involuntary and voluntary basis. We concede that the event of layoff of itself is not a termination of employment. We are not saying in this case, that in the event of significant layoffs, a partial plan windup immediately results. However we are saying that in the case of potentially significant layoffs, the Superintendent should consider that fact, along with other evidence, to determine if subsequent significant terminations and retirements are the result of a reorganization. To do otherwise voids the purpose of the legislation in our view.

[37] We therefore reject the Applicant's submission that only employees at the Closure Date should be included in the windup group. Based on all the facts and evidence before us, we agree with the Superintendent and Unifor that the events leading up to the Closure Date must be considered in their entirely and within the purposes of the Act.

[38] Having found that a partial windup was also triggered under subsection 77.03(1)(a) of the Act, we do need to determine if the terminations were significant. The number of active Plan members reduced from 830 to 558 by the Expiry Date. We find that the threshold legal requirement under the Act that a significant number of employees terminated contemporaneous with the events that constituted the reorganization under subsection 77.03(1)(a) has been met.

[39] Having found that the start date for the reorganization was February 1, 2009, the resulting implied question is whether or not we can consider only involuntary terminations during the period from February 1, 2009 to July 28, 2011, or whether we can include voluntary terminations. Navistar argues that many of those terminations were voluntary, unrelated to the ultimate Plant closure and were unrelated to the facts giving rise to the partial windup under subsection 77.03(1)(b) of the Act.

[40] In absolute terms, we have already found that 470 members of Local 127 and 29 members of Local 35 were laid off effective February 1, 2009. The best evidence before us was that of this group, 343 (of 786 at end of 2008) were Plan members from Local 127, none of whom ever were recalled or returned to work and 140 (18%) subsequently terminated their employment or retired. In the second round of layoffs at January 5, 2009, 168 Plan members from Local 127 and 16 Plan members from Local 35 were laid off. We had limited evidence from Mr. VanVroenhoven that of this group 78 (or roughly 10% of the membership at the end of 2008) terminated their employment or retired. Post-June 2009, Navistar severed at least another 43 employees from among the 558 on roll at the Expiry Date. We find this level of turnover much higher than the 2-4% of employees on layoff in the past who would terminate voluntarily and give up recall rights in normal circumstances as the evidence before us suggests. We have some doubts however as to precisely how many were involuntary terminations or voluntary terminations during the period from February 1, 2009 to July 28, 2011, but hold that we are not required to make this determination for the following reasons:

a. The Act does not distinguish between involuntary and voluntary terminations although the Legislature could certainly have done so.

b. We reject Navistar's argument that terminations before July 2011 should not be considered. The former Pension Commission rejected a similar argument by the employer in another *Imperial Oil* decision[8] and stated:

> "Did the workforce reduction result from these activities (the activities giving rise to the reorganization)? Again, we answer "yes". Are we inclined to force the Superintendent to consider each termination over the 3 year period to ensure that the driving force was the reorganization? No. The amount of resources to do that would be enormous and it is not clear that accurate information could even be obtained. For example, if a lower performing employee is let go when the restructuring takes place, is the termination deemed to be a result of performance or the restructuring? If the employer and employee differed in their views as to what was the dominant reason, how would the dispute be resolved? This simple example illustrates the futility of such an approach. If it were to be done for literally thousands of employees, the task might never be completed. The information given

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[8] *Imperial Oil. Limited v. Ontario (Superintendent of Pensions)* (1996) PCO Bulletin/Vol 6/Issue 4/ page 90, at page 95 (XDEC-34). motion for appeal denied by Ontario Court of Appeal.

by Imperial Oil shows that the terminations took place contemporaneous with the reorganization and were related to the activities we have found amount to a reorganization. There is no need to go behind that information."

Navistar suggests that this decision stands for the proposition that former members who would have retired early anyways could not be said to have ceased to be employed by the employer as a result of plant closure. We disagree with Navistar. We agree with the Divisional Court which upheld the Commission's reasoning and decision and went on to say:

> "It does not take some great leap of faith or presumption to arrive at the conclusion that significant jobs were lost 'as a result of' the reorganization found to have taken place, without the need to examine into the minutiae of evidentiary materials that might be involved, both subjectively and objectively, in looking into each of many hundreds of terminations."

c. The Applicant also makes reference to the *CBS Canada Co. v. Ontario (Superintendent of Financial Services)*[9] decision of the Tribunal in its written reply submissions, suggesting that those who would otherwise choose to terminate their employment relationship by resignation or retirement prior to plant closure have no windup rights, since windup rights under subsection 77.03(1)(b) of the Act are not triggered until the windup date which is on plant closure. Not surprisingly Navistar did not refer to any specific passage in the decision; we certainly cannot find one that supports its theory. The *CBS* case can also be easily distinguished on its facts. On reviewing individual terminations in that case, a review which resulted in including certain retirees in the windup group, the Tribunal concluded:

> "Our decision in this matter should not be taken to indicate that this Tribunal will necessarily review the situation of any member of a pension plan who has ceased employment at the effective date of the partial windup of the plan or during the period of the event giving rise to the partial windup whenever the plan sponsor seeks to exclude that member from participation in the partial windup. The present case is an unusual one in that, in the end, the Tribunal has simply had to decide, within the terms of a negotiated settlement, the specific question of whether the bargaining agent for certain named plan members has successfully met the onus of establishing that they are entitled to be included in certain partial windups of the plan."

d. The Navistar reorganization did not take place on a single date (the Closure Date), but was implemented over a period of time. As the facts revealed, plans began as early as May 2008 with the first layoffs effective February 1, 2009. Layoffs continued from that date until permanent layoffs on June 29, 2009 (coincident with the Expiry Date). As noted above, a significant percentage of members on layoff terminated or retired contemporaneous with the events which constituted the reorganization, prior to and on the Closure Date. We find these events constituted a single reorganization.

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[9] *CBS Canada Co. v. Ontario (Superintendent of Financial Services)*, 2003 ONFST 10 at page 7.

e. We agree with the Superintendent that an employer should not be able to circumvent its partial windup obligations simply by staggering its layoffs and announcing closure late in the downsizing process. Negotiations had formally ceased by January 2011 when Navistar withdrew its proposal. It could have chosen to announce closure then or much earlier.

f. We are also reminded of the principle stated in *Del Grande v. Shoppers Drug Mart Inc.* that to be included in a windup group, the member's termination must not only be contemporaneous with the events which constitute the reorganization (on which we have made our findings), but also that the terminations must be related to those same events.[10] We are content to follow the reasoning in *Imperial Oil* noted above, which was affirmed on appeal to the Divisional Court and the Court of Appeal and was also referred to in another Tribunal decision in *Marshall Steel* to support the proposition that "if the termination of employment occurred during the partial wind-up period, it is deemed to be as a result of the events giving rise to the partial wind-up."[11]. We find a nexus between the terminations which took place from the date of first layoff on February 1, 2009 to the planned reorganization that ended with a Plant closure on July 28, 2011 (the Closure date and also the windup date). As noted above, the terminations were significant both in actual numbers and as a percentage of plan membership and were connected to and in our view the result of the reorganization.

[41] Having found that a partial windup took place under both subsections 77.3(1)(a) and (b) of the Act, and defined the windup group as including members who terminated employment or retired between February 1, 2009 and July 28, 2011 as well as the subsequent terminations, we turn to Navistar's additional arguments that members terminated prior to July 28, 2011 be excluded on the bases: that they (a) received severance packages with the result that they would be unjustly enriched in the event they were also awarded windup benefits; and (b) that some members signed releases in favour of Navistar which effectively disallowed them participation in the windup group. Under the first argument, Navistar further argues that if the members were included in the windup group they should have their severance bargains unwound to permit Navistar to recover the value of the severance benefits.

[42] We find that the severance benefits referred to by Navistar, sample copies of which were put before us, appear to relate to the severance benefits awarded under the *Employment Standards Act, 2000.* Employees gave up their recall rights in order, in part, to be entitled to such benefits. In our view, severance benefits are distinct from windup benefits under the Act.

[43] We note the prior decision of the Tribunal in the case of *Imperial Oil*, where the former Pension Commission observed that severance packages involve common law notice periods for wrongful dismissal and statutory entitlements under employment standards legislation. The Commission held:

> "Those (severance) amounts must be given regardless of whether "grow in" benefits must be given. To suggest that severance packages are to be compared to "grow in" benefits is a comparison of apples and oranges. Moreover, whether severance

[10] See *Del Grande v. Shoppers Drug Mart Inc.*, (2009) 79 C.P.P.B. 127 at para 12.
[11] *Marshall Steel Limited and Associated Companies and the Superintendent of Financial Services of Ontario*, FST File No. P0150-2001, at page 6.

packages are generous or not cannot be determined by the Pension Commission. It is up to the courts to determine the amounts to be awarded for wrongful dismissal."[12]

[44] Similar remarks were made in the case of *Atlantic Oil Workers*[13], wherein the Nova Scotia Court of Appeal ruled that severance payments cannot be offset against statutory pension entitlements: "To suggest that their (members') severance pay could be used to purchase pension enhancements seems to me to be comparing apples and oranges . . . I do not see any element of "windfall" (in receiving both severance and pension entitlements) in that."

[45] The *Atlantic Oil* case was applied by the Tribunal in the case of *Marino v. Ontario (Superintendent of Financial Services)*[14], wherein the Tribunal said: "As a matter of employment law, they would receive statutory severance benefits, and they might also receive greater severance benefits at common law. However, it has been held that severance benefits and benefits which might accrue upon a windup compensate for different types of losses suffered by an employee, and that qualified employees are entitled to both". We are not bound by this decision *(Atlantic Oil)* from another province, but it is of persuasive authority, and we will follow it."

[46] Most recently, the Supreme Court of Canada's decision in *IBM Canada Limited v. Waterman*[15] considered whether Mr. Waterman's receipt of pension benefits reduced the damages otherwise payable for wrongful dismissal. IBM's position was that his pension benefits should be deducted from the salary and benefits otherwise payable during this period. The trial judge rejected this position, and IBM's appeal was dismissed by the BC Court of Appeal and the Supreme Court of Canada. The concept of "double recovery" was addressed. The Court recognized that: "Pension benefits are a form of deferred compensation for the employee's service and constitute a type of retirement savings. They are not intended to be an indemnity for wage loss due to unemployment. The parties could not have intended that the employee's retirement savings would be used to subsidize his or her wrongful dismissal."[16] We agree and would extend that finding to that of a statutory severance payment.

[47] The majority of the Court in *Waterman* also suggested that as a matter of policy the law should not provide an economic incentive to dismiss pensionable employees rather than other employees. We agree. Older employees who were pension eligible, who are part of the windup group and afforded the protections of the Act and whose retirement constituted a termination of employment, should not be automatically disentitled to ESA benefits unless the employer can prove an exception under the ESA to that severance benefit. This is so in our view whether or not the severance amounts were equal to ESA benefits or exceeded those amounts. An employee is entitled to the protection of the Act, regardless of whether or not he or she may be entitled to other benefits on termination.

[48] For the "unjust enrichment" argument, Navistar relies solely on the decision in *National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada),*

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[12] *Imperial Oil Limited and Superintendent of Pensions (1996) PCO Bulletin/Vol 6/Issue 4, page 90 at page 96 (XPEC-34).*
[13] *Atlantic Oil Workers Union, Local 1 v. Imperial Oil Ltd.*, [2006] N.S.J. No 337 N.S.C.A.) at paragraph 80.
[14] *Marino v. Ontario (Superintendent of Financial Services)* (2007), op cited at para 77.
[15] *IBM Canada Limited v. Waterman* [2013] S.C.C. No. 70 (QL)
[16] Ibid., para 4.

Local 1451 v. Kitchener Frame Ltd.[17], ("Kitchener Frame"). In our view that decision does not assist the Applicant. It did not speak to the unjust enrichment argument proposed by Navistar, but was an examination of the purpose of the legislation and the value of windup benefits versus severance benefits under employment standards legislation on an appeal of an arbitrator's decision. *Kitchener Frame* took the position that the employees were ineligible under the ESA for severance under the exemptions in that legislation. The union sought statutory severance pay for workers who were already eligible for unreduced pension benefit income on plant closure. The arbitrator and court were comparing the value of the unreduced pension benefits in that case to the severance benefits and refused the union's request. The facts of *Kitchener Frame* can be easily distinguished from the facts in this case on the basis that in *Kitchener Frame* the members had no entitlements to additional pension benefits granted on windup.

[49] Further, it is not up to the Tribunal to determine severance amounts under the ESA. We have no jurisdiction in that regard. Consequently if the Applicant has any argument to be made as to the reduction of severance benefits for some retirees who may have been disentitled to ESA benefits as a result of being eligible for and collecting an immediate unreduced pension, it may make that argument in the appropriate forum.

[50] Navistar also submits that it is also entitled to rely on certain waivers signed by some members that would disentitle them to windup benefits. It provided us with no compelling legal arguments in this regard nor to any applicable case law. It simply served to act as a booster to its argument of unjust enrichment which we have rejected.

[51] We accept instead the Superintendent's position that the release appears to be a standard form that states that the agreement is in full, final and complete settlement of any and all matters relating to the employee's employment and the termination thereof, and that the employee has no claims of any kind or nature whatsoever against Navistar relating to his/her employment or the termination thereof. The purported 'waiver' signed by some members states:

> IRREVOCABLE RECALL RIGHTS ELECTION
>
> 1. I, (employee) hereby elect to be paid any severance pay to which I may be entitled in accordance with the Employment Standards Act, 2000 and to renounce all seniority rights and rights to recall to employment I may have now or in the future with the company.
>
> 2. I acknowledge that I have no claims of any kind or nature whatsoever against the company, its officers and directors or other employees relating to my employment, the termination thereof, other than specifically provided for in this agreement.
>
> 3. I agree not to file any grievance or any other claim or to commence any action with respect to my employment, the termination of my employment or this irrevocable election to sever my employment and to renounce my recall rights.

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[17] *National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada), Local 1451 v. Kitchener Frame Ltd.* (2010) O.J. No. 3041 (Div. Ct.)

4. I have entered into this agreement voluntarily having had the opportunity to obtain advice from legal counsel or a representative of my choosing.

[52] We find that, the above noted waiver relates to an individual employee's claim against his/her employer in connection with the individual employee's employment and termination from employment, not with respect to statutory rights under the Act. There is nothing to suggest that the payment is a substitute for pension or windup benefits under the Act.

[53] It is trite law that parties cannot contract out of a minimum statutory standard such as the right to be included in a partial windup under the Act. The courts and the Tribunal have previously upheld this principle: see *Andre Provost v. Superintendent of Financial Services*[18].

[54] This Tribunal also held in *Provost* that a release signed in the context of settling termination and severance issues cannot affect a member's entitlement to benefits under the PBA: *Marshall Steel*[19]. The release in this case therefore does not affect the members' entitlement to be included in the partial windup. Even if the release expressly addresses the member's pension entitlement, a member cannot waive entitlement to be included in a future partial windup and the rights and benefits that flow from that entitlement; rights that on the date the waivers were executed had not been crystallized as no windup had been declared until 2013.

[55] Contrary to Navistar's written submissions, its own witness, Mr. VanVroenhoven conceded that the union played no role in drafting the election, did not consent to or sign it in any capacity and in our view is not bound by it. Nor is the Superintendent.

[56] Consequently we find that Plan members who are part of the windup group are not subject to "unjust enrichment" and consequently the Applicant is directed to prepare a windup report that reflects their full windup entitlements.

Issue (b):

[57] We turn now to the next issue before us: Is a Plan member required to physically return to work from lay off or sick leave in order to be entitled to the credited service enhancements set out in section 7.03(b)(iii) of the Plan? This issue is strictly speaking not an issue related to the partial windup. Its resolution will impact all past Plan member terminations which could go back as far as 1954 when the Plan began. However we note that we have only been provided with the current Plan document; an examination of earlier provisions would be required by the Superintendent to determine any retroactive effect prior to 1969.

[58] Navistar argued that its' past practices are determinative of the issue where the Plan terms are ambiguous, as it claims is the case herein. It suggests that the Plan does not contemplate the shutdown of the Plant and, as a result its ambiguity must be resolved on the basis of the parties "reasonable expectations". While it contends that a return to service requirement was not imposed on disabled Plan members who presumably were unable to return

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[18] *Andre Provost v. Superintendent of Financial Services*, May 31, 2012, FST Decision No. P0480-2011-1 at paragraph 15
[19] Supra, at p. 6.

to work, it suggests that such a requirement was imposed on members on layoff. This issue (b) is essentially one of plan interpretation.

[59] The Superintendent and Unifor submit that the Plan terms are clear and unambiguous; they do not distinguish between the disabled and laid-off member; there is no need to consider past practice, and even if you did, the evidence suggests a change to past practice to require a return to work only took place in 2010.

[60] Navistar also suggested that it and the CAW were parties to written agreements acknowledging that the crediting of 0.9 years of pensionable service for the period of the leave is not applicable if the member does not return to work. The Applicant suggested that CAW representatives have "signed off" on these agreements, as have individual employees, as applicable. On this aspect we reiterate our findings of fact above: we were not presented with any evidence that the CAW knew of or consented to such a practice, if in fact there was such a practice. We accept Mr. VanVroenhoven's evidence that the CAW would not have been copied on member annual statements or statements on retirement or termination. We further accepted his evidence that he also found no evidence of any agreement by the CAW of such a practice in company files. Consequently we find that if such an administrative practice did exist before 2011, the CAW, now Unifor, did not consent to such a practice and could not be said to have acquiesced or intended to be contractually bound by such a practice.

[61] Let us turn our attention then to the issue of Plan interpretations. Section 7.03 (b) states that service from January 1, 1969 shall be credited as follows:

> "An Employee of the Company on and after January 1, 1969 who is absent from work due to layoff or Company-approved sick leave and who accrues in any calendar year commencing after 1971 less than 1615 compensated hours, shall receive credit of 40 hours for each complete calendar week of such absence during such year due to layoff or Company-approved sick leave provided that the Employee shall have received pay during that year for at least 170 hours, and provided further that if such layoff or sick leave continues after that year the Employee shall be credited with 40 hours for each complete calendar week of absence after that year, not to exceed 1530 hours of credit for all such absence related to receipt of such pay from the Company in the first year. An Employee who returns to work on or after July 1, 1980 and receives pay for a period of less than 170 hours and who thereafter returns to such layoff or sick leave, shall not be disqualified, solely because of the receipt of such pay, from receiving credit for which he would otherwise be eligible hereunder. For the purposes of this subsection only, an Employee who is laid off subsequent to July 1, 1980 and whose first day of absence due to such layoff is the first regularly scheduled work day in the January next following his last day worked shall be deemed to have been laid off on December 31 of the year in which he last worked. Notwithstanding the above, in no event shall there be any duplication of Credited Service by reason of this subsection (iii)."

[62] General principles of plan interpretation have been laid out in the courts and applied previously by the Tribunal. To address an issue of pension plan interpretation, first and foremost, the words of the plan should be given their natural and ordinary meaning and the Plan

should be interpreted as a whole and every part of the text should be given effect. [20] All of the words of the plan should be considered and read and understood in the proper context.

[63] The Plan text does not require a return to work in section 7.03(1)(b)(iii). While it may be true that the section does not contemplate plant closure explicitly, it does contemplate termination of employment which is a direct result of plant closure. In other aspects of the Plan, a return to work requirement is reflected in the plan provisions which suggests to us that the authors of the text could also have imposed such a requirement in section 7.03(b)(iii) had they so desired: see sections 7.05 of the Plan. They did not do so. The various conditions laid out within the section are detailed and clear. Navistar's own witness, Mr. VanVroehoven conceded on cross-examination that the Plan did not require a return to work for laid-off members. Navistar provided no evidence or argument to justify a differing treatment between the disabled and laid-off employee under this section of the Plan. To read the requirement of a return to work into the Plan provisions would be an unwarranted plan amendment by Navistar and the Tribunal and that cannot be done.

[64] We find the text unambiguous – no requirement to return to work exists.

[65] It is generally understood that if the terms of a pension plan are unambiguous, it is unnecessary to resort to extrinsic evidence or to the factual matrix in which the Plan terms were adopted, as a tool or method of plan interpretation. We do not need to refer to extrinsic evidence in these circumstances. However if the Tribunal had needed to rely on extrinsic evidence to interpret the plan provisions, we would reiterate our findings of fact regarding this issue which we repeat here:

> Mr. VanVroenhoven conceded that he could not point to any Plan requirement or other documentation prior to 2010 that reflected any requirement for Plan members on layoff to return to work in order to be entitled to the additional service under section 7.3.02(b)(iii). He had no explanation of an internal memo dated November 20, 2002 from a former colleague, Kathy Sherring, then Manager, Human Resources regarding 2002 negotiations around the 0.9 credited service issue. That memo made no reference to any return to work requirement for members on layoff who could otherwise retire on full pension with 29.1 years of credited service in the event of permanent layoff or plant closure. Based on the evidence before us, we find that Navistar did not demonstrate a clear and consistent practice of administering the Plan to require a return to service from layoff before the Closure Date.
>
> His evidence was equally unpersuasive as to Navistar's past practices, if any, with respect to the application of the 0.9 years of credited service under section 7.03(b)(iii) of the Plan. He lacked any personal involvement in this aspect of Plan administration prior to 2010. His understanding of past company practice he advised came from verbal advice received from his former boss, Todd Armstrong, who was not called as a witness by the Applicant although according to Mr. VanVroenhoven he could be easily reached. In reviewing past termination calculations for employees who had been on layoff in preparation for this hearing, based on the sample documents before us, he advised that

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[20] *York University Faculty Association v. Superintendent of Financial Services and York University and Canadian Union of Public Employees Local 3903* (2010 ONFST 11, page10; citing *Davenport v. Hudson's Bay Company*, (2006) O.J. No. 3623 (Sup. Ct.) at paragraph 27.

staff manually adjusted calculations if a member did not return from layoff and reduced their credited service accordingly. The member's annual pension statements however reflected the 0.9 year of additional credited service at least until 2011.

Navistar relies on the unilateral addition by it after Closing Date of a paragraph to the annual member statements that reads: "While on layoff, should you leave the employment of the company due to either termination, retirement or the expiration of your recall rights, the credited service will be adjusted to reflect credit to the point of layoff." We find that this statement was only added to the annual statements after the Closure Date by the Applicant. In fact, Mr. VanVroenhoven conceded that he only became aware of that language in preparing for this hearing. We find no evidence that the addition of this statement was brought to the attention of Plan members who were still seeing the additional credit on their annual statements or to the CAW.

[66] Based on the limited evidence before us, we find that Navistar's past practice if any to require laid-off members to return to work, only started to evolve at a point in time where all members were already on permanent layoff or terminated or retired. The change in practice was unilateral, with manual changes to member records, without union consent and in our view should be given no weight in interpreting the Plan provisions.

[67] If the Applicant's arguments had been equally compelling, we would still have favoured the Superintendent's interpretation on that basis that ambiguity should be resolved as against Navistar as the drafter of the Plan, based on the *McCreight* and *BICC* cases.[21]

[68] We do find it appropriate to ask whether the result produces an absurd result. This is not a retroactive plan amendment as Navistar contends, just a requirement that the administrator administer the Plan provisions correctly as required by the Act. While this was not really argued by the parties, we recognize the practical difficulty and potential for inadequate record-keeping to successfully determine whether Plan members correctly received the right amounts of past service. Consequently we direct the parties to provide the Superintendent with evidence of compliance on this issue and it remains open to the Superintendent to issue an order of compliance under subsection 87(2)(a) of the Act as necessary.

[69] Consequently we have determined that members who were on layoff or disability and who otherwise met the requirements of section 7.03(b)(iii) should be granted the 0.9 years of credited service, such additional credited service not to go beyond the later of the individual's termination date or effective windup date of July 28, 2011.

Issues (c) and (d):

[70] The final issues for resolution are:

(c) Are members who terminated prior to July 28, 2011 and met all the eligibility requirements for entitlement to the special early retirement benefit in section 1.C3 of the Plan (the "SER Benefit"), other than the consent of the Applicant, entitled to the SER

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[21] *McCreight v. 146919 Canada Ltd.* (1991), 35 C.C.E.L. 282 (Ont. Gen. Div.), at page 12, as cited in *BICC Cables Canada Inc. v. Ontario (Superintendent of Financial Services)* (2000), 26 C.C.P.B. 179, paragraph 17.

Benefit pursuant to sections 40(2) and 74(7) of the Pension Benefits Act, Ontario ("the Act")?

(d) Are Plan members whose combination of age plus years of continuous employment or membership in the Plan equals 55 years or more on the effective date of Plan partial windup, entitled to the SER Benefit, once the member has met all eligibility requirements under section 1.03 of the Plan, except the consent of the Applicant?

[71] Navistar's position in respect of issue (c) is that the provisions of subsections 40(3) and 74(7) of the Act do not apply with respect to the SER Benefits under section 1.03 of the Plan for members who terminated service prior to July 28, 2011. Navistar relies on the application of conditions set out in Exhibit "C" to the Plan to exclude SER Benefits to all former employees who terminated prior to July 28, 2011 and suggests that the deemed consent provision in subsection 74(7) of the Act does not apply to former employees who terminated service before July 28, 2011. Navistar made no arguments and offered no evidence with respect to any past practices under section 1.03. It further suggested in respect of issue (d) that members who were laid-off prior to July 28, 2011 should be excluded from the partial windup group in any event.

[72] The Superintendent's position reframed the issue under (c) to suggest that a member is entitled to the SER Benefit if they (a) are not within the windup group but had age 55 with 10 years of credited service and deemed employer consent under subsections 40(2) and (3) of the Act; or (b) they are part of the windup group and therefor can grow into the benefit under subsection 74(1.3) of the Act, with deemed employer consent under subsection 74(7). We note that the Superintendent did not indicate how far back the application of subsection 40(2) and (3) should be applied under issue (c) and no evidence was offered as to how long section 1.03 had been part of the Plan. The Superintendent's part (b) is essentially the original issue (d).

[73] Section 1.03 of the Plan is headed "Special Early Retirement" and states:

> Any Employee who has attained age 55, but not age 65, and has completed 10 or more years of Credited Service, may be retired at the option of the Company, or under mutually satisfactory conditions, and shall upon proper application be entitled to a pension, provided, however, that an Employee discharged for cause shall not be eligible for a pension under this Section.

The benefit provided under Section 1.03 of the Plan as determined under Section 2.03 of the Plan is the right to an unreduced pension under the Plan at age 62, and otherwise reduced as per Section 2.01.

[74] Although section 1.03 of the Plan does not contain the word "consent", it contains the words "at the option of the Company or under mutually satisfactory conditions". Identical language to this was held to constitute a consent benefit in the Pension Commission's decision in *Caterpillar*.[22] Navistar waffled on its apparent concession in submissions that section 1.03 was a "consent" provision with respect to the members of the Plan who ceased to be employed on July 28, 2011, but suggested that Exhibit "C" is an integral piece of the Plan text and must be

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[22] *Caterpillar of Canada Ltd. Pension Plans for Hourly-Rated and Bi-Weekly Employees*, May 16, 1996, XDEC-33 (PCO), at page 7.

read together with section 1.03 to deny the SER Benefit to all terminations prior to July 28, 2011.

[75] Navistar contends that the purpose of this provision was to provide it with a tool for Navistar to "thin" the ranks of senior employees who might be induced to take a package. It urged caution in the application of section 40 of the Act to this type of provision, although it offered no case law on point to suggest that section 1.03 was not a consent benefit.

[76] Sections 40(1), (2) and (3) and section 74(7) of the Act state:

> 40(1) A pension plan may provide the following ancillary benefits:
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> 1. Disability benefits;
> 2. Death benefits in excess of those provided in section 48 (pre-retirement death benefit);
> 3. Bridging benefits;
> 4. Supplemental benefits, other than bridging benefits, payable for a temporary period of time;
> 5. Early retirement options and benefits in excess of those provided by section 41 (early retirement option);
> 6. Postponed retirement options and benefits in excess of those referred to in subsection 35(4);
> 7. Any prescribed ancillary benefits.
>
> 40(2) An ancillary benefit for which a member has met all eligibility requirements under the pension plan necessary to exercise the right to receive payment of the benefit shall be included in calculating the member's pension benefit or the commuted value of the pension benefit.
>
> 40(3) For the purposes of subsection (2) and clause 14(1)(c), if the consent of an employer is an eligibility requirement for entitlement to receive an ancillary benefit and a member, former member or retired member has met all other eligibility requirements, the employer is deemed to have consented.
>
> 74(1) A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least fifty-five, at the effective date of the windup of the pension plan in whole or in part, has the right to receive,
>
> (a) A pension in accordance with the terms of the pension plan, if under the pension plan, the member is eligible for immediate payment of the pension benefit;

(b) A pension in accordance with the terms of the pension plan, beginning at the earlier of,

(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that data

74(7) For the purposes of this section (grow-in benefits on windup), where the consent of an employer is an eligibility requirement for entitlement to receive an ancillary benefit, the employer **shall** be deemed to have given the consent. (emphasis added)

We note for completeness that the provisions of subsection 74(1) changed effective July 1, 2012 and after the windup date in this case, but nothing turns on that amendment.

[77] We also note the provisions of subsection 10(1) (7) of the Act which states:

10.(1) The documents that create and support a pension plan shall set out the following information:

....

7. The method of determining benefits payable under the pension plan.

[78] Based on the reasoning in *BICC Cable*[23], we find that the SER Benefit is a consent benefit within the meaning of subsection 40(1)5 of the Act. It is an early retirement benefit that it is excess of the prescribed minimum benefit under section 41 of the Act. As an ancillary benefit, it is also a consent benefit under subsections 40(1) and (3) and 74 (7). The consent of Navistar is part of the eligibility conditions under section 1.03 in order to receive the ancillary benefit.

[79] The opening paragraph of Exhibit "C" states as follows:

"Section 1.03 of Article 1 of the Non-Contributory Retirement Plan provides that an employee may be retired early at the option of the company or under mutually satisfactory conditions providing he is otherwise eligible. The following standards will be used by the company as a guide in the application of this provision." (emphasis ours)

[80] Accordingly, Exhibit "C" is just that: a simple guide to the application of Section 1.03 of the Plan. Indeed, paragraph C of Exhibit "C" does furnish a guide as to how the company's consent pursuant to section 1.03 might be given in circumstances of a plant closure. However, Exhibit "C" is not part of the Plan. No evidence was given to suggest that there was any agreement or representations made between Navistar and the CAW when Exhibit "C" was drafted as to the context in which it was drafted, nor of its application in the event of closure or

[23] BICC Cables, op cited

layoff. As the Plant had never closed before, its application had never been tested. There is no evidence to suggest that the CAW, now Unifor, agrees with Navistar's position concerning the scope of benefits under section 1.03. Such past practice or bargaining history would be irrelevant to the rights and entitlements afforded under the Act to the members under the combined provisions of subsections 40 (2) and (3), and 74(1) and (7).

[81] We find Unifor's arguments in respect of Exhibit "C" and the application of the *Caterpillar* case compelling. Again, the *Caterpillar* decision provides assistance. The first paragraph of Letter of Agreement No. 4 in the *Caterpillar* case contains the following words:

> "In either case, the following standards have been adopted by the company as a guide in the application of these provisions in certain conditions of layoff or discontinuance of operations."

[82] The Pension Commission of Ontario found that Letter of Agreement No. 4 was simply a guide as to how Caterpillar was to exercise its discretion, and therefore, had no effect on the operation of the Special Early Retirement provision in the Caterpillar plan, in the context of a partial plan wind-up.

[83] The Pension Commission of Ontario found in *Caterpillar* as follows:

> "We acknowledge that the question of the legal effect of the Letter of Agreement No. 4 troubled us. In the end, we are of the view that it was merely a guide to the way in which Caterpillar might exercise its discretion in future. We formed this view for two reasons. First, it is the view most consistent with the actual language of the Letter of Agreement. It is based on the basic principle of interpretation of contracts that the documents are to be construed as a whole giving effect to everything in them, if at all possible. It gives the words of the pension plans and letters of agreements their plain meaning...."

[84] The similarity between the opening paragraph in Letter of Agreement No. 4 in the *Caterpillar* case and the opening paragraph in Exhibit "C" herein leads to the similar conclusion that Exhibit "C" has no legal effect upon the operation of Section 1.03. We are also mindful of the Non-Contributory Retirement Plan Agreements made June 23, 2004 between the then CAW Locals 35 and 127 and Navistar that refers to the Plan document as Exhibit "A" attached thereto, with separate reference to Exhibits "B" and "C". Had the parties desired to make Exhibit "C" a part of the Plan document they could have easily done so.

[85] We are also mindful of FSCO's active policy effective March 1, 2005 with respect to consent benefits which is reproduced below:

> "Can a pension plan provide a consent benefit where the amount of the benefit is at the discretion of the employer?
>
> No. All consent benefits provided by a pension plan must be determinable.
>
> Section 10(1)7 of the (Act) requires that the method of determining benefits payable under a pension plan be set out in the documents that create and support the pension plan. This applies to all benefits, including those where the employer's consent is required to receive an ancillary benefit (i.e., a consent benefit). Accordingly, any plan provision that sets out a consent benefit where the amount of the benefit is at the

> discretion of the employer is inconsistent with section 10(1)7 of the (Act). Such a provision must be amended to clearly set out the method of determining the benefit payable. If such a provision is not amended, the administrator of the plan should sever the provision or read it out of the plan.
>
> Should the employer wish to provide an enhancement to selected individuals based on the previous wording of the provision, the method of determining the enhanced benefit must be set out in an amendment to the plan, taking into account policy B100251(Amendments for Benefit Improvements Notice and Funding,)."

[86] Given the clear wording of the Plan text and Exhibit "C" and the effect on the parties, particularly the Plan members, we dismiss the Applicant's argument that the further limitations under Exhibit "C" apply to section 1.03. In fact the Exhibit is not a model of clarity given the potentially competing application of parts B and C to the members.

[87] We find that under issue (c), members who terminated prior to July 28, 2011 and who were 55 years of age, but not age 65, with 10 years of credited service under the Plan on the date that they retired, and provided that they were not discharged for cause, are entitled to the additional value of the ancillary benefits provided by the SER Benefits, if any, into their pension benefit or the commuted value of their pension benefit, and Navistar is deemed to have given consent under subsection 40(3) of the Act. It does not require them to have been affected by a plant closure or part of the windup group. To argue otherwise would defeat the clear purpose of the Act. For clarity members of the windup group who also meet the eligibility conditions of section 1.03 are also entitled to grow into the SER Benefit under subsection 74(1.3) of the Act, with deemed consent by Navistar under subsection 74(7) of the Act.

[88] With respect to the final issue (d), Navistar argues that the application of Exhibit "C", paragraph C only applies to "employees laid off on or after June 1, 2002 at or after age 40 as the direct result of a plant closing..." who meet other listed conditions, for the basis of excluding terminations before July 28, 2011. It argues that terminations prior to the Closing Date should be excluded as they are not directly resulting from the closure, an argument that we have rejected. Navistar states in its submissions that:

> "Since these employees were laid off because of reductions in production prior to the expiration of the collective agreement and the Plant closure, these employees are not entitled to rely on the subsection's deemed consent provision in claiming the SER benefits set out in Part C of Exhibit C. In their cases, which did not involve termination as a result of the partial windup, subsection 74(7) of the (Act) does not apply and there is no deemed consent."

[89] We have already determined that the windup group must extend to members who terminated employment or retired from February 1, 2009 to and including July 28, 2011 for reasons that relate to the reorganization or closure, that on the facts of this case put them squarely in the windup group. We see no basis for excluding them under the provisions of section 1.03 and further note that Exhibit "C", paragraph B, gives consideration to employees "whose layoff appears to be permanent and appears to have no further opportunity for employment with the Company" without listing any other conditions other than company consent. Not surprisingly the Applicant made no reference in its submissions to this recognition of permanent layoff in paragraph B of Exhibit "C". However the benefit in section 1.03 is not a

plant closure or permanent lay off benefit because it applies in other situations as determined in paragraph 87 above.

[90] Issue (d) is therefore also answered in the affirmative. Consequently we find that consent is now deemed to be given under subection 74(7) of the Act if such members are part of the windup group and at least 55 points in years of age plus years of continuous employment or Plan membership by the effective date of the windup, and provided the other conditions under Section 1.03 are met.

[91] Finally, given the certainty in law required by subsection 10(1)(7) of the Act and FSCO's longstanding policy on consent benefits, the result in our view should have been contemplated by the parties and is a realistic result in the circumstances.

V. PANEL'S ORDER

[92] We hereby make the following orders:

a. The Superintendent shall proceed to order a partial windup of the Plan effective July 28, 2011, amended as follows.

b. Navistar is directed to prepare and file a windup report as soon as practicable that:

   i. Includes all Plan members who ceased to be employed between February 1, 2009 up to and including June 28, 2011;

   ii. Credits all such members with up to 0.9 years of Credited Service under section 7.03(b)(iii) of the Plan regardless of their return to work, such additional credited service not to go beyond the later of the individual's termination date or effective windup date of July 28, 2011; and

   iii. Provides all eligible Plan members affected by the partial windup whose age and continuous service or plan membership equals 55 years or more with the SER Benefit as defined in section 1.03;

c. Navistar is ordered to provide proof to the Superintendent that the pensions or commuted value of the pensions for all members who are not affected by the partial windup and are entitled to 0.9 years of credited service under section 7.03(b)(iii) of the Plan have been re-calculated to include these benefits, or in the case of deceased members where there is no continuing benefit payable, to the deceased member's beneficiary;

d. Navistar is ordered to provide proof to the Superintendent that the pensions or commuted value of the pensions have been re-calculated to include the SER Benefit benefits for all members who are not affected by the partial windup and who are entitled to the SER Benefit in Section 1.03 of the Plan by virtue of being 55 years of age, but not age 65, with 10 years of credited service under the Plan on the date that they retired, and provided that they were not discharged for cause. In the case of deceased members with such an entitlement, Navistar shall provide proof of payment to the deceased member's beneficiary.

e. For the purpose of implementing our orders above, the Tribunal remains seized of all issues relating to the implementation of its orders herein, and shall to the extent necessary adjudicate any related disputes that may arise between the parties.

Dated at Toronto, this 11th day of July, 2014.

Florence A. Holden

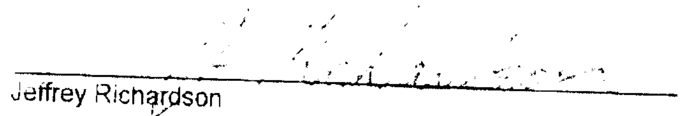
Jeffrey Richardson

Patrick Longhurst

e. For the purpose of implementing our orders above, the Tribunal remains seized of all issues relating to the implementation of its orders herein, and shall to the extent necessary adjudicate any related disputes that may arise between the parties.

Dated at Toronto, this 11th day of July, 2014.

Florence A. Holden



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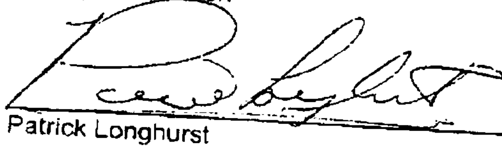

Patrick Longhurst