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## Reasons for Decision

Global Helicopter Pilots Association,

*applicant,*

*and*

CHC Global Operations (2008) Inc.,

*respondent.*

Board File: 26066-C

Neutral Citation: 2009 CIRB **459**

June 30, 2009

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The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chairperson, sitting alone pursuant to section 14(3) of the *Canada Labour Code (Part I - Industrial Relations)* (the *Code*). A hearing was held in Vancouver, British Columbia, on November 24, 25, 26, 27, and December 4, 2008.

### **Appearances**

Mr. Denis W. Ellickson, for the Global Helicopter Pilots Association;

Messrs. Paul Fairweather and Scott McCann, for CHC Global Operations (2008) Inc.

### **I - Nature of the Application**

[1] The Global Helicopter Pilots Association (the union or the Association) filed an application, pursuant to section 24 of the *Code*, to be certified as the bargaining agent for a group of

approximately 275 helicopter pilots located at various bases around the world. The proposed bargaining unit reads as follows:

All pilots excluding full-time managers (Chief Pilot, Asst. Chief Pilot, etc); pilots whose primary duty is non-flying Base Manager; and excluding foreign national pilots employed by CHC partner companies such as Thai Air Services, East-West Helicopters, Icaro, Sonair, etc.

[2] At the time of the hearing, counsel for the respondent indicated that the business entity formerly known as CHC Global Operations, a Division of CHC Helicopters International Inc., is now CHC Global Operations (2008) Inc. (the respondent or Global Operations). The respondent did not take the position that CHC Global Operations Canada (2008) Inc. is a different employer from Global Operations. In fact, it was agreed, for the purposes of this decision, that the term “Global Operations” would be inclusive for the purposes of describing the appropriate employer of the pilots at issue.

[3] The respondent initially raised the following five objections to the application for certification: (1) the Association was not a union; (2) the membership evidence was “incorrect and cannot be relied upon;” (3) the bargaining unit proposed by the Association is inappropriate; (4) Global Operations is not the true employer of those persons included in the proposed bargaining unit; and (5) the Board does not have jurisdiction over the proposed bargaining unit, save for those employees in Halifax, Nova Scotia, because the remaining employees in the unit are not employed in a federal work, undertaking or business.

[4] The Board dealt with the jurisdictional issue in a preliminary decision (see *Global Helicopter Pilots Association*, 2007 CIRB 396 [*Global (396)*]). The present decision is to be read in conjunction with the Board’s earlier preliminary determination.

[5] In *Global (396)*, *supra*, the Board concluded that Global Operations was in fact a federal undertaking and that, therefore, the Board had the jurisdiction to entertain an application for certification that included the different categories of pilots affected by the application for certification. However, the Board also concluded that a final determination, in that regard, ought to

await its substantive determination respecting the issues of true employer and appropriateness of the bargaining unit. It stated:

[104] In applying the various factors, each of these different groups of pilots have some but differing levels of connection with Global Operations. However, as can be seen by the nature of some of the factors and criteria to be considered, the evidence and criteria overlap considerably with the other fundamental issue of who is the true employer, which has not yet been heard by this Board. If it is found on evidence to come that the local entities are in fact the true employer of some of the affected pilots, this fact would change or affect the overall analysis. The Board has come to believe that it is essential to hear the parties on this issue of true employer before a final determination can be made on the issue of the Board's jurisdiction over all of the different pilots concerned.

[105] Accordingly, the Board concludes that, on the basis of the parties' admissions and the evidence as presented thus far, it is possible to rule that the Board has the initial jurisdiction to entertain an application for certification that includes the different categories of pilots who operate out of the various operations set out in this decision. However, the Board has also concluded that a final determination in regard to this matter ought to await the Board's determination in regard to the issues of true employer and appropriateness.

[106] Consequently, the next issue the Board must address in this application for certification is whether Global Operations, a federal undertaking, is the true employer of the pilots in each of the various categories referred to earlier.

[6] While it originally raised the five objections, Global Operations indicated at the hearing that the only remaining issue for the Board to decide is whether Global Operations is the true employer of all the pilots in the proposed bargaining unit. It did not make any submissions with respect to the remaining objections, other than to suggest that, if Global Operations is the true employer of the pilots included in the application, then all the foreign nationals working at various bases around the world should also be included in the bargaining unit.

[7] Accordingly, the remaining issues for the Board to address are whether Global Operations, a federal undertaking, is the true employer of the pilots affected by the application for certification and, if so, whether the bargaining unit applied for is appropriate for collective bargaining.

## **II - Background and Facts**

[8] At the outset of this hearing, the Board directed, and the parties agreed, that the findings of facts referred to in *Global (396)*, *supra*, are not to be disturbed or revisited. Therefore, it is not necessary to reiterate the facts already outlined in that decision, save for emphasis or narrative purposes, or to

address some facts that may be affected by changes that have taken place since that decision was issued.

[9] Global Operations, headquartered in Richmond, British Columbia, is one of the largest and most geographically diverse helicopter operations in the world. It provides chartered helicopter services to the oil and gas industry in Canada and around the world. As concluded in *Global (396)*, *supra*:

[4] All the employees in the proposed unit are helicopter pilots. With the exception of the base in Halifax, Nova Scotia, these pilots fly in different countries around the world. All their flights in these foreign countries are domestic, not international. They fly for domestic airlines that are in partnership with the employer. All the pilots, who are hired in Canada, perform the same work under the same terms and conditions, although subject to some local variations. Global Operations, for the purposes of this decision, is assumed by the parties to be the true employer. Some of these pilots are either Canadian citizens or residents of Canada, while others are from the United Kingdom, Australia, Europe, Indonesia, etc. Some of these pilots therefore have little or no attachment to Canada, and many of these foreign citizens work in countries in which they are neither residents nor citizens (i.e., a United Kingdom pilot working in Cameroon). They are referred to by the parties as “expats.” All of the above pilots are in the union’s proposed bargaining unit.

[10] There are four categories of pilots identified in *Global (396)*, *supra*, at paragraphs 99-102, who are the subject of this application:

- Pilots who fly in countries where the helicopters are registered in Canada and where Global Operations operates under its Canadian aircraft operating certificate (AOC) as well as its Canadian operations manual (COM).
- Pilots who are employed overseas and who work on a six-week rotation basis and return to Canada during their six weeks off. They are either citizens and/or residents of Canada.
- Pilots who are foreign expats, i.e., a non-Canadian citizen (e.g. from the United Kingdom) hired by Global Operations and assigned to a third country (e.g. Thailand). Global Operations deals with these pilots in the same manner as it deals with pilots who are Canadian residents - that is, it controls all their terms and conditions of employment.
- Pilots who are Canadian citizens (or other expats) who are now full-time residents in the foreign countries in which they work.

[11] Foreign nationals are not included in the application for certification. They are paid differently than the expat pilots and are employees of the domestic commercial airline in the foreign country in which they work.

[12] The pilots who are the subject of this application were all hired in Richmond. Once hired, they are assigned to a work rotation of six weeks on, six weeks off. Pilots fly their assigned aircraft to and from oil rigs on land or offshore. All the pilots perform the same work under the same terms and conditions although subject to some local variations. While they are provided airfare to return to their home of residence, in many cases, the pilots choose to fly elsewhere and do not return to Canada.

[13] Pilots and aircraft maintenance engineers hired by Global Operations in Richmond are assigned to one of a number of bases around the world. Those bases are grouped as follows:

- South East Asia (Philippines, Vietnam, Brunei, Thailand, Malaysia)
- Middle East and Africa (Azerbaijan, Georgia, Kazakhstan, Equatorial Guinea, Chad, Cameroon, Libya)
- Americas (Halifax)
- Nigeria
- Brazil
- Australia

[14] At the time of the hearing, there were no pilots assigned to Brazil or Australia.

[15] To avoid confusion, the parties described the operator of the various bases as the “local entity.” In order for the local entity to operate a commercial aircraft in a foreign jurisdiction, it must obtain an AOC from the local regulatory authority. In order to obtain an AOC, the local entity must have an appropriate operations manual approved by that local regulatory authority. The operations manual names “postholders” who are usually citizens of the country in which the local entity operates and are employed by the local entity. In almost every case, the local entity holds the contract with the oil company. In Kazakhstan, Global Operations has a contract with the oil company and has an agreement with Euro-Asia Air (Euro-Asia) to operate under its AOC in order to service that contract.

[16] There is no dispute that Global Operations is the true employer of the pilots assigned to its base in Halifax. In Canada, the AOC is issued to CHC Global Operations Canada (2008) Inc. by Transport Canada.

[17] Pilots in Brunei, Azerbaijan, Georgia and Vietnam operate under the Canadian AOC, and pursuant to the COM. Global Operations agrees that it is the true employer of the pilots working at those four bases.

[18] The Board heard evidence from four witnesses: Messrs. Ian Richards, Dennis Rigo, Steve Fincken and Norman Robichaud. For clarity purposes, the evidence will be summarized under two general headings: Control of the Working Conditions, and Control of the Operations.

## **A - Control of the Working Conditions**

### **(i) Relationship Between Global Operations and the Local Entity**

[19] Mr. Ian Richards is the Director of Planning and Resources at Global Operations. He has been with the company for 16 years and has worked in different capacities in Australia, Thailand, Myanmar, Canada, Nigeria and Brazil.

[20] Mr. Richards also testified at the hearing into the preliminary issue of the Board's jurisdiction. His testimony in relation to the jurisdictional question is summarized in detail in *Global* (396), *supra*. It is not necessary to reiterate it, save to clarify the testimony given in relation to the true employer determination.

[21] Mr. Richards described the corporate relationship between Global Operations and the local entities and categorized its role as that of a "service provider." He introduced a complex organizational chart depicting the myriad of companies around the world in which Global Operations has an interest or to which it provided services. These services included: hiring of pilots; training of pilots; preparation and production of operations manuals; and operational advice. Most local entities,

including Aero Contractors Company of Nigeria Ltd. (ACN), in Nigeria, and Thai Aviation Services (TAS), in Thailand, are owned either in full or in part by Global Operations. Global Operations has no ownership in Euro-Asia, the operation in Kazakhstan.

[22] Mr. Richards also produced a copy of an “Inter-company Secondment Agreement” (Exhibit 18), which outlines the relationship between Global Operations and its subsidiaries and affiliates. However, a review of the document reveals that it was prepared approximately a year and a half after the application for certification was filed and that it was not consistent with other copies of the same document produced by counsel for the union. In any event, having regard to inconsistencies and timing, the Board finds the document of little assistance in considering the issues at play in the present case.

[23] Mr. Richards acknowledged that Global Operations’ primary responsibility is the recruitment and assignment of people to fulfill the requirements of the local entity. He stated that Global Operations pays the pilots in that, in his words, it “puts the money in their bank accounts,” and that it recovers this cost from the local entity. The local entity provides living arrangements; it holds the contract with the oil company, which specifies the level of experience required. Licensing requirements for the pilots are determined by the local regulatory authority.

[24] He testified that the pilots’ working conditions are governed by the local entity and the operations manual of that entity. He suggested that Global Operations’ handbook, which deals with the terms and conditions of employment, is subject to the local entity’s laws. For example, the flight and duty limitation may vary from country to country. The operations manuals, which, for the most are prepared by Global Operations, are approved by the local entities and are prepared at their request. For example, Brazil and Angola (SonAir) have not requested operations manuals from Global Operations.

## **(ii) Nigeria**

[25] In *Global (396)*, *supra*, the Board described in detail the relationship between Global Operations and ACN. At the hearing into the preliminary matter, Mr. Koen Neven, the Managing Director of

ACN, was called as a witness to provide testimony on the operations in Nigeria. Mr. Neven explained that ACN is a registered Nigerian company and is regulated under the Nigerian Civil Aviation Authority, which issued the AOC to ACN. Mr. Neven also explained that ACN obtains its pilots from two organizations, namely Global Operations, and Aviation Personnel Recruitment and Management Limited. He acknowledged that the Nigerian pilots are unionized and that they negotiate their own terms and conditions of employment with ACN. The Board commented as follows:

[45] In cross-examination, Mr. Neven acknowledged that the Nigerian pilots are unionized and that they negotiate their own terms and conditions of employment. This is of course not the case in regard to the CHC seconded pilots who are assigned to ACN from Richmond. ...

[26] Mr. Neven was not called as a witness for the purposes of the true employer determination. However, Mr. Richards, who worked in Nigeria for 14 months as a field operations advisor, provided some details regarding the operations in Nigeria and the relationship between Global Operations and ACN. He went to Nigeria because there were difficulties with pilots not following the operations manual. Mr. Richards advised local management on how to manage these difficulties. He noted that he was there only as an advisor and that he had no place in ACN's organizational structure.

[27] In Nigeria, there are over 110 rotary-wing pilots, 39 of whom are local pilots employed by ACN. The remainder are Global Operations pilots. All pilots perform the same work and operate under the same ACN logo. The aircraft are leased, or are in the process of being leased, from Global Operations. Mr. Richards explained that assignments in Nigeria are carried out in accordance with ACN's operations manual. Global Operations appears as part of the corporate structure in ACN's operations manual. When asked why this was so, Mr. Richards explained that it was part of a "marketing strategy" in that customers want to see Global Operations in the organization to ensure that the local entity maintains the best operational practices.

[28] ACN holds the contract with the oil company while Global Operations provides the staff, the operations manual and technical assistance. Mr. Richards stated that scheduling and training is arranged by ACN, which determines if a pilot stays in the country.

[29] ACN proved to be an illuminating study into the broad nature of the role of Global Operations. Mr. Richards explained how, when difficulties arose with some pilots not following the operations manuals in Nigeria, ACN decided to employ Aviation Personnel Services (APS) for its fixed-wing division. APS provides services similar to Global Operations. When APS was hired, Global Operations' fixed-wing pilots were given the choice to work in Nigeria with APS or to continue to work with Global Operations. If the pilots decided to stay with Global Operations, it would reassign them to another base.

[30] Mr. Richards explained that, when ACN decided to switch from Global Operations to APS, a majority of the fixed-wing pilots transferred to the new employer. While the transition of pilots to ACN is informative from the perspective of the relationship of Global Operations with the pilots assigned to that base, the change to APS only affected the fixed-wing pilots in Nigeria. It therefore did not have an impact on the helicopter pilots who are the subject of this application.

### **(iii) Role of Global Operations**

[31] While minimizing the role of Global Operations to merely providing staff, manuals and technical assistance to the local entity, Mr. Richards suggested that the local entity was responsible for the pilots assigned to each location. To underscore this position, he pointed out that the schedules of the pilots are established by the local entity, that the customer (the oil company) produces the flight schedule, that the local entity sets out the required training and that it decides whether extended tours (overtime) are necessary. That said, Mr. Richards acknowledged in cross-examination that once an oil company signs on with a local entity, "they are getting our services." Those "services" are discussed more fully later.

[32] Mr. Richards also pointed out that the local entity can refuse a pilot assigned by Global Operations and provided the example of a pilot who was refused in Nigeria (Exhibit 24, Tab 7). That exhibit contains correspondence concerning a pilot who was assigned to Nigeria, but was asked to be removed from ACN's payroll and to be reassigned by Global Operations, because he had failed to renew his visa. While a review of that exhibit reflects that ACN requested that the pilot not return to its base, it also underscores that Global Operations was, as a result, required "to search for another

available location for (the pilot).” Further, Mr. David Boyle, Global Operations’ Head of Resource Scheduling, sent a letter to the pilot in question concerning this issue, and advised him that the letter would be placed on the pilot’s employment file:

... to record the fact that our customer ACN has requested that you not return to their operation due to your inability to keep your Visa valid. If an incident of this nature occurs again, it could warrant discipline up to and including termination of employment.

[33] Mr. Richards testified that travel arrangements for the first assignment are paid by Global Operations, but thereafter the cost is absorbed by the local entity that reimburses Global Operations. He stated that Global Operations had its own travel agency, Griffin, and that most of the pilots’ travel was arranged through that agency. Nevertheless, pilots could utilize the travel agent of their choice; however, if they chose to use Global Operations’ travel agency, they got a discounted fare.

[34] Pilots are trained in various locations around the world. Global Operations establishes the probationary period of new pilots, and assesses their skills after they have been assigned to a local entity. A pilot who does not meet the requisite standards set by Global Operations will be dismissed.

[35] In cross-examination, Mr. Richards acknowledged, as reflected, *inter alia*, by the contents of an exhibit that contains a number of offers of employment from Global Operations (Exhibit 21, Tab 2-H), that the terms and conditions of a pilot’s employment, including salary, vacation and holidays, are set by Global Operations. Pilots are given an employee number by Global Operations, are paid by direct deposit from Global Operations and are enrolled in a mandatory pension plan. The offers of employment provide that enrollment in the company pension plan is mandatory and specifies the contribution amounts for both the pilot and Global Operations. A similar reference is made to the Global Operations Group Benefits Plan to which the pilot is entitled on his/her first day of employment. While in Nigeria, for example, pilots continue to make contributions to Global Operations’ pension plan. Foreign nationals are not covered by Global Operations’ pension plan.

[36] The terms and conditions of employment require that pilots sign a confidentiality agreement and a code of ethics with Global Operations. In addition, pilots are formally advised as follows:

In addition, as a term and condition of employment with CHC, you understand and agree that you may be assigned to work for extended periods of time in locations in Canada and other countries. You further understand and agree that such assignments may require you to live and work in countries or areas experiencing among other things, conflict and political instability. As well, you further recognize that living and working in countries or areas experiencing such conditions is an ordinary and normal part of the employment with CHC and shall not constitute a reason for justification for refusing an assignment to such a country or area. Nevertheless, CHC remains committed to providing a safe and secure working environment for all of its employees at every CHC operation. We will continue to engage external specialist to review the safety and security of our employees at our bases in addition to improving the living conditions for our staff.

(Offer of employment made by Global Operations to Mr. John Smith, dated January 21, 2008 - Exhibit 21, Tab 2-H)

[37] When pilots are assigned to dangerous locations around the world, they receive incentive pay to work at such locations. Mr. Richards stated that these “extra” amounts are paid to the employee by Global Operations which, in turn, are reimbursed by the local entity. He suggested that the incentive pay and extended tour pay are established by the local entity with the agreement of Global Operations. However, it is evident from a review of an administrative memo from Mr. Brian Clegg to Nigeria crew members concerning Incentive Pay and Service Bonus for Nigeria (Exhibit 5, Tab 14) and various memos to pilots between 2007 and 2008 (Exhibit 23, Tab 5-E) that the apparent determination and notification of the incentive pay rests with Global Operations and not the local entity. Finally, in this regard, when a pilot is assigned from one local entity to another, the earned years of service are recognized by Global Operations with respect to vacation entitlement and long-term service (see the offer of employment made by Global Operations to Surezza Abdullah, dated May 11, 2005 - Exhibit 21, Tab 2-H).

[38] As well, it is important to note, for our purposes here, the conclusions reached by the Board in *Global (396)*, *supra*:

[19] Mr. Richards further conceded that Global Operations has applied to Human Resources Development Canada to have the hours of work of helicopter pilots averaged over a 52-week period. In a letter dated May 4, 2005, Ms. Mary Huitson, Director, Labor Program, set out Global Operations’ application and the regulations that apply to Global Operations’ averaging plan; that letter reads in part:

“This is regarding your notice to the Labor Program of the intention of CHC Helicopters International Inc. to average the hours of work of helicopter pilots and aircraft mechanic engineers, flight coordinators and customer service agents working at Nova Scotia and various international locations over a fifty-two (52) week period.

It is noted that, pursuant to the provisions of section 6 of the *Canada Labor Standards Regulations*, the company alleges that the nature of the work of the employees covered by the averaging plan necessitates an irregular distribution of hours of work.

I should like to bring to your attention the conditions of averaging as prescribed by subsections 6(1) and 6(13) of the *Regulations*, as well as the provisions of subsection 24(2)(i) concerning records to be kept when an averaging plan is in effect. You should also please note the provisions of section 2 of the *Regulations* regarding the posting of notices.”

[39] Following a review of an administrative memo dated July 10, 2002, from Ms. Kathy Lalonde to all crew concerning the company’s averaging policy (Exhibit 5, Tab 17), Mr. Richards acknowledged that the application to Human Resources Development Canada discussed in *Global* (396), *supra*, applied to all Global Operations’ pilots around the world.

#### **(iv) Employee Testimony**

[40] The union’s perspective regarding the effective control of the employees’ working conditions was, *inter alia*, provided in the evidence of Mr. Fincken, who has been a helicopter pilot with Global Operations since 2007. Mr. Fincken initially applied for a position with Global Operations, via the company’s website, while he was living in Brunei. A Global Operations recruiter sent him an email explaining that there might be opportunities for work in Malaysia. Mr. Fincken was told that Global Operations determines the location of work based on the operational requirements and the requirements of the customer in each location. Global Operations applied to obtain a local license on his behalf.

[41] Mr. Fincken followed a two-step recruitment process. The first step was a telephone interview. The second step was an interview in Vancouver. Following that interview, he received a number of documents: a confidentiality agreement, a code of ethics, an employee handbook and an offer of employment, dated April 17, 2007, from Global Operations (Exhibit 24, Tab 1.6) similar to the offer of employment made to Mr. John Smith set forth above. He also received a Global Operations employee number and a confirmation that he was to be paid by Global Operations (Exhibit 24, Tab 1.8).

[42] When Mr. Fincken asked the employer to provide him with a letter of employment in order to rent property, he received a letter from Global Operations, which confirms that he was “recently hired as a permanent employee with CHC Global Operations, located in Richmond, British Columbia, Canada” and indicates that “[a]ll costs associated with overseas assignments including airfare, accommodation and meal allowance(s) will be covered by the Company” (Exhibit 24, Tab 1.7). His statement of pay indicates that it comes from “CHC Global Operations’ payroll.” On his pay stub, there are deductions for Canadian federal income tax, health care programs, pension benefits and workers’ compensation.

[43] In December 2007, he was assigned to a base in Miri, Malaysia, which was totally crewed by Global Operations pilots with the exception of four pilots employed by Malaysia Helicopter Services (MHS). The three aircraft flown at the base were registered under a Canadian AOC. His work rotation was six weeks on, six weeks off. All Global Operations employees, maintenance crew and managers stayed at a local Marriott Hotel. On October 1, 2008, Awan Inspirasi (Awan) took over the contract in Malaysia, apparently because the customer was dissatisfied with the services provided by MHS.

[44] Describing a typical day at work, Mr. Fincken explained that, beginning the evening before, he is notified of a report time by the base manager. In the morning, he rides to the hangar in a vehicle provided by Global Operations. At the hangar, he is provided with a flight program, which indicates the aircraft to fly, the flight to be carried out, the destination and the number of passengers to pick up. That document is prepared by the local oil company. When he gets that information, one of the two crew members looks at the weather forecast and the flight route. They use a special software to determine how much fuel will be required and how many passengers they can carry. They then contact the engineer. One of the pilots inspects the aircraft. They prepare the aircraft 15 minutes prior to departure. The passengers arrive on a bus at the main terminal and are escorted by representatives of the oil company. The paper manifests are prepared by the oil company. Once the pilots receive the paper work, they start the aircraft in accordance with the procedures in the operations manual. The number of hours they fly are charged to the oil company. Prior to October 1, 2008, they entered

the name of “Shell” as the customer. By the date of the hearing, they were instructed to indicate “Awan → Shell.”

[45] In terms of day-to-day supervision, the pilots are told when to report to the base and are given a flying program by the oil company. They utilize the operations manual to fly the aircraft in accordance with the legal requirements and subject to the Flying Staff Instructions (FSI), which are memoranda that vary or add to what is contained in the operations manual. There are also Local Staff Instructions.

[46] Mr. Fincken’s visa and work permits are arranged locally. The first two were arranged by MHS. The last one he obtained was arranged by Awan. When Mr. Fincken travels to and from Malaysia, the travel arrangements are made in Richmond. He first receives a copy of an email that Global Operations, in Richmond, sent to the travel agent, Griffin. Then he receives an email from Griffin to approve his ticket. If he wishes to make a change to the trip, the change must be approved by someone in Richmond.

[47] Pilots are required to undergo regular, recurrent training. One type of training is arranged locally by a Type Rating Examiner or a Type Rating Instructor who Mr. Fincken considered to be Global Operations employees. The other type of training is done on a simulator in Florida and is completed during the pilot’s time off. Travel arrangements to attend that training are also done through Griffin and approved by Richmond. The pay and expenses during training are covered by Global Operations.

[48] Mr. Fincken gave further evidence on the day-to-day supervision of the operations, which will be addressed further in the next section.

## **B - Control of the Operations**

### **(i) The Operations Manuals**

[49] Mr. Rigo has been the Head of Flight Standards for Global Operations in Richmond since October 2007. His job, among other things, is to ensure that Global Operations aircraft are flown according to the same standards around the world. This is largely achieved through the preparation and application of operations manuals. He explained that Global Operations prepares operations manuals for local entities. As far as possible, attempts are made to standardize the manuals. The manuals are approved by the local regulatory authority of the country issuing the AOC and, according to Mr. Rigo, must ultimately incorporate the requirements dictated by the regulatory body in the jurisdiction where it applies.

[50] According to Mr. Rigo, the purpose of the manual is twofold. Firstly, it sets out the day-to-day process of “doing business” (e.g. which aircraft will be utilized; the bases from which they will operate; and the manner in which they are operated). It incorporates the guidelines set out by the International Civil Aviation Organization (ICAO), an agency of the United Nations. Canada has adopted the standards set out by the ICAO. Secondly, the operations manual is required for the local entity to obtain an AOC in order to operate commercial aircraft in that foreign jurisdiction. According to Mr. Rigo, given that fact, the holder of an AOC has total operational control.

[51] Mr. Rigo stated that each country requires a national entity to be the AOC holder. As an example, he pointed out that Thailand requires national citizenship in order to get an AOC. If the aircraft is registered in Canada, the Canadian AOC may be used overseas with the permission of the local regulatory authority in each jurisdiction. For example, in Brunei, Georgia, Azerbaijan and Vietnam, Global Operations was granted permission to operate under a Canadian AOC.

[52] The operations manual must also list a number of “postholders.” A postholder is a position of responsibility that the local entity must have in place before the regulatory body issues the AOC. Postholder positions are normally positions such as accountable manager, maintenance manager, operations manager and chief pilot. Mr. Rigo acknowledged in cross-examination that these

individuals need not be on site or at a base of operations, nor are they generally involved in the day-to-day operations, and they may delegate authority to the operations manager. They are only accountable for the application of the provisions of the operations manual which essentially, for our purposes here, dictate how the pilots are to fly. As a consequence, there would not be “that much” day-to-day supervision since pilots normally follow the same flight routines.

[53] Operations manuals contain the organizational structure of the entity, the procedures, training programs and licence qualifications for the pilots. They are available to crew members operating under the AOC. The manuals are available on Global Operations’ website, at the bases and in the aircraft. They are set out in a standard form. Parts A, B and C are generally required to be on board the aircraft.

[54] Part A contains the general terms and conditions, each individual’s roles and responsibilities, and the operational control and supervision.

[55] Part B contains the standard operating procedures for the aircraft. Each aircraft type must have a Part B.

[56] Part C is specific to each base. It contains the route guide and ensures that pilots are kept aware of the day-to-day operations for each base. Part C does not have to be approved by the regulatory authority in each jurisdiction.

[57] Part D deals with training to ensure the qualifications of all pilots. The training requirements are set by the local regulatory authority. In Canada, they are set by Transport Canada.

[58] Mr. Rigo introduced various operations manuals at the bases from which Global Operations operates. The manuals were prepared by Global Operations. They are all formatted based on a European model and, for the most part, include the same matters with some variations to accommodate the regulatory requirements of the jurisdiction under which they operate. The operations manuals are intended to give direction to the pilots; by design, they are similar. All operations manuals discussed were prepared by Global Operations in Richmond. Each one indicates

that Global Operations operates through associated companies. In fact, Mr. Rigo stated that all local entities, as indicated in their operations manuals, are partially owned by Global Operations and form the group of “associated” companies around the world. As in Canada, other jurisdictions require local ownership. Mr. Rigo acknowledged that, if Global Operations wishes to operate in other jurisdictions, it would have to create a local entity.

[59] While Mr. Rigo essentially took the position that a postholder must be a resident national of the country where the local entity operates, the evidence reflects that Global Operations employees, residing in Richmond, held postholder positions (see TAS’s operations manual, Part A, which lists the management personnel in Thailand - Exhibit 32, Tab 2). Furthermore, it is apparent that, notwithstanding the suggestions to the contrary, Global Operations employees residing in Richmond were otherwise involved in direct operational control. For example, in Malaysia, as reflected in Awan’s operations manual, Part A (Exhibit 35, Tab 2), Mr. Boyle, while not a postholder, holds the position of “Head of Resource Scheduling.” His responsibilities in that capacity include:

... crew hiring, scheduling, remuneration issues and travel, and in particular ensuring that crew scheduling complies with flight and duty time regulations.

[60] Similarly, in Nigeria, Mr. Rigo appears in ACN’s operations manual as the Head of Flight Standards (Exhibit 20A, Tab 3). He explained that he does not have any responsibility under this manual and that his name appears for correspondence purposes only. That said, he acknowledged that he had the authority to issue an airworthiness memorandum, which authority was delegated to him by the operations manager in Nigeria. Moreover, the operations manager responsible for the overall supervision of the operations in Nigeria is Mr. LeGassick, a former Global Operations employee.

[61] For the base in Halifax, the postholders are Ms. Baird and Mr. Clegg, who work in Richmond. It is therefore not a requirement to be on base to be a postholder.

[62] In Thailand, Mr. Guy Smith, who was replaced by Mr. Rigo, appears on the management list. When asked why someone from Richmond was on the management list for the entity in Thailand, Mr. Rigo responded that it is useful for the customer to see who the local entity would be

corresponding with in Richmond. TAS's operations manual is available on Global Operations' website, and refers to two head offices: Thailand and Global Operations'. To hold an AOC in Thailand, the postholders must be employees of TAS.

[63] In Malaysia, there are five aircraft at the base in Miri, four of which are Canadian registered but currently flown under Awan's AOC, which was based upon the operations manual prepared by Mr. Rigo. Prior to October 1, 2008, these aircraft were operating under a Canadian AOC. The Head of Resource Scheduling, who reports to the operations manager, is from Richmond.

[64] In Kazakhstan, the situation is unique in that Global Operations has a contract with the oil company and has contracted with Euro-Asia to use its AOC and aircraft to service that contract. Global Operations was required to use the COM. However, any portion of Part A of the manual that contradicts the regulations in Kazakhstan would be published in the local Part C. There was significant conflicting evidence as to who the postholders in Kazakhstan were. The operations manual lists Ms. Baird and Mr. Clegg. Mr. Rigo suggested that this is "an error" that he only noticed a month ago and is in the process of changing. That said, he agreed that the Kazakhstan authorities approved the COM, which has been in use for at least a year and a half.

[65] Finally, Mr. Rigo indicated that training and competency records for each pilot, irrespective of where he/she are located, are kept in Richmond, as per the requirements of Transport Canada.

## **(ii) The Operations in Malaysia**

[66] In addressing the issue of operational control at the bases, the union led evidence from Messrs. Fincken and Robichaud. Mr. Fincken testified that in Malaysia, prior to October 1, 2008, the operations manual required to be on the aircraft was that of Global Operations. He described how, prior to the launch of Awan, Mr. Mike Price, the Chief Pilot, held a meeting with the pilots and informed them of the change from MHS to Awan. When asked, during the meeting, under which AOC the pilots would be operating, Mr. Price answered that they would be operating under the Canadian AOC until the aircraft were registered in Malaysia.

[67] If he experienced any problems locally, prior to October 1, 2008, Mr. Fincken would report to Mr. Kelly Carter or Mr. Bill Crowe, both Global Operations employees. Following October 1, 2008, he began reporting to Mr. Carter and Mr. Andre Ten Barge, both of whom appear on the respondent's contact list as Global Operations employees.

[68] Mr. Fincken stated that he did not know most of the postholders listed in Awan's new operations manual. He stated that he knew Mr. Kwee, who was previously the Chief Pilot for MHS, but that person did not perform the role of base manager. To his knowledge, Mr. Ten Barge and Mr. Kelly Carter are the base managers. In reality, the base managers in Malaysia remain the same as they were prior to October 1, 2008. Furthermore, according to Mr. Fincken, nothing has changed in terms of the day-to-day operations in Malaysia, notwithstanding the naming of different postholders in the new operations manual.

[69] Mr. Fincken explained that he put a number of suggestions for improvement at the base to Mr. Mike Price, the Chief Pilot in Malaysia, but the response has always been that any changes should go through Mr. Guido Lepore, in Richmond, whose name appears on the Canadian AOC.

[70] During his testimony, Mr. Fincken was shown a document (Exhibit 41), which purports to be a "Letter of Appointment" (LOA), offering a position of pilot with Awan, which was the local entity to whom Mr. Fincken was assigned by Global Operations. According to the evidence, all pilots at Awan were asked to sign the document, or at least the final page of that document, that was provided to them, in order that new work permits could be obtained on their behalf. The phrase "purports to be" is used purposively above, in that it became clear from the evidence that the document was not in fact a formal hiring document but rather a "dummy LOA" to accelerate the process of obtaining a new work permit and facilitate the transfer of the operating authority in Malaysia to Awan. According to the evidence given by Mr. Fincken, the last page of Exhibit 41 had been sent to him for signature, and he had not seen the initial five pages. It is apparent from a review of the evidence that the purpose of the document was not to transfer Mr. Fincken's employment status to Awan, but rather to simply provide the "dummy" documents necessary to complete the "paper work" in Malaysia; these documents had no effect on the employment relationship between Global Operations and its pilots there. This is further evidenced by the email record of Global Operations' office

manager (Exhibit 24, Tab 2), who requested that the pilots sign the final page of Exhibit 41. It states as follows:

Hi all,

We (Shirley & Sarah - Al, Beatrine and I - CHC) are trying to accelerate the process of new work permit under the new company - Awan Inspirasi before hands. We came-out with tons of paper works. One of it is the data base and dummy LOA.

This LOA is just the paper works, does NOT exist and it is has NOTHING to do with your status with CHC. That is why it comes only with the last page of the LOA. We had everybody on the base signed- Mike Price, Bill Crowe and every one.

Kindly sign the dummy LOA attached, scan and send it back to me ASAP.

Should you have further queries, please direct your questions directly to Mike Price.

Thanking everyone advance for your kind co-operation and support.

...

Office Manager  
CHC Global Operations (Miri)

[sic]

[71] There was no evidence to suggest that signing the document (Exhibit 41) had any impact whatsoever on Mr. Fincken's, or any other pilot's, working relationship with Global Operations.

[72] Finally, in this respect, Mr. Fincken was clear that at no time was he told that he would be an employee of, or seconded to, any company other than Global Operations. It was only as a result of this hearing, and his impending testimony, that he learned of the respondent's position that he was not, in fact, an employee of Global Operations.

### **(iii) The Operations in Kazakhstan**

[73] Mr. Robichaud is a touring pilot and the base manager in Kazakhstan. He has been a Global Operations employee for over 22 years. There are currently two aircraft in Kazakhstan, which are operated by Global Operations and Euro-Asia. Mr. Robichaud testified that the operations manuals used in Kazakhstan are the Canadian manuals approved by the Kazakhstan civil aviation committee. Those documents along with the approvals have been on board the aircraft since the start

of the operation over one year ago. Currently, there are one or two Global Operations pilots on site, three in a busy season. Most pilots have been reassigned from Nigeria, because the type of aircraft flown is the same. According to Mr. Robichaud, Global Operations pilots fly in the same aircraft as pilots employed by Euro-Asia. He indicated that Euro-Asia operated in Kazakhstan prior to Global Operations' involvement.

### **III - POSITIONS OF THE PARTIES**

#### **A - Global Operations**

##### **(i) True Employer**

[74] Global Operations submits that the test to determine the true employer must focus on the identity of the entity that has fundamental control over the work. It argues that since operational control must, by regulation, be in the hands of the AOC holder, the day-to-day operations must consequently also be within the fundamental control of the AOC holder. Given that CHC Global Operations Canada (2008) Inc. holds the AOC in Halifax, Vietnam, Brunei, Georgia and Azerbaijan, it submits that it is the true employer of the pilots working at the bases in those locations. This concession also applies to the bipartite relationship in Equatorial Guinea, where a couple of aircraft are flown under a Canadian AOC and others are flown under a South African AOC.

[75] However, in all the other operations, Global Operations takes the position that its role is that of an employment agency rather than that of an employer. While it acknowledges its role in paying and disciplining employees, it argues that the issue of pay and discipline is less determinative, in these circumstances, than the applicable criteria to determine day-to-day control.

[76] In this regard, Global Operations referred to *Saskatchewan Wheat Pool*, 2002 CIRB 173, a decision that outlines the test to be applied in the context of a "tripartite relationship," which it suggests is the case here. Taking each of the criteria set out in *Saskatchewan Wheat Pool*, *supra*, Global Operations makes the following arguments:

## **1 - Payment of Wages and Benefits**

[77] Although Global Operations puts the money in the pilot's bank account, the local entity bears the costs, because the local entity has the contract with the oil company. Global Operations further submits that the local entity bears the burden for extra hours of travel.

## **2 - Access to Employment**

[78] There are certain aspects of employment that are clearly within Global Operations' control, but the local entity determines whether the pilots continue to work once the probationary period is over. Global Operations referred to the incident in Nigeria (described earlier) where a pilot was advised that the local entity no longer wished him to stay. It also referred to the experience in Nigeria where ACN decided to no longer use Global Operations fixed-wing pilots and instead employed another service provider, APS. The fixed-wing pilots were given an opportunity to resign from Global Operations and to go work for APS. According to Global Operations, while ACN currently chooses to utilize Global Operations' services for helicopter pilots, it could decide to replace Global Operations with another service provider "tomorrow."

[79] The ongoing qualifications to stay in operation are set locally, as is the consequent need for pilots. Global Operations points out that, when the local entity asks for a number of pilots and those pilots are sent to the local entity, the responsibility for the pilots' licensing validation and visas rests with the local entity.

## **3 - Establishment of Working Conditions**

[80] Working conditions for the pilots (i.e. flying) are established by virtue of the contract between the local entity and the oil and gas company and are governed by the operations manual approved by the local entity. Global Operations asserts that the broader terms and conditions of employment, set when pilots are hired, are only peripheral to the day-to-day control of the pilots' work.

[81] It argues that working conditions, such as schedules, hours of work, flying assignments, living arrangements and the owners of the equipment being used, are the elements that actually affect a pilot's work.

#### **4 - Performance of Work**

[82] The operations manuals dictate how operations are carried out at each base. The approval of these operations manuals is necessary for granting an AOC. That said, the standards set out in the operations manuals are ultimately determined by the local regulatory authority. An AOC can only be granted to a local entity, which, in turn, is constrained by the regulatory authorities. According to Global Operations, it follows that operational control, relating to the performance of work, must be in the hands of the local entity. Global Operations submits that the base operations are, in fact and by regulation, run by the local entity. If it were otherwise, it would be in breach of the AOC. All things said, Global Operations explains that it is not in the business of overseeing pilots on day-to-day basis; it is in the business of assigning pilots.

#### **5 - Employee Perception**

[83] The employees no doubt see Global Operations as their employer; however, there is as much evidence that points to the local entity as the employer as there is evidence that points to Global Operations. In this respect, Global Operations suggests, *inter alia*, that the local entity determines how many pilots are required; that pilots cannot enter the country without a letter from the local entity; that pilots are integrated into the local entities' operations; that they fly aircraft registered to the local entity and leased or owned by those entities; and that, in the case of ACN, they wear identical uniforms.

[84] While acknowledging that its "brand" is "all over the place," Global Operations argues that it is not a branding issue but rather a marketing strategy: Global Operations is the largest helicopter company in the world and, when a customer wishes to hire a helicopter service, it looks for some assurances regarding the expertise and experience of the pilots involved. This pilot expertise and experience, according to Global Operations, is simply a service that it provides on request.

[85] The previous paragraph underscores Global Operations' acknowledgment that it is much more than an employment agency, particularly having regard to its broad expertise in providing chartered helicopter services, training and drafting of operations manuals. Global Operations acknowledges that its expertise is part of the service that it provides; however, this service is not imposed, it is requested by the local entity and duly paid for. Global Operations contends that, once those services are provided, the manner in which they are ultimately utilized is left to the local entity, which ultimately exercises fundamental control over the pilots working at the bases operating under a foreign AOC.

## **(ii) Appropriate Bargaining Unit**

[86] With respect to the appropriate bargaining unit, Global Operations takes the position that, if the Board includes the pilots as requested in the bargaining unit proposed by the union, it must include all foreign nationals who perform the same work as the pilots at the local bases, considering that fundamental control is the correct test to apply. It contends that, to do otherwise, the Board would have to find that those employees who work side by side with the foreign expats are not under the same control as the expats.

## **B - The Union**

[87] According to the union, while there have been several formulations of the test to determine the true employer, the goal is to determine the appropriate bargaining partner. The union urges the Board to refer to the objectives of the *Code* and argues that the factors used to determine the true employer must be assessed in light of the *Code*'s objective to promote access to collective bargaining. In that context, the union submits that all the pilots' terms and conditions of employment referred to in the evidence, such as the determination of where they work, their salary, their rotations and schedules - which affect the pilots' employment conditions, have been established as falling within the operational control of Global Operations.

[88] The union disagrees with Global Operations' interpretation of the notion of fundamental control. It submits that the Board should look at the fundamental control of the working conditions, not the fundamental control of the work. The union distinguished this case from cases referred to by Global Operations, which apply in the context of a tripartite relationship. In those cases, the union submits that the placement agencies did not dictate standards of operations, nor did they maintain operations manuals or second high-level management to customers for extended periods of time to provide operational expertise and experience.

[89] The union submits that the facts before the Board do not disclose a tripartite relationship; rather, they make it apparent that Global Operations acknowledges full or partial ownership in the local entities. In that regard, the union referred to *Canadian Offshore Marine Ltd. v. Seafarers International Union of Canada*, [1973] F.C. 1339; it submits that the relationship between the two potential employers in that case is similar to the relationship between Global Operations and the local entities here. In that case, the majority of the Federal Court of Appeal upheld an order issued by the Canada Labour Relations Board (CLRB) certifying the union as the bargaining agent for a unit of employees of Canadian Offshore Marine Ltd. The CLRB had found that Canadian Offshore Marine Ltd. was the true employer of non-licensed personnel working on ships belonging to Offshore Marine Limited (Offshore), which was a United Kingdom company that owned 90% of the shares of Canadian Offshore Marine Ltd. In that case, Canadian Offshore Marine Ltd. had reported the employees in question as its employees for Canadian income tax purposes, Canada Pension and Canadian unemployment insurance legislation. The majority of the Court was of the opinion that those acts constituted an admission by Canadian Offshore Marine Ltd. that it was the true employer of the employees in question. In the absence of evidence that the reports to the Canadian Government were made falsely, the majority of the Court was not convinced that Canadian Offshore Marine Ltd. was acting only as an agent of Offshore.

[90] The union suggests that the granting of an AOC and the fact that an operations manual must be submitted to obtain one are neither relevant nor determinative of the issue; the important factor for the Board's consideration must be the employment relationship and not aircraft licensing requirements. It submits that every single indicia of an employment relationship between the pilots affected by this application and Global Operations exists in the present case. To underscore its

position in this respect, it points out that the majority of relevant factors have already been decided in *Global (396), supra*. According to the union, the facts in *Global (396), supra*, demonstrate that Global Operations sets uniform terms and conditions of employment, administered in Richmond, which apply to any pilot assigned to any base in the world, and establish that Global Operations is responsible for hiring, compensating, training, assigning, reassigning, dismissing and disciplining the pilots.

[91] The union submits that the pilots perceive Global Operations as their true employer. It refers to a number of letters and memoranda to the pilots that make generous use of the word “employees” to refer to the pilots who are the subject of this application.

[92] The union asserts that, based on the evidence, the base managers, not the postholders, exercise day-to-day control over the pilots. It contends that there is not one example - in *Global (396), supra*, or in this case - of a base manager who is employed by an entity other than Global Operations. The union submits that Global Operations has failed to provide any evidence to show that the base managers are employed by the local entity.

[93] In any event, base managers operate the base pursuant to the local entities’ operations manuals. These manuals, the union noted, are all very similar and borrow heavily from the COM. The union also points to the fact that the operations manuals consistently refer to Global Operations. With the exception of Awan, all operations manuals contain Global Operations’ organizational charts. According to the union, the terms and conditions of employment do not change based on whether the pilots operate a Canadian-registered aircraft or a Malaysian-registered aircraft. In all cases, the aircraft are flown pursuant to the operations manuals prepared by Global Operations.

[94] The union disagrees with Global Operations’ suggestion that fundamental control rests with the postholders or that the postholders have to be employees of the entity holding the AOC. Furthermore, it suggests that, according to the evidence, postholder positions are not restricted to nationals of the country in which the local entity operates and that, in any event, postholders assign their authority to the base manager or to a similar position.

[95] In short, the union submits that, given the objectives of the *Code* and the facts before the Board, Global Operations is the true employer of the pilots and that the bargaining unit applied for, which excludes foreign nationals, is appropriate for collective bargaining.

#### **IV - Analysis and Decision**

[96] The principal issue to be determined is whether Global Operations, which has already been found to be a federal undertaking, is the true employer of the pilots affected by the certification application. Secondly, the Board must address the issue of the appropriateness of the unit applied for. While no evidence was called with respect to the secondary issue, Global Operations nevertheless submitted that, if it were found to be the true employer of the pilots, then the appropriate bargaining unit should also include all foreign nationals working at the same bases as the pilots in the unit requested by the union.

[97] While the parties disagreed, and submitted argument, on the issue of whether Global Operations' relationship with the various local entities was or was not a tripartite relationship, any debate in that respect is, in this Board's view, largely academic. From a labour relations perspective, the salient consideration in determining the true employer is the finding, based on established criteria, of who exercises fundamental control over the subject employees. This applies irrespective of the categorization used to describe a relationship.

[98] In *Saskatchewan Wheat Pool*, *supra*, a case that dealt comprehensively with a tripartite relationship, the union filed an application for review to amend the scope of the bargaining unit to include truck drivers employed in the operation of tractor-trailer units hauling grain for Saskatchewan Wheat Pool. Saskatchewan Wheat Pool took the position that it never employed truck drivers and that it had entered into a contract with Transpersonnel to provide drivers to operate leased tractor-trailer units. After a review of the evidence and the applicable principles, the Board concluded that Saskatchewan Wheat Pool retained fundamental control over the employees and was the "real" employer of the drivers. Notwithstanding its categorization of the relationship as "tripartite," the Board relied on the long-standing criteria established in *Nationair (Nolisair*

*International Inc.*) (1987), 70 di 44; and 19 CLRBR (NS) 81 (CLRB no. 630) [*Nolisair*], in reaching its conclusion regarding the identity of the true employer.

[99] The critical considerations applied by the Board in determining who exercises fundamental control over employees are set out in *Nolisair*, *supra*, as follows:

1. The Board will assess the factual situation but will not give decisive weight to agreements where they are not confirmed by the facts.

Thus, in our jurisdiction, significant weight cannot be given to the payment of wages. The *Canada Labour Code* speaks of an employee (employé) and makes no reference to remuneration in the definition of this term, contrary to the Quebec Labour Code, for example, which gives a salaried employee (salarie) freedom to associate. More significant will be the identification of the person who does the paying, who ultimately bears the cost, and the impact this has on the employment relationship.

2. Another indicator will surely be the person who controls access to employment: the person who hires or who gives the work to be performed. Here, regard must be had to the selection process and the criteria used. The person who in fact has the power to approve the selection and influence it decisively is more akin to an employer than a mere occasional user. The lessee who retains or exercises a veto or the equivalent over the selection of personnel is certainly not extraneous to the employment relationship.

3. A third criterion concerns the actual establishment of working conditions. Who actually establishes working conditions? An agency that is merely a disguised employment office, a kind of clearing house with a title, could hardly be termed an employer. In this situation, it would merely be an agent acting on behalf of the employer, the equivalent of the personnel department of a company of which it is an integral part and whose wishes it carries out as an employee.

4. Another criterion concerns the actual performance of work. How is the work performed on a day-to-day basis? Who assigns the work? Who in fact determines and approves the standards governing the performance of the work? In this regard, who has the last word, the final say? Is it the person who evaluates, who decides, who determines that an employee will work or be terminated because of his performance? What expertise does the agency have with respect to the work performed? What is the degree of similarity between the duties performed by regular employees and those performed by employees from outside?

5. Other criteria may also assist the Board in its determination: the employees' perception, their identification with the company, their degree of integration into the company, the fortuitous, temporary or permanent nature of their employment with the leasing company.

Finally, it is essential that these criteria, whose significance may vary from case to case, be weighed without losing sight of the purpose of the legislation, namely, to promote access to collective bargaining: ...

(pages 74-75; and 110-111)

[100] The facts in this case, in light of the above criteria, are examined below.

[101] As indicated at the outset, by directive of the Board and agreement of the parties, the findings of fact made in *Global (396)*, *supra*, apply in the present case. Global Operations' application for reconsideration of that decision was dismissed in *CHC Global Operations, a Division of CHC Helicopters International Inc.*, 2008 CIRB 402, and the application for judicial review of *Global (396)*, *supra*, was dismissed by the Federal Court of Appeal in *CHC Global Operations, a division of CHC Helicopters International Inc. v. Global Helicopter Pilots Association*, 2008 FCA 344, on the basis that appeals from interlocutory decisions should only be made in exceptional circumstances.

[102] In addition to the further findings of fact made herein, the Board made the following findings, which remain relevant to the true employer determination, in *Global (396)*, *supra*:

[72] ... It is Global Operations, the Canadian business operating out of Richmond, British Columbia, that constitutes the federal business or undertaking that carries on a business of chartering helicopters to service the oil and gas industry operating in Canada and around the world. ...

...

[87] ... The pilots, regardless of their country of origin, are hired in Richmond, British Columbia. This is the situs of their employment contract. All the pilots receive their initial orientation at Global Operations in Richmond, British Columbia. Global Operations provides for standardized training of all pilots by its own instructors, which is arranged and co-ordinated by Global Operations in Richmond. Chief Pilot Lepore is located in Richmond, British Columbia, and is responsible for establishing the common standards of competence for all pilots.

...

[89] Global Operations manages the evaluation and renewal of pilots' licenses. Global Operations has developed a program of license conversion in which pilots may have their primary license converted to a Canadian license, thereby simplifying the licensing of pilots employed by Global Operations in different parts of the world.

[90] All pilots perform the same work, both within and outside Canada. The employee handbook prepared by Global Operations, which applies to all pilots regardless of their location in the world, sets out the common terms and conditions of employment. Global Operations states that as a matter of best practices it applies the Canadian regulatory framework which reflects certain minimum standards set by Canadian legislation to all pilots regardless of where they are assigned. All these pilots work under these terms and conditions.

[91] Global Operations coordinates all visas and work permits from Richmond, British Columbia, although the local entity will assist with the process.

...

[93] Global Operations is responsible for the assignment and reassignment of all pilots. If a pilot refuses an assignment he/she can be considered as dismissed from employment. Global Operations in Richmond is responsible for all discipline and dismissal of pilots that it has retained on its payroll. It

has also applied to HRDC (Human Resources Development Canada) [now HRSDC] and received permission to average the wages of all its pilots. Global Operations is reimbursed for the payment of wages it makes on behalf of the pilots.

[94] Finally, Global Operations provides administrative and technical support to local entities and to pilots. This takes the form of such things as Flight Operations and Maintenance manuals, which are essential to not only the work of the pilots but also to the ability of any of its partner airlines to obtain an AOC—a license is required to operate a commercial airline in all countries.

[103] Global Operations is the largest helicopter company in the world. It has an acknowledged experience and expertise in providing chartered helicopter services. It operates its own base in Halifax; it operates under its own AOC in Brunei, Azerbaijan, Georgia and Vietnam. The corporate relationship between Global Operations and the other local entities varies. Some are owned in full and others in part, except Euro-Asia in Kazakhstan, which is independent. However, Global Operations has an agreement with Euro-Asia whereby its pilots, in servicing the contract with the oil company, operate pursuant to the COM.

[104] With respect to the locations at issue here, Global Operations' principal argument throughout is that since operational control must, by legal directive of the regulating state, be in the hands of the AOC holder, the day-to-day operations must accordingly be within the fundamental control of the AOC holder. According to the respondent, since the AOC can only be granted to a foreign entity, Global Operations does not, nor can it, have fundamental control over the pilots who work at bases that operate under an AOC registered to a foreign entity.

[105] Although it agrees that the proper test is that of who exercises fundamental control over the employees, the Board does not agree that the AOC holder, by definition or otherwise, necessarily exercises the requisite fundamental control to designate it as the true employer for labour relations purposes.

[106] For the purposes of the *Code*, the determination of fundamental control is not as simplistic as determining where an aircraft is registered or who has been granted the regulatory authority to fly the aircraft. In *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, the majority of the Supreme Court of Canada affirmed that the essential test for identifying the true employer remains more complexe than that:

... The application of the fundamental control test leads to an analysis of which party has control over, *inter alia*, the selection, hiring, remuneration, discipline and working conditions of temporary employees and to a consideration of the factor of integration into the business. ...

(pages 1047-1048)

[107] It is apparent that AOCs, replete with the designation of a postholder in the operations manuals, are regulatory requirements necessary to operate commercial aircraft. Most foreign jurisdictions require that a local entity with local ownership be the holder of the AOC. However, it is equally apparent that the local entity may, in fact, act as an agent of Global Operations for the purposes of conducting business overseas in accordance with the regulations of the country in which it operates. Given this fact, and in keeping with the applicable jurisprudence, the Board must look beyond that corporate structure, and the designated name on the AOC, to determine which entity actually exercises fundamental control over the employees (see *Newfoundland Steamships Ltd.* (1981), 45 di 156; and 2 CLRBR (NS) 40 (CLRB no. 331)).

[108] According to the evidence, postholders, who Global Operations argued were essential to the granting of an AOC and determining the exercise of fundamental control, are not involved in the day-to-day operations of any of the bases in the bargaining unit applied for. They are merely accountable to the regulatory authority, should the need arise, to ensure that flight operations are carried out pursuant to the operations manual. In fact, there is generally little day-to-day supervision required. The pilots usually follow the same routine and procedures established in the operations manuals, which provide them with directions to operate on a day-to-day basis. All the operations manuals referred to were prepared by Global Operations in Richmond. And all manuals reflect that Global Operations operates through associated companies, which include all entities in all the countries in which the pilots who are the subject of this application carry out their assignments. Further, as reflected by the management list for Awan, in Malaysia, and the role of the Head of Resource Scheduling (Exhibit 35, Tab 2), even where the AOC is granted to the local entities, Global Operations maintains a hand in the operation of the base and operational control of its pilots there.

[109] The affected pilots report to a base manager. The base managers are either employed by or seconded from Global Operations. In terms of day-to-day supervision, the following generally

occurs: pilots are instructed by the base manager when to report to the base; when they arrive, they are given a flight program provided by the customer oil company; the flight program indicates which aircraft the pilot is to fly, the flight to be carried out, the destination and the number of passengers to pick up. The pilots then utilize the operations manuals to fly the aircraft in accordance with the legal requirements and the FSI. At the end of the day, the number of hours the pilots fly are charged to the customer oil company.

[110] Although, just prior to the hearing, there had been a change in the local entity in Malaysia (from MHS to Awan), the evidence disclosed that the base managers were provided by Global Operations and the day-to-day operations remained the same despite the naming of different postholders in the new operations manual. The evidence indicated that, although a change in the local entity in Malaysia was effected to accommodate a new AOC application, this had “nothing to do” with the pilots’ status with Global Operations, and the signing of a new employment contract with Awan was nothing more than a paper trail to “accelerate the process of new work permit under the new company - Awan Inspirasi. [*sic*]” As such, it is difficult to conclude, in light of the documents (Exhibits 41 and 24, Tab 2), and the evidence surrounding them, that Awan became the employer of the pilots in question or that the pilots’ employment status with Global Operations had changed.

[111] With respect to the control of assignments: the Board already found in *Global* (396), *supra*, that Global Operations is responsible for the assignment and reassignment of all pilots who are the subject of this application. That fact is also confirmed by the evidence introduced at the present hearing. According to the evidence, Global Operations is responsible for the recruitment of employees and the selection process. It decides whether a pilot meets the requisite standards established by the company in order to be assigned to a base. Further, when a pilot has passed the probationary period set by Global Operations, and is not assigned to a particular base, that pilot still remains on Global Operations’ payroll until an assignment opens up.

[112] All the pilots hired by Global Operations are governed by the same terms and conditions of employment and by the company’s employee handbook, irrespective of their location and subject only to local variations dictated by the laws of the country in which they operate. When hired, pilots

are required to sign a confidentiality agreement and a code of ethics with Global Operations. They are also provided with a Global Operations employee number. They must acknowledge that they may be assigned to dangerous locations and, if so, they will receive incentive pay from Global Operations to compensate for the danger. While it was suggested that the local entities established incentive pay, the memoranda from Global Operations (Exhibits 5, Tab 14, and 23, Tab 5-E) clearly indicate that incentive pay is established by Global Operations.

[113] Mr. Richards acknowledged that the terms and conditions of employment, salary, vacation and holidays are set by Global Operations. None of the pilots negotiate those conditions with the local entity. If an employee is not specifically assigned, Global Operations is the employer and bears the cost of that pilot's wages. The pilots must enroll in a mandatory company pension plan and must continue to make contributions to that plan, even when they are assigned overseas. When pilots are reassigned from one local entity to another, their accumulated years of service are recognized by Global Operations in the new location.

[114] As addressed in *Global (396)*, *supra*, and at the hearing in this matter, Global Operations applied and received permission from HRDC to "average the hours of work of helicopter pilots and aircraft mechanic engineers, flight coordinators and customer service agents working at Nova Scotia and various international locations over a fifty-two (52) week period." (Exhibit 5, Tab 18). While not, in itself, determinative of the true employer issue, this indicates that Global Operations has treated pilots, who are assigned abroad, in a similar fashion as those who work at the base in Nova Scotia.

[115] Moreover, with respect to the actual performance of work, the evidence clearly indicates that Global Operations is in charge of disciplining and terminating the pilots (Exhibit 24, Tab 7).

[116] Before pilots hired by Global Operations are assigned to a local entity, they must complete a probationary period and meet the requisite standards established by the company. Global Operations assesses whether the pilot has completed the probationary period, and a pilot who fails the requisite standards is dismissed. Global Operations oversees the pilots' training requirements. Pilots are required to undergo regular, recurrent training. One type of training is arranged locally and is done

on the aircraft. Some of the training captains are employed by Global Operations, depending on the type of training required. The second type of training is done on a simulator and is completed during the pilot's time off. Travel arrangements to attend that training are arranged through Griffin and approved by Global Operations in Richmond. Global Operations pays for the training and expenses of the pilots.

[117] Training and competency records for pilots, whether based in Halifax or abroad, are kept in Richmond, as required by Transport Canada. Conversely, Global Operations does not keep training and competency records for foreign nationals who are hired by the local entity.

[118] Given all of the above and the fact that, by its own admission, Global Operations has an acknowledged experience and expertise in providing chartered helicopter services, and the requisite knowledge of the work performed by helicopter pilots, this calls into question the suggestion that Global Operations is only a recruitment agency.

[119] In addition, the evidence presented at the hearing suggested that the pilots in question perceive Global Operations as their true employer. Pilots receive regular memoranda from Global Operations identifying them as "employees" of the company and they are considered to be an integral part of Global Operations' organization.

[120] The imposition of discipline, the payment of wages and benefits, the direction of vacation time, work assignments, rotation schedule, the recognition of years of service between assignments, and training are all fundamental terms and conditions of employment of the pilots in question, over which the local entities have little or no influence. None of the lengthy evidence regarding the local requirements for an AOC, and the naming and functions of postholders in the operations manuals, served to diminish the apparent fundamental control over the working conditions of the employees, which control rests with Global Operations.

[121] Notwithstanding the corporate structure and the varying degrees of relationship between Global Operations and the local entities in question, the evidence was conclusive that Global Operations controls access to employment of the pilots in question, establishes the working

conditions of those pilots, controls the performance of work, and is perceived as the true employer of the pilots who are the subject of this application. Global Operations hires and assigns the pilots to the various bases around the world. It sets out the terms and conditions of employment and establishes the standards necessary to assign a pilot to a base. Global Operations has ultimate control over the selection of pilots and the determination of whether a pilot will be terminated or disciplined. The pilots maintain the same terms and conditions of employment when they are assigned from one base to another and their years of service are recognized by Global Operations. When not assigned to a particular base, a pilot remains part of Global Operations and continues to receive a salary from Global Operations.

[122] When all the factors set out in *Nolisair, supra*, are considered, the evidence overwhelmingly points to the fact that Global Operations exercises fundamental control over the working conditions of the pilots who are the subject of this application. A finding in this respect is not only consistent with the facts, it is also conducive to sound labour relations and consistent with the objectives of the *Code* to promote access to collective bargaining.

### **Appropriate Bargaining Unit**

[123] No evidence was called with respect to the appropriateness of the bargaining unit applied for. The only issue to address in that respect is Global Operations' suggestion that all foreign nationals at all the bases where pilots in the proposed bargaining unit fly should also be included in the unit since, as it argued, they fly "cheek by jowl" with them. With respect, the Board disagrees.

[124] The Board has already made a finding in this regard in *Global (396), supra*:

[103] Again, it should be recalled that the application for certification does not include foreign nationals. These are pilots who are citizens, for example, of Thailand or Nigeria. Pilots of TAS who are Thai nationals are paid differently than the expat pilots. Their wages are set in Thailand. In Nigeria, the Nigerian pilots are unionized and negotiate their own terms and conditions of employment. These pilots may be trained in Canada, but that may be the last time that they see Canada. They are citizens and residents of the foreign country in which they work, and employees of the domestic commercial airline in that foreign country. The application for certification rightly excludes such persons from the bargaining unit, because they would not meet any of the required factors under sections 2 and 4 of the *Code*.

[125] While the duties performed by foreign nationals may be similar to the duties performed by the pilots assigned by Global Operations, there was no evidence to suggest that Global Operations exercises fundamental control over the work of the foreign nationals in the manner it does over the work of the pilots subject to this application. There was no indication that the foreign nationals are governed by the same terms and conditions of employment as Global Operations employees and/or are hired and assigned by Global Operations to work overseas. On the contrary, as *Global (396)*, *supra*, determined, the foreign nationals are paid differently than the pilots in question and negotiate their own terms and conditions with the local entity. This separation from Global Operations is further evidenced by the fact that the foreign nationals in Nigeria who work for ACN have been unionized under Nigerian law and that the unionization of the foreign nationals in Nigeria has not affected the terms and conditions of employment of the pilots who were hired and assigned by Global Operations to work in Nigeria.

[126] Accordingly, the Board concludes that Global Operations is the true employer of all the pilots in the unit described in the union's certification application. In addition, the Board is satisfied that the bargaining unit applied for is appropriate for collective bargaining and that the majority of the employees in the unit wish to be represented by the Association.

[127] Therefore, the Board grants the application for certification. A copy of the certification order is attached to this decision.

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Richard I. Hornung Q.C.  
Vice-Chairperson



Order No.: 9674-U

## IN THE MATTER OF THE

Canada Labour Code

- and -

Global Helicopter Pilots Association,

applicant union,

- and -

CHC Global Operations (2008) Inc.,  
Richmond, British Columbia,

employer.

**WHEREAS** the Canada Industrial Relations Board has received an application for certification from the applicant union as bargaining agent for a unit of employees of CHC Global Operations (2008) Inc., pursuant to section 24 of the *Canada Labour Code (Part I - Industrial Relations)*;

**AND WHEREAS**, following an oral hearing into the determination of true employer and consideration of the submissions of the parties concerned, the Board has found that CHC Global Operations (2008) Inc. is the true employer of the employees in question;

**AND WHEREAS**, following investigation of the application and consideration of the submissions of the parties concerned, the Board has found the applicant to be a trade union within the meaning of the *Code* and has determined the unit described hereunder to be appropriate for collective bargaining and is satisfied that a majority of the employees of the employer in the unit wish to have the applicant trade union represent them as their bargaining agent;

**NOW, THEREFORE**, it is ordered by the Canada Industrial Relations Board that the Global Helicopter Pilots Association be, and it is hereby certified to be, the bargaining agent for a unit comprising:

**Order No.: 9674-U**

*“all pilots employed by CHC Global Operations (2008) Inc., excluding full-time managers, pilots whose primary duty is non-flying base manager, and foreign national pilots employed by CHC partner companies.”*

**ISSUED** at Ottawa, this 30th day of June, 2009, by the Canada Industrial Relations Board.

Richard I. Hornung, Q.C.  
Vice-Chairperson

**Reference: File No. 26066-C**



N° d'ordonnance : 9674-U

## CONCERNANT LE

Code canadien du travail

- et -

Global Helicopter Pilots Association,

syndicat requérant,

- et -

CHC Global Operations (2008) inc.,  
Richmond (Colombie-Britannique),

employeur.

**ATTENDU QUE** le Conseil canadien des relations industrielles a reçu du syndicat requérant une demande d'accréditation à titre d'agent négociateur d'une unité d'employés de CHC Global Operations (2008) inc., en vertu de l'article 24 du *Code canadien du travail (Partie I - Relations du travail)*;

**ET ATTENDU QUE**, à la suite de l'audience tenue pour déterminer le véritable employeur et de l'examen des observations des parties en cause, le Conseil a constaté que CHC Global Operations (2008) inc. est le véritable employeur des employés en question;

**ET ATTENDU QUE**, après enquête sur la demande et examen des observations des parties en cause, le Conseil a constaté que le requérant est un syndicat au sens où l'entend ledit *Code* et a déterminé que l'unité décrite ci-après est habile à négocier collectivement et est convaincu que la majorité des employés dudit employeur, faisant partie de l'unité en question, veut que le syndicat requérant les représente à titre d'agent négociateur.

**EN CONSÉQUENCE**, le Conseil canadien des relations industrielles ordonne que la Global Helicopter Pilots Association soit accréditée, et l'accrédite par la présente, agent négociateur d'une unité comprenant :

**N° d'ordonnance : 9674-U**

*« tous les pilotes qui travaillent pour CHC Global Operations (2008) inc., à l'exclusion des gestionnaires à temps plein, des pilotes exerçant principalement la fonction de responsable de base au sol, et des ressortissants étrangers employés comme pilote par les sociétés affiliées à CHC ».*

**DONNÉE** à Ottawa, ce 30<sup>e</sup> jour de juin 2009, par le Conseil canadien des relations industrielles.

Richard I. Hornung, c.r.  
Vice-président

**Référence : n° de dossier 26066-C**