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Dear Sir/Mesdames:

In the matter of the *Canada Labour Code (Part II–Occupational Health and Safety)*
and an application for an interim order pursuant to section 19.1 and a stay of a
direction pursuant to section 146(2) thereof filed by Air Canada, applicant.
(039391-C)

A panel of the Canada Industrial Relations Board (the Board), composed of Ms. Natalie Zawadowsky, Vice-Chairperson, sitting alone pursuant to section 14(3.1) of the *Canada Labour Code* (the *Code*), considered the above-noted application.

Section 16.1 of the *Code* provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to determine this matter without an oral hearing.

I. Nature of the Application

On December 8, 2025, Air Canada (the applicant) filed an application to appeal a direction that had been issued on December 1, 2025, by an official delegated by the Head of Compliance and Enforcement (ODH) of the Labour Program of Employment and Social Development Canada.

Air Canada simultaneously requested a stay of that direction pending a resolution on the merits of the issues raised in the application to appeal.

II. Background and Facts

The ODH had issued the direction following an investigation conducted on January 20, 2025, regarding an employee complaint related to the application of section 128(5)(b) of the *Code* in the workplace operated by Air Canada.

In the direction, the ODH found that Air Canada had failed to ensure that the interpretations in the Air Canada Flight Attendant Manual 2.20.3.1 (FAM) and in the Flight Operations Manual 12.12 (FOM) were compliant with section 128(5)(b) of the *Code*. Air Canada was required to terminate the contravention by no later than December 9, 2025, and to take steps to ensure that it did not continue or reoccur by no later than December 16, 2025.

Section 125 of the *Code* describes the process for employees to engage in a work refusal. Sections 125(3) and (4) pertain to work refusals of employees working on a ship or an aircraft that is “in operation”:

125 (3) If an employee on a ship or an aircraft that is in operation has reasonable cause to believe that

(a) the use or operation of a machine or thing on the ship or aircraft constitutes a danger to the employee or to another employee,

(b) a condition exists in a place on the ship or aircraft that constitutes a danger to the employee, or

(c) the performance of an activity on the ship or aircraft by the employee constitutes a danger to the employee or to another employee,

the employee shall immediately notify the person in charge of the ship or aircraft of the circumstances of the danger and the person in charge shall, as soon as is practicable after having been so notified, having regard to the safe operation of the ship or aircraft, decide whether the employee may discontinue the use or operation of the machine or thing or cease working in that place or performing that activity and shall inform the employee accordingly.

(4) An employee who, under subsection (3), is informed that the employee may not discontinue the use or operation of a machine or thing or cease to work in a place or perform an activity shall not, while the ship or aircraft on which the employee is employed is in operation, refuse under this section to use or operate the machine or thing, work in that place or perform that activity.

Section 128(5)(b) defines “in operation” for an aircraft as follows:

128 (5) ...

(b) an aircraft is in operation from the time it first moves under its own power for the purpose of taking off from a Canadian or foreign place of departure until it comes to rest at the end of its flight to its first destination in Canada.

Essentially, the parties disagree on the meaning of “in operation” when an aircraft is stationary at an airport outside of Canada. Air Canada’s interpretation of section 128(5)(b) of the *Code*, as reflected in the FAM and the FOM, is that all work refusals occurring abroad made by an onboard employee should be dealt with in accordance with sections 128(3) and (4) of the *Code*. The Head of Compliance and Enforcement (the Head) has a different interpretation of the section and considers that the process contained in sections 128(3) and (4) only applies where the refusing employee is on board an aircraft that is moving under its own power either on a runway or in the air.

Upon receipt of the application for a stay, the Board set out expedited timelines for the parties to provide submissions. Further to a teleconference with the Board’s Regional Director, the parties agreed to extend the timelines for submissions. They also agreed to an interim stay of the direction that suspends the effect of the direction until the Board renders its decision on the application for a stay.

On December 9, 2025, the Board provided the Canadian Union of Public Employees, Airline Division, Air Canada Component (CUPE) and the Air Line Pilots Association (ALPA) with notice of the application, and both bargaining agents filed requests to intervene on December 10, 2025. In a letter dated February 4, 2026, the Board advised the parties that it had granted both requests to intervene, with reasons to follow.

These reasons deal only with the application for a stay of the direction and not with the merits of the application to appeal the direction. The reasons also address the Board’s decision to grant intervenor status to CUPE and ALPA (hereinafter referred to collectively as the intervenors).

For the reasons that follow, the Board has decided to dismiss the application for a stay of the direction of the ODH issued on December 1, 2025.

III. Decision on the Requests to Intervene

The Board granted requests to intervene filed by CUPE and ALPA as the bargaining agents representing employees that have an identifiable and direct interest in the outcome of the application. In the case of CUPE members, the decision on the application for a stay could affect their right to refuse dangerous work until the Board renders a decision on the application to appeal. In the case of ALPA members, the decision could affect their participation in the work refusal process until a final decision on the merits is rendered. Given these interests, the bargaining agents are in positions to provide information and perspectives regarding the application that could assist the Board in furthering the objectives of the *Code*.

IV. Positions of the Parties

A. The Applicant

The applicant submits that it has met the threshold to establish that there is a serious case to be tried. It has established that it has a substantive argument on appeal that the interpretation accorded to section 128(5)(b) by the ODH is incorrect.

Air Canada asserts that it will suffer significant prejudice if the direction is not stayed. It submits that revising the FAM and the FOM to accord with the ODH's interpretation would require significant effort, resources and time. It points to the fact that there is a 90-day minimum turnaround time to update these policies, including securing approval and sign-off from Transport Canada.

According to the applicant, training the cabin crew on the revisions to the FAM and the FOM would then be required, and this would necessitate additional time. If the Board finds Air Canada's interpretation to be correct, it will need to undo all the revisions to the FAM and the FOM, and this would create unnecessary confusion amongst flight attendants and pilots as to the appropriate work refusal process to follow.

The applicant also describes potential procedural and operational concerns with investigating a work refusal outside of Canada if the revised procedure is implemented. These concerns are described in more detail below.

Air Canada submits that the Board must undertake a contextual analysis to determine whether there is significant harm and that this determination will depend on the specific circumstances of each case. The Board has held that, when a direction is issued pursuant to section 145(1) of the *Code* and not out of a finding of imminent danger under section 145(2) of the *Code*, this is a relevant consideration in assessing the risks attached to granting a stay versus the harm that would ensue if one were not granted.

Air Canada asserts that in considering significant harm, the Board has considered costs to an employer and the significant impact on an employer's operations. Further, the Board has considered the timeframe for compliance and the timeframe for issuing the direction. Air Canada submits that the ODH's initial direction provided eight months to comply, and, when the ODH realized that a different direction was required to achieve her intent, she waited another three months to issue the new direction. Air Canada asserts that the timeframes and pace of action from

the ODH reflect the level of risk posed by the alleged contravention. As such, the ODH cannot now suggest that there is a pressing need or urgency for the manuals to be revised before the appeal on the merits can be determined.

Air Canada submits that no evidence has been provided that demonstrates a risk of accidents or injuries to health based on the issue that is the subject of the application to appeal. Air Canada has handled work refusals abroad in the same manner for over 10 years, and there is no suggestion that there have been any resulting incidents or issues that justify denying a stay.

In weighing the prejudice caused to Air Canada by requiring it to proceed with implementing the direction pending appeal, against the possibility of any danger to worker health and safety, Air Canada submits that the balance of convenience favours granting it a stay. This is because there is no demonstrated risk to worker health and safety, there have been no incidents or recent complaints regarding the subject matter of this application to appeal and compliance with the direction would entail significant effort and disruption for Air Canada. Further, should the steps taken to comply need to be reversed in the event of a successful appeal, unnecessary confusion would arise regarding the management of work refusals, which could affect employee health and safety.

B. The Head

The Head opposes the application for a stay of the direction. The Head acknowledges that the application to appeal does raise a serious question to be tried but asserts that Air Canada has not shown that it would suffer significant harm if it were to comply with the direction. In the alternative, the Head submits that if the Board finds that Air Canada has demonstrated significant harm, Air Canada has not shown that the potential harm outweighs the health and safety of its employees.

The Head asserts that considering Air Canada's size and earnings, it has not established that the efforts, resources and time required to amend the FAM and the FOM constitute significant harm. The Head submits that updating occupational health and safety policies or procedures and training employees are regular and basic requirements under Part II of the *Code*. Further, Air Canada's submission that undoing all the revisions to the FAM and the FOM would create confusion among its personnel does not establish significant harm.

With respect to Air Canada's operational and procedural concerns about implementing the revised process outside of Canada, the Head submits that it is speculative to assert that a work refusal would occur in a foreign jurisdiction before the Board renders its decision on the merits. The Head submits that, consequently, it is at best uncertain whether these elements would even materialize. The Head also provides suggestions on how each concern could be addressed, which are described in more detail below.

The Head submits that the right to refuse dangerous work is a fundamental health and safety right under the *Code*. They assert that Air Canada's existing procedure for work refusals that are made abroad when the aircraft is not in operation is not sufficient to guarantee the health and safety of the employees. This is because the existing procedure essentially deprives onboard employees

of the full protection offered by sections 128 and 129 of the *Code* when work refusals are carried out abroad while the aircraft is not moving under its own power.

According to the Head, Air Canada has not explained why the work refusal process in place for on-ground staff cannot be adapted for work refusals that occur or are maintained abroad.

With respect to Air Canada's submission on the time required to change the FAM and the FOM, the Head submits that in the present file, Transport Canada has committed to completing the review of the FAM and the FOM within a week after their receipt from Air Canada. If the Board rejects Air Canada's application for a stay, the Head suggests that the Board could provide Air Canada with a "reasonable" period to modify the FAM and the FOM, which would take into consideration the one-week period to which Transport Canada commits to complete its review.

C. The Intervenor

Both intervenors also oppose a stay of the direction.

CUPE submits that Air Canada has not established that implementing the direction pending the decision on the merits would result in significant harm, nor has it established that measures will be put in place to protect the health and safety of employees.

According to CUPE, amending the FAM and the FOM and providing employee training does not rise to the standard of significant harm. Rather, it represents an inconvenience to Air Canada. CUPE further submits that the cost and inconvenience of complying with directions are not determining factors and that administrative changes and stress associated with complying with a direction are not sufficient harm. It asserts that even if an employer is later proven right in its appeal, this does not constitute significant harm.

ALPA acknowledges that the application to appeal the direction raises a serious question to be tried but disagrees with Air Canada's submission that the significant effort, resources and time required to comply with the direction satisfies the burden of suffering significant harm.

ALPA submits that Air Canada has not demonstrated that its current practice adequately protects the health and safety of employees when it deprives them of many health and safety procedural protections, merely because they cross a border outside of Canada.

According to ALPA, the Board should exercise extreme caution in restricting any employee health and safety rights. Air Canada's current procedure for dealing with work refusals when an aircraft is in motion requires pilots to act in the role of the employer. When a pilot is acting in this capacity, their ability to exercise their own statutory protections under the *Code* is restricted. Therefore, the Board should limit the period that the pilots are expected to take on the obligations and responsibilities of the employer.

V. Analysis and Decision

A. The Test

The Board's authority to grant a stay of a direction is found at section 146(2) of the *Code*:

146 (2) Unless otherwise ordered by the Board on application by the employer, employee or trade union, an appeal of a direction does not operate as a stay of the direction.

This provision provides the Board with broad discretionary authority to grant a stay. However, the Board has also noted that the wording of this section suggests that a stay of a direction is an exception and a departure from the norm and must therefore be based on convincing grounds (see *GCT Canada Limited Partnership*, 2020 CIRB 939 (*GCT Canada*)).

The Board's discretion in determining whether it is appropriate to grant a stay of a direction is guided by a well-established test:

1. The applicant must satisfy the Board that the question to be tried is serious as opposed to frivolous or vexatious.
2. The applicant must demonstrate that it would suffer significant harm if the direction is not stayed.
3. The applicant must demonstrate that should a stay be granted, measures will be put in place to protect the health and safety of employees or any person granted access to the workplace.

As the Board articulated in *Air Canada*, 2021 CIRB 990, each application for a stay is assessed on its own merits, taking into consideration the particular circumstances of the case. The Board will also keep in mind the preventive nature of the provisions contained in Part II of the *Code*, which is articulated at section 122.1:

122.1 The purpose of this Part is to prevent accidents, occurrences of harassment and violence and physical or psychological injuries and illnesses arising out of, linked with or occurring in the course of employment to which this Part applies.

The Board will consider the application against this framework.

B. Should a stay be granted in this case?

1. Serious Question to Be Tried

On the first criterion of the test, the Board has consistently held that the threshold to be met is relatively low. Overall, it will be met if the applicant can put forward a reasonably arguable case regarding the interpretation and application of the *Code*. In this case, the employer raises an issue with the interpretation of section 128(5)(b) of the *Code* and how work refusals take place when an aircraft is abroad. All the parties acknowledge that there is a serious question to be tried. Given the above, the Board has no difficulty finding that the first part of the test has been met and that there is a serious question to be tried.

2. Significant Harm

The second aspect to consider is whether the applicant would suffer significant harm if the stay were not granted. When assessing this second criterion, the Board must balance the prejudicial effect or harm to the applicant with the purpose and objectives of the *Code* (see *GCT Canada*, at paragraph 24).

In the present case, Air Canada identified prejudice that falls into two main categories. The first category results from the time, effort and resources involved with modifying the FAM and the FOM. The second category relates to operational and procedural challenges involved with implementing the revised work refusal procedure outside of Canada.

With respect to the time, effort and resources involved with modifying the FAM and the FOM, Air Canada states that effort and resources are required to make changes and that there is a 90-day minimum turnaround time for any modifications. Further, training the crew on the new processes would be required. Air Canada says these factors must be balanced with the lack of demonstrated harm caused by its current process and the lack of urgency displayed by the Head in issuing the direction.

While the Board may consider time and resources involved with implementing the direction, case law has held that costs and inconvenience in implementing the direction are generally not determining factors (see *GCT Canada*, at paragraph 20). Further, in cases where costs were a factor in a finding of significant harm, the potential costs were described as “substantial” or “considerable.” Other factors, such as the scope and complexity of the measures required to comply with the direction, were also taken into account (see *City of Ottawa (OC Transpo) v. Norman McDuff*, 2013 OHSTC 27; and *Termonet Montréal Inc. v. Syndicat des Débardeurs, SCFP, Section locale ILA Local 375 and Syndicat des Vérificateurs, ILA Local 1657*, 2015 OHSTC 7).

In the present case, Air Canada has not provided information or specifics as to what the costs involved with changing the FAM and the FOM would be. Therefore, the Board cannot find that it has established that there are considerable or substantial financial costs involved with implementing the direction.

Regarding the time required to implement the direction, the Head has provided a commitment that Transport Canada will be able to review the revised FAM and FOM in a one-week period. Further, and as suggested by the Head, the Board could provide Air Canada with a reasonable period within which to comply. While Air Canada submits that this commitment does not change the fact that the direction, as issued, was impossible to comply with, it appears to the Board that the Head’s commitment is an attempt to correct this.

Air Canada has further submitted that a change to the policy would be confusing for the affected employees, especially if the Board ultimately determines that the direction should be rescinded. The Board recognizes that frequent changes to health and safety policies can be disruptive and potentially confusing for employees. However, the potential for confusion does not constitute significant harm. Accepting this argument would require the Board to conclude that a proper basis for granting a stay of a direction that revises a policy is the potential for the direction to be

rescinded. In the Board's view, this would require examining the merits of the direction, which is not a proper consideration in determining whether to grant a stay.

The second main category of prejudice alleged by Air Canada involves challenges with implementing the revised procedure outside of Canada. These challenges are summarized as follows:

1. The employer representatives normally involved in investigating a work refusal for an aircraft inside of Canada would not be available to immediately assist with an investigation, nor would the investigation be "in the presence of the employee who reported it," as required under section 128(7.1) of the *Code*.
2. The employer workplace committee representative would not be readily available to assist with an investigation "in the presence of the employee who reported it," as required under section 128(10) of the *Code*, and, even if they were available, it is uncertain if they would be permitted entry into a foreign jurisdiction to perform this work.
3. An ODH is required to release the aircraft, when they agree with its continued operation and when there is a continued work refusal before they even proceed with an investigation under section 129 of the *Code*. The ODHs are not available 24/7 and, therefore, aircraft are not likely to be released in a timely way, as these refusals occur in different time zones all over the world.
4. If the ODH wishes to personally attend the location of the aircraft, this would result in an indeterminate delay while arrangements are made to travel to the location.
5. It is uncertain whether the ODHs would have the legal right to attend on-site in a foreign destination and proceed with an investigation as required under section 129 of the *Code*.
6. It may not be possible for the crew to remain in a foreign jurisdiction while the investigation unfolds, as flight crews are only granted 72-hour visas in some countries when they arrive in a foreign jurisdiction.
7. Air Canada would not have other aircraft readily available that could be substituted for the aircraft involved in the refusal in a timely way and that would avoid significant delay and inconvenience to passengers, disruption of flight schedules and work hours for the crew and significant costs for Air Canada.
8. Air Canada would not have other crew readily available that could be substituted for the original crew, resulting in significant delays and inconvenience to passengers, disruption of flight schedules and work hours for the crew and significant costs for Air Canada.

The Head submits that the use of remote technologies would address Air Canada's concerns about employer representatives and workplace committee members not being readily available to investigate a work refusal outside of Canada.

Air Canada disagrees with this submission, stating that the process for work refusals at these preliminary stages (before the Head is contacted) is not a rapid one and that, in certain situations, physical attendance at the work location is required. Air Canada states that there "are many circumstances where physical attendance at the location of the work refusal is critical by the employer and workplace committee representatives including to observe and assess the workplace." It also states that section 128(7.1) of the *Code* requires that the employer "investigate

the matter in the presence of the employee who reported it,” which suggests that it cannot use remote technologies to investigate.

In its submissions, CUPE indicates that in practice, work refusals that take place while an aircraft is not in operation are regularly dealt with remotely and that it is common for employee representatives of workplace committees to participate in the investigation by telephone. It further submits that employer representatives “can and do participate in the investigation by telephone.” It provided an Air Canada document titled “Right to Refuse Dangerous Work Checklist Aircraft Not in Operation,” which states that the Air Canada representative can investigate the refusal by telephone or in person at the location of the work refusal.

In reply, Air Canada submits that in the case of a work refusal within Canada, the employer representative can get there and attend if required. However, when the work refusal is abroad, they cannot do so readily.

The Board accepts that it would normally be more difficult for the employer representatives to physically attend a work location abroad rather than inside Canada. However, it is not convinced that such physical attendance is required to investigate a work refusal. While Air Canada has asserted that there are many circumstances where physical attendance is required, it has not provided any examples of such circumstances. The Head and CUPE have submitted that remote technologies can be and are used for investigating work refusals. Given the above, the Board accepts that using remote technologies to investigate work refusals outside of Canada would normally be reasonable.

Air Canada also raised concerns regarding an ODH’s ability and availability to investigate a work refusal outside of Canada. It submits that an ODH is required to release an aircraft back into operation following a refusal. The Head indicated that Transport Canada can have ODHs available on a 24/7 basis. Air Canada replied by indicating that past practice demonstrates that this is not the case and provided four examples of instances in which it was not able to reach an ODH or it only made contact with the ODH on the next business day.

To the Board, these examples illustrate that such delays occur even in responding to work refusals within Canada. While Air Canada submits that delays are more likely to occur when responding to a refusal abroad due to the different time zones all over the world, the Board notes that only one of the four examples pertained to a refusal that occurred “in the middle of the night.” Another example was a refusal that occurred on a Saturday, and the two others appear to have occurred on business days. The examples do not demonstrate a difference in an ODH’s response time that is attributable to the time of day.

Further, and as indicated above, the Board accepts that a remote investigation could be carried out from Canada through interviews and the collection of videos, pictures and documents.

With respect to the potential for delays and operational difficulties identified by Air Canada, the Head asserts that potential operational and economic consequences caused by a work refusal are comparable to those produced by other causes such as bad weather, mechanical issues with an aircraft and illness of crew members. The Head submits that Air Canada has not established that

it is not possible for it to address a work refusal in the same or similar manner to how it addresses a variety of other situations that may negatively affect flight schedules. With respect to concerns regarding the visas of crew members, CUPE submits that there is already a process in place to address circumstances where a crew member may need to extend their visa, such as when they are not fit to travel due to illness.

In reply, Air Canada asserts that the Head's submissions suggest that it should add delays caused by work refusals to its existing burden of unavoidable flight delays. These delays are already the source of significant costs to Air Canada and inconvenience to passengers. It submits that the statistics from 2025 demonstrate that work refusals occur fairly frequently.

The Board understands Air Canada's valid concerns regarding operational delays and will not minimize the importance of these concerns. Air Canada states that it is more difficult to arrange for alternate aircraft and crew outside of Canada and that this can result in significant delays for passengers, disruption of flight schedules and work hours for the crew and significant costs for Air Canada.

However, it is the Board's understanding based on Air Canada's submissions that in 2025, there were 12 work refusals involving Air Canada and Rouge. Air Canada stated that three of those 12 work refusals occurred outside of Canada. No precise statistics were provided by Air Canada on the number of delays caused by factors other than work refusals. However, given the scope of Air Canada's operations, it seems to the Board that three work refusals would be a very small fraction of the total number of delays that Air Canada experienced in 2025.

Air Canada has submitted that there is no evidence that a stay of the direction would create any risk to worker health and safety and that it has used its current approach for more than ten years. Air Canada also submits that the timeframe for compliance and the timeframe for issuing a direction are relevant factors in considering an application for a stay. According to Air Canada, the Board must balance the potential harm to the employer with the need to protect workers and the objectives of the *Code*.

The Board agrees. In its assessment of significant harm, it has considered the prejudicial effects as alleged by Air Canada. It has also considered the timeframe in issuing the direction and the corresponding lack of urgency that it suggests on the part of the ODH.

In addition, the Board has considered the purpose and importance of the provisions of the *Code* at issue. The right to refuse dangerous work is one of three critical employee rights to which Part II of the *Code* gives effect. The other two are the right to know of hazards in the workplace and the right to participate in decisions that affect the employee's health and safety (see *GCT Canada Limited Partnership*, 2023 CIRB 1068; and *Rogers Communications Canada Inc.*, 2024 CIRB 1106). Given the importance of this right in the overall scheme of Part II of the *Code*, the Board will not lightly exercise its discretion to stay a direction regarding the process used to invoke it. This is especially true in circumstances like the present, where Air Canada has not demonstrated substantial prejudice from implementing the direction until the appeal on the merits is determined.

When balancing the prejudicial effects alleged by Air Canada with the objectives of the *Code*, the Board finds that the importance of the process governing the right to refuse unsafe work outweighs the potential financial and operational implications identified by Air Canada. The Board finds that the second part of the test for granting a stay of the direction has not been met.

3. Measures in Place to Protect the Health and Safety of Employees

The test for granting a stay of a direction is sequential, and all three criteria must be met before such an application can be granted. Since the Board has found that the second criterion is not met, there is no need to address the third part of the test.

VI. Conclusion

For the reasons set out above, the application for a stay of the direction issued on December 1, 2025, is dismissed. Air Canada will have 60 days from the issuance of this decision to implement the direction.

For the Board,

A handwritten signature in black ink, appearing to read 'N 3 Q', with a long horizontal flourish extending to the right.

Natalie Zawadowsky
Vice-Chairperson

c.c.: Mr. Jesse Peters