

IN THE MATTER of an arbitration before Chairperson Owen Shime Q.C.

BETWEEN

Unifor and its Locals 127 and 35

("the Union")

- And -

Navistar Canada Inc.

("the Employer")

1. I was appointed by the parties pursuant to section 8 of the Closure Agreement dated April 1, 2016 and under the Post Closure Dispute Resolution Procedure.
2. This grievance concerns the payment of severance pay pursuant to the *Employment Standards Act, 2000*, (the "Act") following the re-organization and closure of the Employer's facility located in Chatham, Ontario.
3. This grievance relates to the following provisions of the Act: section 63; subsection 64(1); subsection 65(2); and provisions of O.Reg. 288/01.
4. In response to the Union's grievance for severance pay, the Employer relied upon subsection 9(1)3 of O.Reg 288/01 to assert it was exempt from the obligation to pay many of the workers severance pay. The Union asserted that section 63, subsections 64(1), 65(1) and 65(2) made out a case for severance pay for all workers specified in its grievance.

Background

5. Navistar Canada Inc. ("Navistar") owned and operated a heavy truck assembly plant located at 508 Richmond Street in Chatham, Ontario, Canada (the "Plant").
6. Navistar also owns and operates a warehouse facility in Hamilton, Ontario. No assembly is done at the Burlington location.
7. In 2008, the Plant produced heavy duty Class 8 trucks, namely ProStar and Lonestar products. The Chatham Plant was the only Canadian assembly location and one of two assembly plants in the North Eastern market for Navistar, Inc., the other being in Springfield, Illinois.
8. Most employees of Navistar who worked at the Plant were members of the National Automobile, Aerospace, Transportation and General Workers Union of Canada, more commonly referred to as the Canadian Auto Workers union (the "CAW") Locals 35 and 127. The CAW on September 1, 2013, merged with the Communications, Energy and Paperworkers Union of Canada and is now known as Unifor.
9. Navistar sponsors the Navistar Canada Inc. Non-Contributory Retirement Plan (the "Plan"), a defined benefit pension plan covering former employees at the Plant who are represented by the CAW, as well as CAW-represented employees employed at Navistar's Burlington, Ontario facility. The Plan was formerly known as the International Truck and Engine Corporation Canada Non-Contributory Retirement Plan and is registered with the Financial Services Commission of Ontario ("FSCO"). The registration number of the Plan is 0351684.
10. Navistar and the CAW were parties to two separate collective agreements. The CAW and its Local 127 and Navistar were parties to a collective agreement governing hourly production workers and related skilled trades; and the CAW

and its Local 35 and Navistar were parties to a collective agreement governing office and clerical workers (together, the "Collective Agreements"). The Collective Agreements both expired on or about June 30, 2009 (the "Expiry Date").

11. The Plan was incorporated into the collective agreements by reference as Exhibit "A" to a Pension Agreement entered into on June 23, 2004 between the then International Truck and Engine Corporation Canada and the CAW. The Plan is also referenced within the Collective Agreements in Article 19, paragraph 480(a) (iv). Navistar is the Plan sponsor and employer for the purpose of these proceedings.
12. The Plan was closed to new members effective September 8, 2003.
13. Navistar Canada Inc. is a wholly-owned subsidiary of Navistar, Inc. a multi-national corporation with headquarters in Lisle, Illinois, USA.
14. In the years prior to 2008, the truck industry in particular was hit by a combination of factors including the credit crisis, fluctuating exchange rates, higher fuel prices, high production costs, and changing freight delivery patterns, which ultimately resulted in fewer truck orders. For the Plant, a long haul truck facility in Chatham, fewer orders meant fewer jobs, subject to a minimum associated with a guaranteed daily production rate negotiated into the collective agreement. Historically, headcount would rise and fall with the economy.
15. On or about November 2, 2008, there were approximately 1,135 unionized hourly production employees employed by Navistar at its Chatham facility represented by the union. Approximately 852 of these hourly production employees were actively employed, and approximately 283 were on layoff from active employment with a right of recall. On November 5, 2008, Navistar issued a layoff notice to Plant employees that announced a change in the production schedule and anticipated layoff of up to 500 CAW-represented employees. 470 members of Local 127 and 29 members of Local 35 were laid off effective February 1, 2009. Of this group, 343 (of 786 at the end of 2008) were Plan members from Local 127, none of whom ever were recalled or returned to work and approximately 140 (18%) subsequently terminated their employment or retired.
16. On January 5, 2009, notice of a second round of layoffs took place of up to 199 employees. The effective date of the layoff was March 1, 2009.
17. Effective February 1, 2009, and coincident with the first round of layoffs, the line rate was reduced to 35 units a day: the minimum required under the existing Collective Agreements (down from 115).
18. On April 2, 2009, Navistar sent a Notice to the CAW to commence bargaining for new collective agreements. Formal negotiations between Navistar and the CAW began on May 4, 2009.

19. On April 2, 2009, the Plant Manager posted a notice of indefinite layoff to all members of the CAW Local 127 and Local 35 commencing on the expiration of the Collective Agreements on June 30, 2009. No agreement was reached for new collective agreements and on June 29, 2009 all remaining 522 CAW Local 127 and Local 35 members at the Plant were placed on indefinite layoff. All were Plan members.
20. On June 13, 2009, the Ministry of Labour issued a "no board" report at the request of Navistar and following a meeting with the conciliator on May 19, 2009.
21. A request by the CAW was made for a 90-day extension of contract negotiations and mediation and was refused by Navistar in June, 2009.
22. On June 17, 2009 the CAW had advised Navistar of a commitment not to strike at the Expiry Date. This commitment to continued bargaining was also reflected in member communications. No strike ensued. Conversely, Navistar did not impose a lock-out.
23. On or about June 29, 2009, Navistar advised the CAW that Navistar did not intend to reconfigure or resume production at the Plant until new collective agreements were reached. All production at the plant ceased and never resumed.
24. It appears from Navistar's own operating statistics that it produced 2067 units in August 2008, dropping to 420 units in February 2009, and dropping to zero by the end of June 2009. There was no production at the Plant after June 2009.
25. Negotiation sessions between Navistar and the CAW continued beyond the June 30, 2009 Expiry Date. The parties met on November 18, 2009, December 9, 2009, February 16, 2010, August 19, 2010, September 29, 2010, January 20, 2011, March 8, 2011 May 5, 2011 and May 19, 2011 In addition, there were a number of phone calls and e-mails between the parties which supplemented negotiations.
26. On or about July 28, 2011, Navistar notified the CAW and all affected employees that the Plant would be closed permanently (the "Closure Date"). At this time, according to Navistar there were approximately 558 employees left "on roll" with recall rights.
27. A number of employees retired or chose to terminate their employment between the Expiry Date and the Closure Date as indicated above. The number of such employees is unclear, but it could be as high as 181.
28. The Navistar Canada Inc. Non Contributory Retirement Plan has been wound up, in part, effective July 28, 2011, according to the terms of a decision of the FST dated July 11, 2014, and affirmed by the Divisional Court in a judgment released on July 3, 2015. In accordance with the FST's decision, the partial wind

up was ordered by the Superintendent of Financial Services on December 23, 2015. The Order states, in part:

2. Navistar Canada Inc. shall prepare and file within 60 days from the date of this Order a partial wind up report relating to the Navistar Canada Inc. Non-Contributory Retirement Plan, Registration Number 0351684, that shall include the following terms:

a) the partial wind up is effective July 28, 2011;

b) the partial wind up includes all Plan members who ceased to be employed between February 1, 2009, up to and including June 28, 2011;

c) all members affected by the partial wind up are credited with up to 0.9 years of Credited Service under section 7.03(b)(iii) of the Plan regardless of their return to work, such additional credited service no to go beyond the later of the individual's termination date or effective windup date of July 28, 2011; and

d) all eligible Plan members affected by the partial wind up whose age and continuous service or plan membership equals 55 years or more are provided with the SER Benefit as defined in section 1.03 of the Plan.

29. The partial wind up report has been approved by the Financial Services Commission of Ontario.
30. The employer and union executed a closure agreement dated April 1, 2016. Paragraph 8 of the Closure Agreement provides as follows, in part

8. The Company will meet and fulfill all legislative requirements regarding the payment of severance pay to on roll employees. On roll employees is defined as all employees on the unionized seniority lists of both local unions as of June 30 , 2009, and includes without limiting the above all laid off employees, employees on Company approved leaves of absence, employees on disability leave and employees on WSIB.....The Company shall provide the Union with a comprehensive statement outlining its position regarding the payment of statutory severance pay to on roll employees within thirty (30) days of the signature of this agreement. In the latter statement the Company must spell out which on roll

employees the Company says are not entitled to statutory severance pay. It is agreed and understood that any dispute between the parties regarding the Company's position with respect to entitlement to statutory severance pay shall be referred by the Union to a mutually agreed upon Arbitrator or an arbitrator selected pursuant to the provisions of Appendix A. All relevant provisions of Appendix A shall apply to the resolution of the parties' dispute regarding entitlement to severance pay.

31. On or about May 12, 2016 the Employer communicated its position as to the severance payments it would make to the "on roll" workers referred to in paragraph 8 of the closure agreement and spelled out above. There were several attachments (A-F) to the company's statement of position. Each Attachment spelled out a group or category of workers as set out below.
32. Navistar stated, among other things, that former employees who had:
 - (i) prior to the date of the closure agreement, (April 1 2016), retired with the equivalent of an unreduced pension benefit under the Navistar Non Contributory Retirement Pension Plan, or
 - (ii) who retired, and as a result of the partial wind up of the Plan will have the equivalent of an unreduced pension benefit, will not receive any severance pay. These former employees were listed in Attachment A to the Company's communication
33. Further Navistar communicated that former employees who are eligible to commence the equivalent of an unreduced pension benefit as of the date of the closure agreement but have not yet applied to commence such pension will not receive severance pay. These former employees were listed in Attachment B to the Company's communication.
34. Navistar added that former employees who will become eligible to commence the equivalent of an unreduced pension benefit are not entitled to severance pay. These employees were listed in Attachment E to the company's communication (Navistar stated that the equivalent of an unreduced pension benefit refers to eligibility under the partial windup of the Plan for a pension under Section 1.02(c), 1.03 and 1.04 of the Plan.)
35. However at the same time Navistar proposed that employees who will become eligible to commence the equivalent of an unreduced pension benefit after an unspecified date following the arbitration proceedings herein would be entitled to a specified percentage or fraction of their full severance entitlement depending

upon the amount of time the employee has to wait before his or her unreduced pension benefit began.

36. Navistar also stated that former employees who accumulated less than five years of seniority as at the date of the partial wind up of the Plan will not receive any severance. These former employees were listed in Attachment C.
37. Navistar stated that former employees who accumulated five years seniority prior to the date of the partial windup (July 28 2011) but will never qualify for the equivalent of an unreduced pension benefit will receive severance pay. These former employees were listed in Attachment D.
38. However, approximately 157 former employees of the Company represented by Unifor Locals 127 or 35 have been paid severance pay, upon their renunciation of their right of recall. These workers, who otherwise would have been part of Groups A, B, or E noted above are listed in Attachment F and received severance pay from the Company. These severance payments were made to those workers who requested severance pay by the Company up to December 2012, at which time the Company ceased making any severance payments to any workers formerly employed at the Plant. The Company has stated that these workers listed on Attachment F are not entitled to any further payments.
39. By a notice of dispute dated May 25 2016, the Union grieved the Company's statement of position. The Union stated that all former employees in Attachments A, B, E, are entitled to full severance pay according to the provisions of the closure agreement and the ESA 2000.
40. The Union also asserted that any former employees in Group C or any employee more generally, with five years or more employment, (as opposed to five years seniority) as that condition of five years employment is expressed in Section 64 of the ESA 2000, are still entitled to severance pay.
41. The parties agree that, at all material times, the Company had a payroll in excess of \$2.5 million.

Relevant Legislation and Regulation

42. The following sections of the ESA are applicable:

What constitutes severance

63. (1) An employer severs the employment of an employee if,

- (a) the employer dismisses the employee or otherwise refuses or is unable to continue employing the employee;
- (b) the employer constructively dismisses the employee and the employee resigns from his or her employment in response within a reasonable period;

- (c) the employer lays the employee off for 35 weeks or more in any period of 52 consecutive weeks;
- (d) the employer lays the employee off because of a permanent discontinuance of all of the employer's business at an establishment; or
- (e) the employer gives the employee notice of termination in accordance with section 57 or 58, the employee gives the employer written notice at least two weeks before resigning and the employee's notice of resignation is to take effect during the statutory notice period. 2000, c. 41, s. 63 (1); 2002, c. 18, Sched. J, s. 3 (24).

Definition

(2) In subsections (2.1) to (2.4),

"excluded week" means a week during which, for one or more days, the employee is not able to work, is not available for work, is subject to a disciplinary suspension or is not provided with work because of a strike or lock-out occurring at his or her place of employment or elsewhere. 2002, c. 18, Sched. J, s. 3 (25).

Lay-off, regular work week

(2.1) For the purpose of clause (1) (c), an employee who has a regular work week is laid off for a week if,

- (a) in that week, the employee earns less than one-quarter the amount he or she would earn at his or her regular rate in a regular work week; and
- (b) the week is not an excluded week. 2002, c. 18, Sched. J, s. 3 (25).

Effect of excluded week

(2.2) For the purposes of clause (1) (c), an excluded week shall be counted as part of the period of 52 weeks. 2002, c. 18, Sched. J, s. 3 (25).

Lay-off, no regular work week

(2.3) For the purpose of clause (1) (c), an employee who does not have a regular work week is laid off for 35 or more weeks in any period of 52 consecutive weeks if for 35 or more weeks in any period of 52 consecutive weeks he or she earns less than one-quarter the average amount he or she earned per week in the period of 12 consecutive weeks that preceded the 52-week period. 2002, c. 18, Sched. J, s. 3 (25).

Effect of excluded week

(2.4) For the purposes of subsection (2.3),

- (a) an excluded week shall not be counted as part of the 35 or more weeks, but shall be counted as part of the 52-week period; and
- (b) if the 12-week period contains an excluded week, the average amount earned shall be calculated based on the earnings in weeks that were not excluded weeks and the number of weeks that were not excluded. 2002, c. 18, Sched. J, s. 3 (25).

Resignation

(3) An employee's employment that is severed under clause (1) (e) shall be deemed to have been severed on the day the employer's notice of termination would have taken effect if the employee had not resigned. 2000, c. 41, s. 63 (3).

Section Amendments with date in force (d/m/y)

2002, c. 18, Sched. J, s. 3 (24, 25) - 26/11/2002

Entitlement to severance pay

64. (1) An employer who severs an employment relationship with an employee shall pay severance pay to the employee if the employee was employed by the employer for five years or more and,

- (a) the severance occurred because of a permanent discontinuance of all or part of the employer's business at an establishment and the employee is one of 50 or more employees who have their employment relationship severed within a six-month period as a result; or
- (b) the employer has a payroll of \$2.5 million or more. 2000, c. 41, s. 64 (1).

Payroll

(2) For the purposes of subsection (1), an employer shall be considered to have a payroll of \$2.5 million or more if,

- (a) the total wages earned by all of the employer's employees in the four weeks that ended with the last day of the last pay period completed prior to the severance of an employee's employment, when multiplied by 13, was \$2.5 million or more; or
- (b) the total wages earned by all of the employer's employees in the last or second-last fiscal year of the employer prior to the severance of an employee's employment was \$2.5 million or more. 2000, c. 41, s. 64 (2); 2001, c. 9, Sched. I, s. 1 (16).

Exceptions

(3) Prescribed employees are not entitled to severance pay under this section. 2000, c. 41, s. 64 (3).

Location deemed an establishment

(4) A location shall be deemed to be an establishment under subsection (1) if,

- (a) there is a permanent discontinuance of all or part of an employer's business at the location;
- (b) the location is part of an establishment consisting of two or more locations; and
- (c) the employer severs the employment relationship of 50 or more employees within a six-month period as a result. 2000, c. 41, s. 64 (4).

Section Amendments with date in force (d/m/y)

2001, c. 9, Sched. I, s. 1 (16) - 4/09/2001

Calculating severance pay

65. (1) Severance pay under this section shall be calculated by multiplying the employee's regular wages for a regular work week by the sum of,

- (a) the number of years of employment the employee has completed; and
- (b) the number of months of employment not included in clause (a) that the employee has completed, divided by 12. 2000, c. 41, s. 65 (1).

Non-continuous employment

(2) All time spent by the employee in the employer's employ, whether or not continuous and whether or not active, shall be included in determining whether he or she is eligible for severance pay under subsection 64 (1) and in calculating his or her severance pay under subsection (1). 2000, c. 41, s. 65 (2).

Exception

(2.1) Despite subsection (2), when an employee in receipt of an actuarially unreduced pension benefit has his or her employment severed by an employer on or after November 6, 2009, time spent in the employer's employ for which the employee received service credits in the calculation of that benefit shall not be included in determining whether he or she is eligible for severance pay under subsection 64 (1) and in calculating his or her severance pay under subsection (1). 2009, c. 33, Sched. 20, s. 1 (1).

Where employee resigns

(3) If an employee's employment is severed under clause 63 (1) (e), the period between the day the employee's notice of resignation took effect and the day the employer's notice of termination would have taken effect shall not be considered in calculating the amount of severance pay to which the employee is entitled. 2000, c. 41, s. 65 (3).

Termination without notice

(4) If an employer terminates the employment of an employee without providing the notice, if any, required under section 57 or 58, the amount of severance pay to which the employee is entitled shall be calculated as if the employee continued to be employed for a period equal to the period of notice that should have been given and was not. 2000, c. 41, s. 65 (4).

Limit

(5) An employee's severance pay entitlement under this section shall not exceed an amount equal to the employee's regular wages for a regular work week for 26 weeks. 2000, c. 41, s. 65 (5).

Where no regular work week

(6) For the purposes of subsections (1) and (5), if the employee does not have a regular work week or if the employee is paid on a basis other than time, the employee's regular wages for a regular work week shall be deemed to be the average amount of regular wages earned by the employee for the weeks in which the employee worked in the period of 12 weeks preceding the date on which,

- (a) the employee's employment was severed; or
- (b) if the employee's employment was severed under clause 63 (1) (c) or (d), the date on which the lay-off began. 2000, c. 41, s. 65 (6); 2002, c. 18, Sched. J, s. 3 (26).

In addition to other amounts

(7) Subject to subsection (8), severance pay under this section is in addition to any other amount to which an employee is entitled under this Act or his or her employment contract. 2000, c. 41, s. 65 (7).

Set-off, deduction

(8) Only the following set-offs and deductions may be made in calculating severance pay under this section:

1. Supplementary unemployment benefits the employee receives after his or her employment is severed and before the severance pay becomes payable to the employee.
2. An amount paid to an employee for loss of employment under a provision of the employment contract if it is based upon length of employment, length of service or seniority.
3. Severance pay that was previously paid to the employee under this Act, a predecessor of this Act or a contractual provision described in paragraph 2. 2000, c. 41, s. 65 (8).

Section Amendments with date in force (d/m/y)

2002, c. 18, Sched. J, s. 3 (26) - 26/11/2002

2009, c. 33, Sched. 20, s. 1 (1) - 15/12/2009

...

O. REG. 288/01

SEVERANCE OF EMPLOYMENT**Employees not entitled to severance pay**

9. (1) The following employees are prescribed for the purposes of subsection 64 (3) of the Act as employees who are not entitled to severance pay under section 64 of the Act:

...

3. An employee who, on having his or her employment severed, retires and receives an actuarially unreduced pension benefit that reflects any service credits which the employee, had the employment not been severed, would have been expected to have earned in the normal course of events for purposes of the pension plan.

Decision

43. After hearing the submissions of the parties with regard to the application of the relevant sections noted above, and after considering the extensive materials the parties have put before me, including actuarial data and reports, I make the declarations below, directing Navistar to pay severance pay in accordance with the Act to the following constituency of employees:
- a. Employees who were not eligible to retire on their Severance Eligibility Date ("SED"), which occurred upon the expiry of thirty-five (35) weeks after their last day worked;
 - b. Employees who were eligible to retire on their SED, whose pension benefit's commuted value as at the Member's Calculation Date (as defined under the Partial Wind-Up Actuarial Valuation Report of the Navistar Canada, Inc. Non-Contributory Retirement Plan), is less than the "Normal Course" pension commuted value as at the Member's Calculation Date of the benefit commencing on their Average Retirement Age ("ARA" also referred to as the "Expected Retirement Age"), as such ARA is defined in Mr. Martin Faucher's expert report and supported data dated February 22, 2017 (provided such ARA/data to be validated by Navistar); and
 - c. Employees who were eligible to retire on their SED, and whose pension benefit would have been impacted by a reduction required pursuant to Article XI of the Pension Plan, where such reduction would have applied, had the employee retired as of their SED.
44. The parties agree, that it appears the estimated range of employees affected by the constituency of employees referred to in paragraph 43 is between five-hundred and ninety seven (597) and six-hundred and five (605).
45. In addition, those employees listed in Tab 34 of Volume Three (3) of the Union's Book of Documents are recognized as having been engaged in non-continuous terms of employment, such that the total length of service exceeds five years. Employees with clock number 5497, 5478, 5567, 5203, 5549 and 5553 are hereby deleted from the list. Prior terms of employment shall be taken together with the last period of employment and calculated as a total to determine these employees entitlement to severance pay pursuant to the Act. The total period of employment shall include any period of layoff up to thirty-five (35) weeks of any prior layoff and the layoff that began in 2009.

46. Any severance payments the Company has already paid to an employee shall be set-off against any entitlement amounts resulting from this Order.
47. Further, I am informed by the parties that some workers who have already received severance pay have not had their period of employment while on layoff for thirty-five (35) weeks after their last day worked included in the calculation of their severance payment. The company shall ensure that all employees already paid severance pay, are provided with any appropriate supplementary adjustment to their severance payments required to reflect their accurate period of employment, including the thirty-five (35) week layoff period which counts as part of their period of employment.
48. Interest is payable on all sums owing to the workers as of July 28, 2011, under the formula in the decision in *Hallowell House* [1980] OLRB Rep. January 35.
49. I am advised the parties have agreed to an administrative framework for processing payments under this final order, and have further agreed that the process for validating and mailing the cheques is estimated to take between fifty (50) and sixty (60) business days.
50. I advise, simply for the purpose of clarity, that regular wages payable under section 65 of the Act includes COLA.
51. This is the final award with respect to the Union's grievance, and addresses all issues raised by the grievance.
52. I thank the parties for their well-organized approach to the disposition of this matter.
53. I remain seized of any and all matters arising out of this decision.

Dated February 27, 2017.

A handwritten signature in black ink, appearing to be the initials 'ORL' followed by a stylized flourish.