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BY EMAIL ([contact@accomponent.ca](mailto:contact@accomponent.ca))

September 14, 2021

Canadian Union of Public Employees, Airline  
Division, Air Canada Component  
25 Belfield Road  
Etobicoke, Ontario M9W 1E8

Attention: Wesley Lesosky, President

Dear Sir:

**Re: CUPE's Failure to Represent Air Canada Flight Attendants Fairly**

We, along with our co-counsel Matthew Macdonald, represent \_\_\_\_\_ who is an Air Canada employee and a union member of CUPE.

\_\_\_\_\_ has been denied their right to fair representation by CUPE, like many bargaining unit members, due to CUPE's inaction or, worse, cooperation with Air Canada's plans to force members to undergo compulsory medical treatments even though they are unnecessary or discriminatory for certain individuals. We write on \_\_\_\_\_ behalf to demand CUPE meet its duty to \_\_\_\_\_, and others, and initiate a grievance process against Air Canada.

As you are aware, Air Canada recently announced an apparent policy requiring the mandatory vaccination of all CUPE members. The announcement was publicized in email and a press release and the measures were described as follows:

The decision to require all employees of Air Canada mainline, Air Canada Rouge and Air Canada Vacations to be fully vaccinated and report their vaccination status ...

Under the mandatory vaccination policy, testing will not be offered as an alternative... failure to be fully vaccinated by October 30, 2021 will have consequences up to and including unpaid leave or termination...<sup>1</sup>

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<sup>1</sup> As publicized at: <https://aircanada.mediaroom.com/2021-08-25-Air-Canada-Introduces-Mandatory-COVID-19-Vaccination-Policy-for-All-Employees-and-New-Hires>

(the “**AC Press Release Policy**”)

There was no circulation of the substantive or detailed policy among members, nor sufficient consultation with flight attendants about the impact on their health, safety, privacy, and employment rights. A union would normally advocate for its members to ensure that there was no unjustified intrusion on these vitally important rights. CUPE has arbitrarily or discriminatorily refused to consult with, and advocate for, its members, or has otherwise been absent in this matter.

It is surprising that CUPE would permit such an intrusion at all, but specifically through the AC Press Release Policy. Given the apparent abdication, there may also be issues of bad faith representation by cooperating with Air Canada in this conduct. Whatever the reason, CUPE has facilitated Air Canada’s efforts to violate members’ health, safety, privacy, and employment rights. This is antithetical to CUPE’s statutorily mandated role under the *Canada Labour Code*, RSC 1985, c L-2 (the “**Code**”).

Many CUPE members now face discipline up to termination if they do not comply with the AC Press Release Policy. Many have legitimate reasons why they cannot comply with the AC Press Release Policy, including \_\_\_\_\_, who has recovered from COVID-19 and has medical confirmation which indicates that her natural immunity is a sufficient proxy for vaccination. Others have medical conditions where they might not be able be vaccinated or might not want to compromise pre-existing, complicated medical conditions with the mandatory vaccination. Others may have strongly held and legitimate religious or conscience views on the topic. Finally, others might have legitimate concerns about an employer collecting such personal and sensitive health information without reasonable justifications or necessity. The AC Press Release Policy unreasonably intrudes on these CUPE members’ rights, is contrary to the collective bargaining agreement, and it appears CUPE has made no effort to refine, improve, review, or grieve the AC Press Release Policy. CUPE members are left justifiably wondering if CUPE has prioritized its leadership’s political views over its obligation to its members.

\_\_\_\_\_ is compelled to be a member of CUPE by operation of law. As a result of being forced into CUPE membership, she has also been forced to give up individual rights that she might otherwise have had in court and on an emergent basis. By operation of the *Code*, CUPE is her exclusive representative and the only entity that can challenge any intrusion on her rights by Air Canada. Since \_\_\_\_\_ and other employees have had their rights to go to court removed by their membership in CUPE, the law requires that CUPE “not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of” \_\_\_\_\_ or other members of CUPE (*Code*, s 37). This imposes a duty of fair representation on CUPE to \_\_\_\_\_ and other bargaining unit members (the “**Duty**”).

CUPE’s apparent breach of the Duty is further illustrated by the jurisprudence deciding the extent of this legal requirement. The requirement to investigate grievable matters and reasonably pursue them is a key element of CUPE’s Duty. Given that a bargaining unit member does not have an absolute right to have a grievance referred to arbitration, CUPE must show that:

1. CUPE did not merely conduct a perfunctory or cursory review of the matter. The review must be thorough.
2. CUPE gathered sufficient information to arrive at a sound decision.
3. CUPE demonstrates that there are no personality conflicts, bad relations, or other matters that could affect the soundness of its decision.

(See *Lamolainair*, 2009 CIRB 463)

Specific breaches by unions of the Duty have been found when there is:

- Inaction that is arbitrary and amounts to a failure to represent the employee(s).
  - *Haley (No. 2)*, [1981] 2 Can LRBR 121
- Failure to inquire sufficiently into a situation that amounts to a failure to represent the employee(s).
  - *Blanchet*, 2008 CIRB 467, application for judicial review dismissed, by the Federal Court of Appeal in *Blanchet v International Association of Machinists and Aerospace Workers, Local 712*, 2009 FCA 103
- A “non-caring attitude” is demonstrated by the union towards the employee(s)’ interests.
  - *Beaulieu (Re)*, 2011 CIRB 570, [2011] CIRBD No 3

CUPE has not met any of these obligations based on our review of the case with various bargaining unit members. It is unlikely, based on CUPE’s actions to date, that the Canadian Industrial Relations Board would find CUPE compliant with its statutorily mandated Duty regarding the AC Press Release Policy.

CUPE’s Duty is further informed by the relevant federal privacy legislation. Under the federal *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 (“**PIPEDA**”), an organization can only collect, use, and disclose, information in the employment setting when it is necessary to do so (section 7.3). The AC Press Release Policy has not demonstrated the necessity to do so, and CUPE’s failure to act is facilitating the breach of its members legal rights in this regard.

CUPE’s breach of its Duty is further demonstrated by contrasting it with the conduct of other unions in meeting their Duty with respect to mandatory vaccinations. Unions representing similar workers have advocated against mandatory vaccinations, or the collection of this sensitive medical information. In Toronto, the Amalgamated Transit Union Local 113 (the “**ATU 113**”) has challenged the Toronto Transit Commissions (“**TTC**”) mandatory vaccination and reporting policy

(the “**TTC Policy**”) as an “unfair and unjust intrusion into the lives of” its members.<sup>2</sup> ATU 113 has not allowed its political views to interfere with its Duty to its members. ATU 113 has advocated for legitimate education on the safety and of benefit of vaccinations but defends against the employer breaching its members rights by the TTC Policy. The TTC Policy, unlike the AC Press Release Policy, does not threaten discipline or termination as the AC Press Release does. It is very concerning that CUPE, in the face of the even more intrusive and offensive AC Press Release Policy, will not even take a similar position that the ATU 113 has with respect to the TTC Policy that apparently does not threat discipline and termination.

### **CUPE Must Start Representing its Members Fairly**

Based on our review of the matter and the nature of its Duty as articulated by the relevant jurisprudence, CUPE has not met its obligations under the *Code* to represent its members fairly. We write on behalf to demand that CUPE take immediate action to remedy this situation or else its members will be forced to file a complaint with the Canadian Industrial Relations Board in accordance with sections 97-99 of the *Code*. If forced to make a complaint, the CUPE members will seek a make whole order:

1. Declaring that CUPE is in breach of its Duty under section 37;
2. Ordering it to pursue a grievance of the AC Press Release Policy;
3. Paying the entirety of legal costs to date of the members for pursuing the complaint;
4. Ordering that CUPE appoint bargaining unit members opposed to and affected by the AC Press Release Policy to manage the grievance of it; and
5. Ordering that CUPE pay for the legal counsel chosen by the bargaining unit members opposed to and affected by the AC Press Release Policy.

To avoid this outcome, CUPE must take steps immediately to meet its Duty to its members. Within 7 days, CUPE must:

1. Initiate a grievance of the AC Press Release Policy, or any policy enacted pursuant to it (the “**Policy Grievance**”);
2. Place on the Grievance Committee for the Policy Grievance to ensure the proper management of it and representation of affected members;
3. Produce records of the actions CUPE has taken in response to the AC Press Release Policy to ensure it respects its members various their health, safety, privacy, and employment rights; and

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<sup>2</sup> Details taken from reported at: <https://www.thestar.com/news/gta/2021/09/07/ttcs-largest-union-urges-members-not-to-divulge-vaccination-status-calls-mandate-an-unjust-intrusion.html>

4. Continue to report to its members who are negatively affected by the AC Press Release Policy on a weekly basis of the actions taken in furtherance of the Policy Grievance.

We look forward to your confirmation that you are taking the above steps within one (1) week of the date of this letter, failing which we will have no choice but to pursue the above-referenced complaint with the Canadian Industrial Relations Board.

Yours truly,

**Jensen Shawa Solomon Duguid Hawkes LLP**



Robert J. Hawkes QC

RH:jjj

cc: Matthew Macdonald (matthew@matthewmacdonaldlaw.ca)  
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