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Superintendent of
Financial
Services



Surintendant des
services
financiers

IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990, c. P.8, as amended (the “*PBA*”)

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

TO:

Navistar Canada, Inc.

5500 North Service Road, Suite 401
Burlington, ON L7L 6W6 Canada

Attention:

Bruce Dobie
Director, Human Resources

Plan Administrator and Employer

NOTICE OF INTENDED DECISION

I INTEND TO MAKE AN ORDER, under sections 77.3(1)(a) and (b) of the *PBA*, that the Navistar Canada Inc. Non-Contributory Retirement Plan, Registration Number 0351684 (the “Plan”) be wound up in part effective July 28, 2011 and that the wind up include Plan members who ceased to be employed at Navistar Canada Inc.’s (“Navistar”) Assembly Plant in Chatham, Ontario after June 30, 2009, including those who retired or voluntarily severed their employment with Navistar between June 30, 2009 and July 28, 2011.

I ALSO INTEND TO ORDER, under section 87 of the *PBA*, that:

- a. Navistar review the pension benefits or commuted value of the pension benefits of members who terminated employment prior to June 30, 2009 and, for each member of the Plan who, at the date of his or her termination of employment met all the eligibility requirements for entitlement to receive the benefit except the consent of Navistar, recalculate, pursuant to section 40(2) of the *PBA*, the member’s pension benefit and commuted value of the pension benefit to include the value of the special early retirement benefit in section 1.03 of the Plan.

- b. Navistar calculate, pursuant to sections 40(2) and 74(7) of the *PBA*, the pension benefit or commuted value of the pension benefit of each member included in the partial wind up to include the value of the special retirement benefit in section 1.03 of the Plan, if at the effective date of the partial wind up the member has met all the eligibility requirements for entitlement to receive the special retirement benefit in section 1.03 of the Plan except the consent of Navistar.

- c. Navistar calculate, pursuant to section 74(1.3) and (7) of the *PBA*, the pension benefit or commuted value of the pension benefit of each member of the Plan whose combination of age plus years of continuous employment or membership in the Plan equals at least 55 on the effective date of the partial wind up to include the value of the special early retirement benefit in section 1.03 of the Plan, commencing once the member has met all eligibility requirements under section 1.03 of the Plan except the consent of Navistar.

- d. Navistar, in the credited service for the purpose of determining the pension benefit or the commuted value of the pension benefit of each member included in the partial wind up who was on layoff or on Company-approved sick leave at the effective date of the partial wind up, include the additional accrual of credited service for the period of layoff or sick leave provided for in section 7.03(b)(iii) of the Plan, if at the effective date of the partial wind up, the member met all the eligibility requirements in section 7.03(b)(iii) of the Plan, whether or not the member returned to work.

- e. Navistar review the pension benefits or commuted value of the pension benefits of members who terminated employment prior to June 30, 2009 and, for each member of the Plan who met all the eligibility requirements in section 7.03(b)(iii) of the Plan, recalculate the member's pension benefit and commuted value of the pension benefit to include the additional accrual of credited service for the period of layoff or sick leave provided for in section 7.03(b)(iii) of the Plan, whether or not the member returned to work.

The partial wind up report shall reflect the value of the benefits referred to in paragraphs (a) to (e) above. The additional amounts referred to in paragraphs (a) to (e) shall be paid to eligible members.

REASONS:

1. Navistar is the employer and administrator of the Plan.

2. The Plan is a non-contributory defined benefit plan.

3. Navistar operated a truck assembly plant in Chatham Ontario (the "Chatham Assembly Plant").

4. CAW-Canada and Locals 127 and 35 (the "CAW") represent the hourly employees who are members of the Plan and who were employed at the Chatham Assembly Plant.

5. Effective June 24, 2004, Navistar entered into a collective agreement with the CAW. The Plan was incorporated by reference into the collective agreement. The collective agreement expired on June 30, 2009.
6. In January 2009, the Chatham Assembly Plant employed approximately 775 employees who were active members of the Plan.
7. In 2008 and 2009 Navistar posted three major Form 1 notices of termination of employment pursuant to s. 58 of the *Employment Standards Act*, 2000: the First Form 1 was dated November 5, 2008 and covered 470 hourly employees. Their indefinite layoff was effective February 1, 2009. The second Form 1 notice was dated January 5, 2009, and covered 170 hourly employees. This notice was effective March 1, 2009. The third Form 1 was dated April 2, 2009 and it covered 375 hourly employees. It was effective June 30, 2009. All affected employees maintained a right of recall under their then subsisting collective agreement. These major lay-off notices were subject to minor amendments or revisions. However, by June 30, 2009 all employees on Navistar's seniority list who had been actively at work in the last half of November 2008 had received a notice of layoff.
8. The effective date of the last set of layoffs coincided with the expiration of the collective agreement.
9. The Form 1 notices of termination of employment that Navistar posted pursuant to s. 58 of the *Employment Standards Act*, 2000 indicated that the reason for the layoffs was "inconsistent orders and the US credit crisis". The third and final Form 1 notice dated April 2, 2009 also indicated that the layoffs coincided with "expiration of production commitments contained in the collective agreement".
10. In May 2009, the parties (Navistar and CAW) began negotiations for a new collective agreement to replace the one expiring on June 30, 2009. The parties were not able to reach an agreement by June 30, 2009 and operations at the Chatham Assembly Plant were suspended indefinitely by Navistar as of that date. In communications to the CAW Navistar made clear that it had "no plans or intent to begin reconfiguring or resuming production at the [Chatham Assembly Plant] without a new collective agreement with Local 127 and Local 35".
11. Navistar and the CAW attempted on a number of occasions subsequent to June 30, 2009 to reach a new collective agreement but were not successful.
12. On July 28, 2011, Navistar informed the CAW that it was permanently closing the Chatham Assembly Plant. It subsequently issued a press release to this effect. There were approximately 551 active members in the Plan as at July 28, 2011. The only members of the Plan that are currently actively employed are 15 members from Navistar's business operations in Burlington, ON.

PROPOSED ORDER TO PARTIALLY WIND UP THE PLAN

13. Navistar submits that the notice by Navistar ceasing operations at the Chatham Assembly Plant dated July 28, 2011 constitutes a discontinuance of all or a significant portion of the business carried on by Navistar at that specific location and therefore the Superintendent of Financial Services (the "Superintendent") has grounds to order a partial wind up under s. 77.3(1) (b) of the *PBA*. Accordingly, Navistar submits that the partial wind up date should be July 28, 2011 and that members of the Plan "who were severed or retired between June 30, 2009 and July 28, 2011 should be excluded from the partial wind up considerations, and layoffs, retirements and voluntary terminations prior to June 30, 2009 should also be excluded since they occurred for economic reasons". Navistar submits that the Superintendent does not have any grounds under s. 77.3(1) (a) of the *PBA* to order a partial wind up.
14. Section 77.3(1) (a) of the *PBA* provides that "(t)he Superintendent may require a partial wind up of a pension plan, (a) if a significant number of members of the pension plan cease to be employed by the employer a result of the discontinuance of all or part of the business of the employer or as a result of the reorganization of the business of the employer".
15. The loss of employment of all members of the Plan who were "on roll" at the Chatham Assembly Plant as at June 30, 2009 (i.e., Plan members who were on layoff, on a Company approved leave of absence or on disability and receiving Workplace Safety and Insurance Board benefits), whether the loss of employment occurred prior to or after Navistar's announcement on July 28, 2011, resulted from the decision of Navistar to discontinue its operations at the Chatham Assembly Plant indefinitely effective June 30, 2009 and its decision on July 28, 2011 to discontinue its operations at the Chatham Assembly Plant permanently.
16. Further, as of June 30, 2009, it was clear from Navistar's communications to the CAW, including its proposals during the course of collective bargaining, and its comments to the media, that Navistar was only prepared to re-open the Chatham Assembly Plant after June 30, 2009 if significant structural or organizational changes were made to the business of Navistar at the Chatham location. These changes would significantly affect the size and make-up of the facility. A new operating environment would be created focusing on core competences and non-core work would be outsourced to third parties or transferred to Navistar's facilities in the United States or Mexico. The communications from Navistar indicated that the workforce at the Chatham Assembly Plant would be substantially smaller (approx. 100). Therefore, for the vast majority of Plan members who were "on roll" as at June 30, 2009, there would be no possibility of return to the Chatham Assembly Plant after that date.
17. Therefore, there are grounds under s. 77.3(1)(a) of the *PBA* to order a partial wind up of the Plan.

18. The members of the Plan who are affected by the partial wind up include those who retired between June 30, 2009 and July 28, 2011 and those who voluntarily severed their employment after June 30, 2009 whether or not they signed waivers absolving Navistar from further rights or claims against Navistar, its officers and directors. The *PBA* prescribes minimum standards for all pension plans in the Province of Ontario and parties cannot contract out of rights conferred by the *PBA*.
19. Section 77.3(b) of the *PBA* states that “(t)he Superintendent may require the partial wind up of a pension plan, ... (b) if all or a significant portion of the business carried on by the employer at a specific location is discontinued.”
20. All of the business carried on by Navistar at the Chatham Assembly Plant was discontinued and the employment of all of the members of the Plan who were employed at that location ceased as a result of the discontinuance of the business at that location. Therefore, there are also grounds under s. 77.3(1)(b) of the *PBA* to order a partial wind up of the Plan.
21. The Superintendent’s authority to order a partial wind up is discretionary. Section 77.3(1) states that the Superintendent “by order **may** require the partial wind up of a pension plan...” [Emphasis added]
22. The purpose of the partial wind up provisions in the *PBA* generally is to protect employees and in particular older employees who lose their jobs (and their ability to accrue pension benefits) as a result of the discontinuance or reorganization of the employer’s business.
23. Navistar submits that members of the Plan are subject to the terms of the collective agreements between CAW and Navistar which contain extensive protective measures for older employees with longer periods of service, including lay-off and recall rights based on length of service thereby securing the employment of older employees with longer periods of service in the event of downsizing or restructuring. Given this collective bargaining regime, Navistar argues that the protection afforded to “older employees with appreciable amounts of service” under s. 77.3(1) (a) of the *PBA* is unnecessary.
24. The collective agreement between CAW and Navistar expired on June 30, 2009. As a result, as noted by Navistar in its letter dated June 29, 2009 to the CAW, the Company was not “bound to apply any provision in the collective agreement with Local 127 and Local 35, including the benefit, layoff or production related provisions”. In any event, there is no evidence that the members of the Plan included in the partial wind up have or will be receiving benefits equivalent to those provided under s. 74 of the *PBA*. The benefits provided in the collective agreement were in the nature of layoff and recall rights based on the length of service and not pension benefits provided under the *PBA*. In the circumstances, there is no good reason for not ordering a partial wind up of the Plan in this case under s. 77.3(1)(a) of the *PBA*.

25. Navistar submits that special early retirement benefits in s. 1.03 of the Plan are not benefits that are provided to members under the terms of the Plan unless and until the Company exercises its discretion to provide them. Further, subject to provisions of Part C of Schedule "C" of the Plan, there is no obligation under the collective agreement for Navistar to exercise its discretion to offer such benefits to employees.
26. Section 40(2) of the *PBA* provides that when calculating a member's pension benefit or the commuted value of the pension benefit, an ancillary benefit must be included in the calculation if the member has met all the eligibility requirements under the pension plan necessary to exercise the right to receive the ancillary benefit. Section 40(3) of the *PBA* provides that where one of the eligibility requirements is the consent of the employer, if the member has met all other eligibility requirements, the employer's consent shall be deemed to be given for the purposes of the calculation in s. 40(2).
27. Section 74 of the *PBA* entitles those plan members whose combination of age plus years of service at the date of wind up equals at least 55 to "grow into" the early retirement benefits provided under the provisions of the Plan. Section 74(7) provides that, for the purposes of s. 74, an employer shall be deemed to have provided its consent, where such consent is required in order for a member to be entitled to receive an ancillary benefit.
28. "Ancillary benefits" are defined in s. 1(2) of Regulation 909, R.R.O. 1990, as amended (the "Regulation") as "...the benefits referred to in subsection 40(1) of the (*PBA*)". Section 40(1) of the *PBA* refers, among other things, to "(e)arly retirement options and benefits in excess of those provided in section 41 (early retirement option)". [Emphasis added] The early retirement option and benefits provided in s. 41 of the *PBA* are the right to retire early and to receive an early retirement pension (i.e., a reduced pension) under the pension plan.
29. Sections 1.03 and 2.03 of the Plan indicate that an employee who has satisfied the eligibility requirements to receive a special early retirement pension under the Plan may become entitled to an immediate monthly pension benefit equal to his or her accrued pension at the date of his or her early retirement, i.e., an unreduced pension. Specifically, ss. 1.03 and 2.03 of the Plan provide as follows:
- 1.03 Special Early Retirement.
Any Employee who has attained age 55, but not age 65, and has completed 10 or more years of Credited Service, may be retired at the option of the Company, or under mutually satisfactory conditions, and shall upon proper application be entitled to a pension, provided, however, that an Employee discharged for cause shall not be eligible for a pension under this Section.
- 2.03 Special Early Retirement.
The monthly pension payable to an Employee retired under Section 1.03 shall be determined in accordance with Section 2.01 of this Article II.
30. Section 2.01 of the Plan is entitled "Normal or Automatic Retirement Pension" and sets out the amount of pension that is payable to an Employee who retires or is retired by the

Company at Normal Retirement or is retired automatically under the Plan when the Employee attains age 65 (an unreduced pension).

31. The early retirement benefit (an unreduced early retirement pension) provided in s. 1.03 of the Plan is in excess of the early retirement options and benefits provided in s. 41 of the *PBA* (i.e., a reduced pension). Therefore the benefit in s. 1.03 of the Plan is an ancillary benefit.
32. There are four criteria that an Employee must meet to be eligible for the benefit in s. 1.03 of the Plan: (i) attained age 55, but not age 65; (ii) completed 10 or more years of Credited Service; (iii) retired at the option of the Company or under mutually satisfactory conditions; and (iv) not discharged for cause.
33. Section 1.03 states that the benefit as set out in the provision shall be provided to any Employee “upon proper application”. As noted by Navistar this means that an Employee would be entitled to receive the ancillary benefit if he or she meets all of the eligibility requirements to receive the benefit.
34. The words “retired under mutually satisfactory conditions” in s. 1.03 of the Plan contemplate an agreement between the Employee (and/or potentially the Union) and the Company about the conditions under which the Employee may be retired. Therefore, an Employee is not eligible to receive the benefit if the Employee is not retired with the Company’s agreement or consent or “at the option of the Company”.
35. Section 40(3) of the *PBA* states that for purposes of s. 40(2), “if the consent of an employer is an eligibility requirement for entitlement to receive an ancillary benefit and a member, former member or retired member has met all other eligibility requirements, the employer is deemed to have consented.” The word “consent” includes any situation in which the employer’s discretion is an eligibility requirement to receive a benefit. Therefore, Navistar is deemed to have given the consent and any member who terminates employment in the normal course is eligible to receive the benefit in s. 1.03 if he or she has attained the age of 55, but not age 65, completed 10 or more years of Credited Service and was not discharged for cause.
36. Similarly, s. 74(7) of the *PBA* states that for purposes of s. 74 “where the consent of an employer is an eligibility requirement for entitlement to receive an ancillary benefit the employer shall be deemed to have given the consent”. Therefore, each member of the Plan whose combination of age plus years of continuous employment or membership in the Plan equals at least 55 on the effective date of the partial wind up is entitled to receive the benefit in s. 1.03 commencing once the member has met all eligibility requirements under s. 1.03 of the Plan except the consent of Navistar, i.e., he or she has attained the age of 55, but not age 65, completed 10 or more years of Credited Service and was not discharged for cause.
37. Navistar submits that “(t)o determine eligibility one must refer to the Exhibits which are an integral part of the Plan text itself.” Navistar submits that the Exhibits are “a piece of the

Plan text itself, and...at all times intended to be crucial to the determination of employee eligibility for special early retirement benefits”. Schedule “C” to the Plan is a part of the Plan and provides an explanation as to how Navistar may exercise its discretion in s. 3.01 of the Plan. The language in Schedule “C” does not limit the circumstances when Navistar may exercise its discretion or consent to an Employee receiving the benefit in s. 1.03 of the Plan. Schedule “C” specifically states at the outset that it is a “guide” in the application of s. 1.03 of the Plan:

Section 1.03 of the Non-Contributory Retirement Plan provides an Employee may be retired early at the option of the Company or under mutually satisfactory conditions providing he is otherwise eligible. The following standards will be used by the Company as a *guide in the application of this provision*. [Emphasis added]

38. Given that Schedule “C” sets out guidelines for the exercise of Navistar’s discretion in s. 3.01 of the Plan and ss. 40(3) and 74(7) of the *PBA* provide that Navistar shall be deemed to have provided its consent, where such consent is required in order for a member to be entitled to receive an ancillary benefit, Schedule “C” is not relevant.
39. The Plan provides defined benefits guaranteed in whole or in part by the Pension Benefits Guarantee Fund and section 30(2)(b) of the Regulation, which applies to the Plan, requires that a wind up report must be prepared by “determining the liabilities for the commuted value of all benefits under the plan in respect of each member, former member and retired member, including,...(v) funded consent benefits”. A “funded consent benefit” is defined in s. 1(1) of the Regulation as “a consent benefit for which a member has met all eligibility requirements except the consent of an employer”. A “consent benefit” is defined in s. 1(2) of the Regulation as “an ancillary benefit other than a plant closure benefit or a permanent layoff benefit, the eligibility requirements for which include the consent of an employer”. A “plant closure benefit” is defined in s. 1(2) of the Regulation as “a pension benefit or ancillary benefit payable only if all or a significant portion of the business carried on by the employer at a specific location is discontinued, whether or not the pension plan is wound up in whole or in part”. A “permanent layoff benefit” is defined in s. 1(2) of the Regulation as “a pension benefit or ancillary benefit for which the eligibility requirements include permanent layoff, whether or not the benefit requires the consent of the employer ...”
40. Section 1.03 of the Plan is not a plant closure benefit because it is a benefit that is payable in situations other than a plant closure. Section 1.03 of the Plan is not a permanent layoff benefit because the eligibility requirements for entitlement to receive the benefit do not include permanent layoff. Therefore s. 1.03 of the Plan is a funded consent benefit and the partial wind up report, in determining the liabilities for the commuted value of all benefits under the Plan in respect of each Employee included in the partial wind-up, must include the value of the benefit in s. 1.03 of the Plan for each Employee who is entitled to receive payment of the benefit.
41. Section 87 of the *PBA* authorizes the Superintendent by order to require that an administrator “take or refrain from taking any action in respect of a pension plan or a pension fund” if the Superintendent is of the opinion, upon reasonable and probable grounds, that the pension plan is not being administered in accordance with the *PBA*, regulations under the *PBA* or the pension plan.

42. For the reasons provided above, the Superintendent is of the opinion that the Plan is not being administered in accordance with the *PBA* and the Superintendent proposes to make the orders as set out at the outset of this Notice in paragraphs (a) to (c). The benefit in s. 1.03 shall be included in calculating the eligible members' pension benefits and the commuted value of their pension benefits and the partial wind up report shall reflect the value of the funded consent benefits, in accordance with s. 30(2) of the Regulation.

PROPOSED ORDER RELATING TO CREDITED SERVICE

43. Section 7.03(b)(iii) of the Plan states that members laid off or on Company-approved sick leave having worked at least 170 hours in their year of layoff are entitled to an additional accrual of credited service for the period of layoff or sick leave, if they meet the other eligibility requirements in s. 7.03(b)(iii). Specifically, the relevant part of s. 7.03(b)(iii) of the Plan provides as follows:

7.03 Credited Service from January 1, 1996.

Service from January 1, 1969 shall be credited as follows:

(b) For the purpose of computing Credited Service:

(iii) An Employee of the Company on and after January 1, 1969 who is absent from work due to layoff or Company-approved sick leave and who accrues in any calendar year commencing after 1971 less than 1615 compensated hours, shall receive credit of 40 hours for each complete calendar week of such absence during such year due to layoff or Company-approved sick leave provided that the Employee shall have received pay during that year for at least 170 hours, and provided further that if such layoff or sick leave continues after that year the Employee shall be credited with 40 hours for each complete calendar week of absence after that year, not to exceed 1530 hours of credit for all such absence related to receipt of such pay from the Company in the first year.

44. Navistar takes the position that employees who qualify are only entitled to receive the additional accrual of credited service for the period of layoff "upon their physical return to work". Navistar submits that this has been the longstanding Company practice.

45. The interpretation proposed by Navistar is inconsistent with the plain wording of s. 7.03(b)(iii) of the Plan. There are no words in the section that limit its scope or application to only those who return to work. The provision does not state or indicate that one of the eligibility requirements for a member to qualify for the additional accrual of credited service is that the member must return to work or that if the member does not, he or she forfeits it.

46. Navistar is asking the Superintendent to permit Navistar to administer the Plan and the wind up of the Plan contrary to the terms of the Plan. The Superintendent does not have authority to do so, unless s. 7.03(b)(iii) of the Plan is contrary to the *PBA*. Section 7.03(b)(iii) is not contrary to the *PBA*, therefore, eligible members of the Plan, whether or not they return to work, are entitled to receive the additional accrual of credited service in accordance with s. 7.03(b)(iii).

47. Section 87 of the *PBA* authorizes the Superintendent by order to require that an administrator “take or refrain from taking any action in respect of a pension plan or a pension fund” if the Superintendent is of the opinion, upon reasonable and probable grounds, that the pension plan is not being administered in accordance with the *PBA*, regulations under the *PBA* or the pension plan.

48. For the reasons provided above, the Superintendent is of the opinion that the Plan is not being administered in accordance with its provisions and the Superintendent proposes to make the order as set out at the outset of this Notice in paragraphs (d) and (e). The value of additional accrual of credited service for eligible members shall be considered in determining the benefits to be provided to the eligible members of the Plan and reflected in the partial wind up report.

49. Such further and other reasons as may come to my attention.

YOU ARE ENTITLED TO A HEARING by the Financial Services Tribunal (the “Tribunal”) pursuant to section 89(6) of the *PBA*. **To request a hearing, you must deliver to the Tribunal a written notice that you require a hearing, within thirty (30) days after this Notice of Intended Decision is served on you.**¹

YOUR WRITTEN NOTICE must be delivered to:

Financial Services Tribunal
5160 Yonge Street
14th Floor
Toronto, ON M2N 6L9
Attention: The Registrar

FOR FURTHER INFORMATION on a Form for the written notice, please see the Tribunal website at www.fstontario.ca or contact the Registrar of the Tribunal by phone at 416- 590-7294, toll free at 1-800-668-0128, ext. 7294, or by fax at 416-226-7750.

IF YOU FAIL TO REQUEST A HEARING WITHIN THIRTY (30) DAYS, I MAY CARRY OUT THE INTENDED DECISION AS DESCRIBED IN THIS NOTICE.

DATED at Toronto, Ontario, this **7th** day of **March, 2013**.

Original Signed By

Brian Mills
Deputy Superintendent, Pensions (Acting)

copy:

Mr. Ken Lewenza, National President, CAW-Canada
Mr. Mitch Frazer, Torys LLP
Mr. Lewis Gottheil, Director of Legal Department, CAW-Canada

¹NOTE - Pursuant to section 112 of the PBA any Notice, Order or other document is sufficiently given, served or delivered if delivered personally or sent by regular mail and any document sent by regular mail shall be deemed to be given, served or delivered on the fifth day after the date of mailing.

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