ATTACHMENT B

Before the Allegiant Air – IBT System Board of Adjustment

In the Matter of the Arbitration Between:

The International Brotherhood of Teamsters,
Airline Division, and Airline Professionals Association,
Teamsters Local Union No. 1224
and
Allegiant Air LLC

PBS-related Grievances
Hearings held July 23 – 25 and September 9, 10, 2019
Before the System Board of Adjustment
Richard I. Bloch, Chair
Tom J. Pozdro – Union-appointed Member
Dustin Call – Company-appointed Member

OPINION

FACTS

Beginning in 2014, Allegiant Air ("Company") adopted a Preferential Bidding System ("PBS") designed to schedule monthly Pilot flying based on the Pilot's expressed scheduling preferences. At issue in this case is the Company's use of so-called "Must Work Days," (hereinafter "MWDs", occasionally) wherein, during the process of constructing pilot monthly schedules, it is determined that the number of pilots

available to cover assignments at a base on a particular day or days is equal to or less than the number of assignments to be covered.If so, the solver automatically identifies a Must Work Day[1] and assigns it - out of sequential order - before the rest of the pilot's monthly schedule is awarded. The Union here protests the use of MWDs on the grounds that such assignments, issued in this manner, can result in the potential of a senior pilot losing a bid that his or her seniority would otherwise have secured.[2] The parties were unable to resolve the dispute over that claim and, accordingly, submitted the matter to arbitration before the System Board of Adjustment. Hearings were held in Las Vegas, Nevada in July and September, 2019. At that time, the parties presented oral and documentary evidence. Thereafter, the parties briefed the matter and the Board met in executive sessions prior to issuing this Award.

ISSUE

Union-proposed Issue:

> Is the Company violating terms of the Collective Bargaining Agreement ("CBA") by not creating initial bid award lines in accordance with Seniority and preferences of Pilots in accordance with Sections 15.B through 15.I of the CBA?

---

[1] A MWD may exist at the outset of the line construction process at a particular base, or it may occur during that process, after the senior pilot(s) have been awarded the day off.

[2] The record contains several references to the fact that, in such circumstances, a junior pilot could end up with an assignment that the senior pilot would have preferred. However, that result does not, in and of itself, require the conclusion that there has been a contract violation. There are numerous factors, contractual and regulatory, that will properly preclude a pilot's securing a desired bid, notwithstanding his or her seniority, thus, on occasion, permitting a more junior pilot to prevail. Assuming the bid construction process was consistent with the CBA's negotiated requirements, as articulated in this award, there will be no violation. In such circumstances, the junior bidder's successful bid, then, does not impact the question, posed here by both parties, of whether the bid line construction process relevant to MWD's was consistent with the CBA.

Company-proposed Issues:

Whether the manner in which the Company solves Pilot schedules in the bid award process for "must-work" days is in violation of Section 15.I.1? If so, what shall the remedy be?

Whether some or all of the grievances are untimely filed and/or barred by the doctrine of laches?

Whether some or all of the grievances should be denied because they failed to include a statement of facts as required by Section 18.C.2. sufficient to allow the Company to research its allegations?

Whether Pilots who failed to avail themselves of the Protest Period in Section 15.B.5 are barred from recovering any remedy?

PARTIES' POSITIONS

Union Position

The Union says the Company's existing bidding system of Must Work Days necessarily results in scenarios where Pilots are deprived of preferential schedule choices their Seniority would otherwise have guaranteed. The Company's continuing utilization of the MWD, it claims, violates, among others, Section 15.B of the labor agreement, which states, "Bid Lines shall be awarded to current and qualified Pilots in order of Seniority." The IBT requests that the Company be required to cease and desist and that affected Pilots be made whole.

Company Position

The Company maintains its intent to create pilot schedules by solving "Must-Work Days" first was fully understood by the bargaining parties during

negotiations leading up to the 2016 Collective Bargaining Agreement.[3] At all times prior to the parties reaching agreement on the CBA, the Company constructed Pilot schedules by solving for Must Work Days first, and it has continued to do so thereafter. The Union was fully aware, during bargaining, of the importance to the Company of this scheduling necessity as an inherent part of Allegiant's business plan, and it was mutually understood the Company would continue the practice as part and parcel of the scheduling devices under the labor agreement. Moreover, says the Company, by awarding the most senior Pilot his or her highest work preference on an MWD, seniority *is* recognized.

The Company also maintains the Union's petition is procedurally defective. The grievances, it says, are untimely. The Union was aware, as early as November 2016, that the Company intended to continue to solve Must Work Days first under the recently negotiated CBA. At that time, it protested that the Company was "not in compliance with the CBA"[4] by continuing to use the MWD process. The Company continued the practice, but the Union did not file grievances until March 2018, well beyond the 30-day deadline for grievance filings. It requests that the grievance be denied.

RELEVANT CONTRACT PROVISIONS

SECTION 15

A. PBS Committee
1. The Union shall establish a Preferential Bidding System ("PBS')

[3] The current labor agreement term is August 1, 2016 – July 29, 2021.
[4] *See*, U. Ex. 7.

Committee that shall meet with the Company for the purpose of developing cooperative and efficient flight operations.

***

9.The Union and the Company shall negotiate an automated PBS and Awarding System Implementation Side Letter of Agreement ("LOA") specifying the software requirements and timeframes for completion of all automation requirements and availability for use in the Bid Period process. Until such agreed upon automation timelines have been met, Crew Scheduling shall complete Schedule Adjustment Period ("SAP") manually. The Company and the Union shall negotiate a mutually agreed upon date for the SAP automated implementation. The first meeting to formulate this LOA shall be held within fourteen (14) working days after the date of signing of this Agreement, complete the LOA within sixty (60) working days, and implemented no later than one hundred eighty (180) working days after the signing of this agreement. The agreed upon timeline shall be extended if completion of automation is beyond the Company's control

SCHEDULING

B. Monthly Bid Period Timeline.

1. A Monthly Bid shall be conducted during each Month of a calendar year. Each Bid Month's duration shall be the number of Days in each respective Month, with the exception of January, February and March which each will be considered a 30 day month through adding Jan 31 and Mar 1 to February. Leap year will make February a 31 day month.
2. Bid Lines shall be awarded to current and qualified Pilots in order of Seniority.

H. Pilot Bid Preferences

Bid Preferences in the Initial Bid shall include:
1. Bid Line with maximum or minimum Days Off.
2. Bid Line with maximum or minimum PCH value.
3. Specific Days Off.
4. Standing Bid.
5. Specific Trip Pairings.

6. Maximum or minimum Trip Pairing PCH. Pilot may specify different requests for individual Days.
7. AM or PM "Duty On" times for daily and/or weekly Duty sequences. A Pilot may request different "Duty On" times for specific Days in the Bid Month.
8. Bid Line preferences for blocks of Long Call Reserve (RLC), Short Call Reserve (RSC), or both in the Bid Month.

Section 15: Scheduling 15-8

I. PBS Initial Awards.
1. All Initial Bid Awards shall be accomplished in Seniority order by awarding each eligible Pilot his Bid preferences in accordance with subsection 15.B., Bid Period Timeline.

SECTION 18
GRIEVANCE PROCEDURES

B. Non-Disciplinary Dispute
1. Prior to filing a Grievance over a dispute regarding an interpretation of the Agreement, the affected Pilot and/or his Union Representative shall discuss (e.g., phone conversation, personal meeting, e-mail exchanges) and attempt to informally resolve such dispute with the System Chief Pilot, or his designee, within thirty (30) days after the Pilot or the Union became aware, or reasonably should have become aware, of the event from which the dispute arises.
2. The System Chief Pilot, or his designee, shall respond with a decision to the Pilot and the Union within fifteen (15) days after discussions of the dispute, as provided in subsection 18.B.1., have occurred.
3. If the Pilot or the Union disagrees with the decision rendered, as provided subsection 18.B.2., the Pilot or the Union may appeal such decision by filing a Grievance, as provided in subsection 18.C.

SECTION 19

SYSTEM BOARD OF ADJUSTMENT

A. Establishment and Jurisdiction of a System Board of Adjustment
1. In compliance with Section 204, Title II, of the Railway Labor Act ("RLA"), as amended, a System Board of Adjustment is hereby established for the purpose of deciding disputes that may arise under the terms of this Agreement that are properly submitted to it, and shall be known as the "Allegiant Air Pilots System Board of Adjustment" (hereinafter referred to as "the Board").
2. The Board shall have jurisdiction to adjust and decide disputes arising under the terms of this Agreement. The jurisdiction of the Board shall not extend to proposed changes in rates of pay, hours or working conditions and shall have no authority to modify, amend, revise, add to or subtract from any of the terms or conditions of this Agreement.
3. The Board shall consider the appeal of any Grievance properly submitted to it by the Union, when such matter has not been previously settled in accordance with the provisions of Section 18, and any issues arising from the subsequent processing of the Grievance. The Board shall not have jurisdiction to consider any dispute in which the applicable provisions of Section 18 have not been complied with, except as provided elsewhere in this Agreement, or which has not been submitted to the Board in a timely manner; provided, all procedural disputes shall be resolved by the Board.

ANALYSIS

Arbitrability

We turn first to the question of whether the case is properly before the System Board. Allegiant argues that the Union became aware of the dispute giving rise to the current grievance in November 2016, when the Company informed the IBT it intended to continue utilizing, and solving first for, Must Work Days.[5] It is not unreasonable for

[5] 11/14/16 e-mail from Ray Vincent to Andrew Robles, noting, among other things, that the Company "will complete a senior Pilot's schedule prior to placing any trip pairings on any junior Pilot's schedule. Should

the Company to identify that exchange as marking the moment the Union was aware of the event ultimately giving rise to this grievance. Absent more, application of CBA Section 18 would require the Union's initiating the dispute settlement process within 30 days.[6]

The grievances in this case, filed some 15 months later, would have been well beyond the negotiated time limits, were they in force at the time. In this case, however, we find they were not in force: As will be discussed below, the record reflects clearly that the parties, by their conduct and by their written agreements, intended to waive applicable time limits for filing a grievance on the subject of PBS during the time both parties were reviewing options in the search for modification or replacement of the existing system.

---

it be necessary for a Pilot to be awarded an assignment on a particular day(s), it will be done in order of his Preferences for said day(s) prior to any assignments being awarded for other day(s) and prior to awarding any assignment to a junior Pilot."

In response, Captain Robles wrote, that same day :

> Your explanation below is not in compliance with the CBA. The bids are to be awarded on a monthly, not daily basis. By assigning on a "particular day" you are violating a Pilot's preferences. Bids are to be awarded following Pilot Preferences. Preferences are listed in sequential order. Awarding Pilot Preferences out of sequential order, is to ignore the Pilot's Preferences. (U. Ex. 7).

[6] CBA Section 18 – Grievance Procedure –requires a multi-step process preliminary to filing a grievance that involves (1) an attempt to informally resolve the dispute with the System Chief Pilot, or his designee, within thirty (30) days after the Pilot or the Union became aware, or reasonably should have become aware, of the event from which the dispute arises. Following such discussions, the Company is obliged to respond within 15 days.

Section 18.C. gives the Union the right (and the obligation) to appeal, then, to the Vice President of flight operations, or designee, within 15 days after the Pilot or Union receives notice of such decision. Failing that, the decision of the Company will stand. See Section 18.E.2.

CBA Section 15.A.9[7] incorporates the agreed-to obligation to establish a PBS Committee. That was done. That Section also sets forth the parties' anticipated process surrounding creation of a Letter of Agreement ("LOA") that would address the ultimate capabilities of an automated system to be used in the Bid Period process:

> The Union and the Company shall negotiate an automated PBS and Awarding System Implementation Side Letter of Agreement ("LOA") specifying the software requirements and timeframes for completion of all automation requirements and availability for use in the Bid Period process. Until such agreement upon automation timelines have been met, Crew Scheduling shall complete Schedule Adjustment Period ("SAP") manually. The Company and the Union shall negotiate a mutually agreed-upon date for the SAP automated implementation. The first meeting to formulate this LOA shall be held within fourteen (14) working days after the date of signing of this Agreement, complete the LOA within sixty (60) working days, and implemented no later than one hundred eighty (180) working days after the signing of this Agreement. The agreed-upon timeline shall be extended if completion of automation is beyond the Company's control."[8]

These terms speak loudly and comprehensively, we conclude, to the parties' commitment to work together aggressively to seek a solution they could both live with. An ambitious timeline – meet within two weeks of the CBA signing, complete the LOA in two months and implement everything in six months– reflects the jointly recognized urgency. Significantly, the Company and Union also agreed to extend the timelines if "completion of automation is beyond the Company's control." The record establishes that the bargaining on the PBS issue continued well beyond the 180- day implementation deadline, the parties ultimately failing to reach accommodation on the

---

[7] *Supra*, at p.4.
[8] CBA, Section 15.9.

matter. But the terms of the LOA, recorded in the CBA itself, are important. As such, they are set forth here in their entirety:

LETTER OF AGREEMENT
between
ALLEGIANT AIR, LLC
and
THE PILOTS
in the service of
ALLEGIANT AIR, LLC
as represented by
THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AIRLINE DIVISION

SCHEDULING AUTOMATION

This LETTER OF AGREEMENT ("LOA") is made and entered into in accordance with the provisions of the Railway Labor Act, as amended ("RLA"), by and between ALLEGIANT AIR, LLC ("the Company"), its successors and assigns, and the Pilots in the service of ALLEGIANT AIR, LLC as represented by THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AIRLINE DIVISION ("the Union").

WHEREAS, the parties recognize the mutual benefits associated with using scheduling products that provide for efficient flight operations; and,

WHEREAS, the parties wish to work cooperatively in choosing certain scheduling products;

WHEREAS, the Company wishes to have a positive and constructive relationship with the Union's PBS Committee ("the PBS Committee" or "the Committee");

NOW, THEREFORE, it is mutually agreed that:

A. The PBS Committee will meet with the Company for the purpose of reviewing and selecting a Preferential Bidding System (PBS) vendor, including the consideration of the current in-house solution.
   1. Selection of a PBS vendor will be mutually agreed to by the parties. Such agreement will not be unreasonably withheld.

B. Should the Company decide to change vendors for Crew Tracking and/or Crew Scheduling Software, the PBS Committee will be promptly notified and the Company will meet and confer with the Committee for the purpose of reviewing vendor/software options.
   1. Selection of a Crew Tracking and/or Crew Scheduling Software will be mutually agreed to by the parties. Such agreement will not be unreasonably withheld.[9]

[9] CBA, at SCHSYS-1-2.

This document, we conclude, manifests unequivocal recognition by both parties that installation of a functioning, mutually acceptable, PBS program was very much a work in progress. The words of the LOA document reflect recognition of the "mutual benefits" of an efficient scheduling product, the wish to "work cooperatively in choosing" them, and the Company's wish to have "a positive and contributing relationship with the Union's PBS committee". While the parties thus far have failed to reach a final agreement on a mutually acceptable replacement system, this Board interprets this language, taken together with the terms of section 15(A)(9), as codifying the shared understanding that the cooperative search for a satisfactory bid system was to be the method for resolving their profound differences over PBS. We cannot conclude the parties constructed, then substantially extended, for some two years, the original 180-day window for settling the matter while, at the same time anticipating a 30-day limit for protesting its continued existence. Capt. Robles testified, without rebuttal, that negotiations over the new system ceased in June or July 2018,[10] by which time grievances were filed.[11] Additional claims were submitted thereafter. These facts require the finding that the matter was timely.[12]

---

[10] Tr.,87-90. See also U. Exs. 8,9,10 and 11.

[11] See Jt. Ex. 4-7, for example.

[12] We do not hereby conclude that the Company's actions amounted to a "continuing violation." See *Arbitration: Time Limits and Continuing Violations*, 96 Mich.L.Rev. 2384 (Bloch, 1998). Our reading of this agreement is that, by their actions, the parties signaled a joint intention to suspend those time limits in favor of the limits constructed in Section 15.A.9 in anticipation of achieving a resolution. Nor do we conclude that all grievances were properly filed. The Company challenges some of the grievances on the grounds they failed to comply with procedural requirements imposed by Sections 15.B.5 and 18. These issues are discussed below.

THE MERITS

At the outset, it is important to understand the function of this System Board of Adjustment. Central to our charge is interpreting and applying the terms of the collectively bargained agreement. Section 19.A.2 states, in relevant part:

> The Board shall have jurisdiction to adjust and decide disputes arising under the terms of this Agreement. The jurisdiction of the Board shall not extend to proposed changes in rates of pay, hours, or working conditions and shall have no authority to modify, amend, revise, add to, or subtract from any of the terms or conditions of this Agreement.[13]

Among other things, the above-quoted language means the Board responds to claimed breaches of the labor agreement not by applying its own judgment on how the parties could better govern their relationship but solely with an eye toward the meaning of their various written agreements on the wages, hours and, significant to this case, conditions of employment as expressed in the Collective Bargaining Agreement. Consistent with that jurisdictional mandate, we do not question the Company's asserted need to include Must Work Days in its business plan. The sole issue for the Board is whether, as here claimed, that plan infringes on bargained obligations surrounding the bid process. Central to this dispute, therefore, are the parties' respective interpretations of language intended to mandate the manner by which Pilot bid preferences are submitted and the manner by which they are awarded.

[13] Section 19.A.2.

The dispute in this case protests the Company's practices with respect to Pilot scheduling. Prior to changes implemented in 2014, to be described below, Allegiant utilized "line bidding" during the process of monthly scheduling of Pilot flying wherein the Company would assess needs for the next month, then build "lines of flying" that included pre-made trip pairings and days off. Pilots would then bid on the particular lines attractive to them and the lines would be awarded in Seniority order.[14]

Due to changes in Federal regulations, it was necessary for Allegiant to revise the bidding methodology and, in January 2014, the Company adopted a Preferential Bidding System premised on Pilots expressing preferences for the type work they wished to do in a given month, including their designation of which days of the month they would choose to work and even the times of day.[15] The PBS system would then create

---

[14] Tr. 215.

[15] The bidding process was described during testimony:

> So the first Tuesday of every month, that's when the bidding process begins. And then that bid period is open until the following Sunday when the bid period closes. And...during that entire bid period, a pilot is able to put in their preferences on a system called CBI...and there's a large number of different types of preferences, but this CBI system captures all of the preferences, organizes the preferences, and after Sunday, once it closes, that file that it creates is exported [to the companies] excel spreadsheet, and then runs a solve to build the lines.
> ...With the current system, it makes you bid on every single assignment. So if there's 185 assignments for your base, you have to order your preferences, 185 of them, in preferential order, in the order that you want to bid on them. ...My first choice would be one; my very last choice would be whatever the number of assignments were available on that month. The witness noted that the ability to put all preferences in sequential order the entire bid period is, among other things, a quality of life issue:
> Q. And under the terms of the Collective Bargaining Agreement, are those bid lines supposed to be done in any particular order?
> A. Yes. So every airline, there's pay, and then there is your quality of life. Your quality of life is based off of your schedule. And so it's-in every contract, in our contract in particular, it says that the preferences-the schedules will be based off of pilot preferences. (*See* testimony of Andrew Robles, at Tr.,99 *et seq.)*

schedules that matched as many of the preferred assignments as possible to the bidding Pilot, accommodating, during the process, questions of seniority, regulatory and contractual requirements and the Company's operational needs.[16]

The 2014 move to PBS and the appearance of MWDs in creating pilot schedules thereafter was controversial. Prior to adopting PBS in 2014, MWDs were not an issue, since management constructed and presented for bid actual lines of flying. The Company's decision to adopt PBS itself was unconstrained by any contrary agreements with the IBT. (Indeed, it occurred prior to any CBA, so there could have been no agreement or obligation.) And, because the new bid process could, from time to time, generate unforeseen scheduling issues, the Company also utilized the Must Work Days which, the Company decided, would be solved, ahead of any sequential consideration of other pilot preferences.

Concurrent with adoption of the PBS system in January 2014, the Company began a "vertical" solving system for Pilots reserve and flight pairings on Must-Work Days. Under the vertical system, Must-Work Days were solved first, beginning with the most senior Pilot. The next most senior Pilot would then be assigned the highest legal work preference on that Must-Work Day, and the process was repeated in Seniority order, in all cases solving only the Must-Work Day schedule. Following that, the solver would turn to the most senior Pilot, completing the balance of his or her schedule for the month. The Company changed from a vertical to a "horizontal" solving process in January 2017. The horizontal process differs from the vertical to the extent that, after the Company schedules the senior Pilot on the Must-Work Day, it then solves the remainder of that Pilot's schedule for the month, prior to moving to the next most senior pilot's preference on the Must-Work Day. (Co. Ex. 12, at 6,8-9,13.)

[16]Tr. 217, 357. Without question, the existence of a Preferential Bidding System does not guarantee a Pilot access to all preferred assignments during a given bidding period. Instead, (as the name implies) the "preferential" system seeks to better respond to Pilot wishes, to whatever extent possible, in constructing flying for the upcoming month. The Company notes, correctly, that a Pilot may not receive a preferred assignment for a variety of reasons, including a more senior Pilot having been awarded the work, or if the Pilot is illegal to work a particular trip under the federal aviation regulations or because bargained contractual restrictions result in the preferred assignment being unavailable. See Tr. 219 *et seq.*

The IBT, having been certified in 2012 as the collective bargaining representative of Allegiant's Pilots, protested the change to PBS by seeking an injunction based on the claim the Company had negotiated a set of work rules with a prior labor representative group. The rules, the Union argued, constituted a Collective Bargaining Agreement requiring the Company, during the IBT negotiation, to maintain the *status quo* by abandoning PBS and returning to line bidding[17] The District Court agreed Allegiant was subject to a *status quo* obligation and that moving to the PBS system was a breach of that restraint. The Court, however, declined to enjoin the Company from using PBS,[18] but issued a limited injunction requiring the Company to modify the PBS system so as "to better respect Pilot Seniority and to provide greater transparency and predictability for the Pilots."[19] The Company appealed to the United States Court of Appeals for the Ninth Circuit. During that appeal, the Union threatened to strike. The Company moved, successfully, to enjoin the strike.[20] Thereafter, the Ninth Circuit overturned the District Court's decision, finding that the Company was not subject to a status quo obligation under existing law. Throughout their court proceedings, the parties continued bargaining on a labor agreement, including PBS, until the agreement was finally executed in 2016.

---

[17] See Int'l *Bhd. of Teamsters, Airline Division v. Allegiant Air,* LLC ("Allegiant I"), 2014 WL 3653455 at *1 (D. Nev. July 22, 2014).
[18] The Court concluded such a award "would cause major disruptions to Allegiant's flight operations." *Id.*, at *12.
[19] *Id.*, at *13.
[20] *See Allegiant Air, LLC v. Int'l Bhd. of Teamsters, Airline Division ("Allegiant II"),* 2015 WL 1994779, *1-2, 4 (D. Nev. May 1, 2015).

The Violation

The problem, according to the Union, is that, once the solver determines a day to be a MWD, it jumps to that day and solves the (most Senior) pilot's schedule without regard to the choices expressed in that Pilot's listed preferences. Because the software does not permit Company or Pilot to determine in advance which day will be designated a MWD, the result is an arbitrary assignment on an unpredictable day.

The CBA

We turn, first, to the terms of the Collective Bargaining Agreement. The bidding program is described in several sections of Section 15.

Section 15.I- PBS Initial Awards - provides:

> All initial Bid Awards shall be accomplished in Seniority order by awarding each eligible Pilot his Bid preferences in accordance with Subsection 15.B., Bid Timeline.

Section 15.B, for its part, reiterates the necessity of awarding Bids by Seniority:

> B. Monthly bid period timeline
>
> Bid Lines shall be awarded to current and qualified Pilots in order of Seniority.

Allegiant does not deny its obligation to award bids in seniority order. It claims, however, that, so long as the Company grants a senior pilot first choice *as to the MWD schedule*, thereby recognizing seniority, the unintended consequence of subsequent "illegality" and the loss of a preference to a junior cockpit crewmember is immaterial.

Such conflict can occur at any time, management observes, including in any standard line bidding system. As Company witnesses explained throughout the hearing, just because a more junior Pilot receives a day off (due to contract or FAR legalities, for example)[21] does not mean there has been a seniority violation. Instead, the Company contends, in each of these instances, the more junior Pilot defaults to receiving a day off "*precisely because the Company has assigned [Must Work Days] schedules in Seniority order.*"[22] As such, Allegiant attributes the senior pilot's having lost the day off bid to a function of the contract and FAR legalities, not the Company's alleged disregard for seniority."[23]

Conceding that "illegalities" are a common factor in bidding, the IBT responds that, inherent in the concept of expressing "preferences" is the clear understanding that preferences are submitted, and are to be considered, *sequentially*. As such, moving the

---

[21] Both parties acknowledge that PBS does not guarantee receipt of preferred assignments: See Tr. 219:12-19, 238: 7-16. See also n. 17, *supra*.

[22] Tr. 339:20-340:2 (Mr. Porter explaining that the system honors seniority because "[i]f everyone is going to have to work on a given day, we were looking at the most senior individual and considering their Bid Preferences for that day" before doing so for any junior Pilots). Moreover, as Witness Zackary Ames explained:

> So the reason why this happens is because we go in Seniority order. So because we assign that junior Pilot who has the must-work day his highest preference, that might be the only thing that's legal for the most junior Pilot, but because we assigned it to the most senior Pilot, that is what he works, and then that junior Pilot has to default to a day off. Tr. 430:23-431:5

See also Tr. 282:1-7 (Mr. Porter testifying that "It's not an inversion. That's based off the parameters of the legalities" of the contract). As such, the Company's observance of seniority results in more senior Pilots receiving the work assignments they want on Must-Work Days, while on occasion, by the time the solver reaches the Pilot's further down the seniority roster, there is nothing left they can legally be assigned. As testified by Mr. Ames: "[T]he solver tries to go through and assign some sort of work on that day through their preferences order for that day. But because we have to assign senior people first, they might take everything that is legal for that junior person..." (Tr.,448:7-13.)

[23] Co. Closing brief, at 53-54.

MWD to the head of the "solving" line disrupts that process and, as such, devitalizes the essential benefits of bidding one's choice by seniority. We find, for the reasons that follow, that the Union's position has merit.

At its heart, the central question in this case is whether "bid preferences" should be interpreted to mean awarding the chosen preferences in "sequential" order. Section 15 does not explicitly refer to "preferences" being in an ordered designation first to last. Surely, however, this was the assumption of both parties prior to the onset of PBS and, moreover, the process that has been continued, following adoption of PBS in all cases *except* those where MWD days are moved to the front of the solving process. In this light, the solve first procedure exists as a major exception to an understood (industry-wide, as well as at Allegiant) practice recognizing the important wage and quality of life implications of molding schedules to suit one's preferences. One may reasonably expect, as we do, that a major exception of this nature would have been writ large in the collective bargaining agreement. Inherent in the concept of "Preferences" is the notion that Pilots list their desired time on and off in an order of most to least and that those choices will be assigned in that order. A contrary assumption, one that would allow management to pick and choose from among the ordered selections, would fly in the face of the unqualified language of Section 15. Allegiant maintains the CBA nowhere explicitly references any concept of Sequential bids.[24] But the very nature of the ability

[24] Says the Company : "... [N]othing in the bargaining history supports the Union's contention that the parties intended these provisions to require the Company to solve pilots schedules solely in "sequential" preference order." (Company Closing brief, at 45.)

to mold lifestyle and work choices, subject to and protected by one's seniority would be meaningfully compromised if management could, at its option, re-arrange the sequence of desired preferences – a substantial exception to a guarantee that is not only unqualified by the labor agreement but which, as noted above, in practice is honored in every assignment *except* those involving MWDs.

The Parties' Negotiations

Contrary to the Company's contention, we do not view the parties' negotiations as reflecting agreement on utilizing MWDs. While the term "Must Work Days" appears nowhere in the CBA, it was the source of vigorous discussion, dispute, and litigation between the parties prior to their ultimately signing off, in 2016, on the current CBA. The Company contends it has always, since 2014, solved MWDs first when creating Pilot schedules.[25] In the process of bargaining, therefore, says Allegiant, the Union both understood and agreed that Must Work Days were a critical part of the airline's business plan and that, accordingly, they would be recognized as an inherent and accepted part of the periodic bidding process. The bargaining history reflects a continuing and unqualified demand by the Company that Must Work Days be an imbedded aspect of the contractual scheduling process. The Company's unwavering, announced need for such system and its intent to keep using it, is "clearly reflected both in the unrebutted testimony concerning the parties' negotiations and the bargaining proposals produced

[25] See Company Exhibit 12 at 3.

by the Company at the hearing."[26] Testifying for the Company, Trent Porter reviewed the bargaining over the Scheduling section. Following the onset of negotiations in December 2012, the Union proposed reverting back to a Line Bid scheduling system, but the Company was adamant in its position that it would retain the discretion on how Must-Work Days would be solved.[27] Testifying for the Company, Jerrold Glass, a participant in the negotiations, stated:

> I mean, think about this for a second. There was litigation, okay, and a lot of it, and that litigation confirmed the Company's ability to continue to utilize Must-Work Days. We were clear in bargaining throughout negotiation at the time that I was there that Must-Work Days was an integral part of the business model... [T]he parties never agreed to the elimination of Must-Work Days. The Union never in its ratification claimed that the Company – that they were successful in doing away with work days. Must-Work Days was and continued to be part of the contract.[28]

Thus, the Company concludes:

> Solving Must-Work Days first – which might result in a Pilot not receiving his or her highest preference on that day – has therefore been a fact of life at Allegiant before the Company and Union reached their 2016 CBA, and at all times since that agreement became effective.[29]

Premised on the assumption that the continued existence of MWD's was mutually understood from their inception, the Company claims it was the Union's

---

[26] Company Closing brief, at 16.

[27] Tr., at 280 *et seq.* According to Witness Porter, the Company never agreed to solve Pilots' schedules by sequentially going through Bid Preferences, without solving MWDs first. He stated:

> We weren't interested in doing that, one, because of the operation, that it would protect – it would add risk into the operation potentially not covering high fly days. (At Transcript 285-286).

[28] Tr., at 479.

[29] Company Closing brief at 11, citing Tr. 226:11-23, 499:11-15.

> ...[D]espite the fact that the Union was clearly aware that junior Pilots could default to a day off due to legalities under the Company's scheduling system in use during the CBA negotiations, it did not secure any contractual language prohibiting the situations from occurring. *See* Tr. 431:10-17
>
> Q: And how long has it been the case at Allegiant that you have this situation where the senior Pilot who preferred the day off worked while the junior Pilot didn't?
>
> [MR. AMES]: Since we had the PBS System.
>
> Q: And that was true before the Collective Bargaining Agreement went I nto effect?
>
> A: Correct.").
>
> To the contrary, ...the parties agreed to scheduling provisions in the CBA that were intended to ensure that the Company could continue to use the scheduling system it had in place and that it had successfully defended in the federal litigation. Conversely, the Union offered no evidence of its own regarding the parties' negotiations. There is therefore no support for the Union's suggestion that the parties intended to require the Company to make fundamental changes to its scheduling system to prevent junior Pilots from receiving days off due to legalities.

There is thus no merit to the Union's argument that the CBA has been violated where a junior Pilot defaults to a day off due to contract or FAR legalities. Rather, it is because the Company is complying with its contractual obligation to award work preferences in Seniority order that these instances occur.[30]

In response, says the Company, the Union was silent on the subject during bargaining , a fact that must lead to the conclusion it had accepted the offending practice. Notwithstanding continued and vigorous pronouncements by the Company that it would reject any bidding system that did not include Must Work Days[31] and incorporate, as well, the practice of solving them first, the Union, it says, did not respond.

[30] Company brief, at 55.

Taken together, the Company argues, these reflections of the context of the parties' negotiations require the conclusion that MWDs were acceptable to the IBT:

> [T]he context in which the scheduling language was agreed to by the parties further shows that they did not intend to require the Company to stop using Must-Work Days. In particular, the scheduling language was tentatively agreed to almost immediately after the Company had prevailed on both of the federal lawsuits regarding its scheduling practices. *E.g.*, Tr. 300:25-302:5 (noting that the Union's July 27, 2015 proposal contained the language ultimately incorporated in Section 15.I.1.), Tr. 314:16-315:6 (same regarding Section 15.B.2.). As the Company's negotiators thus explained, by agreeing to this language at the same time the Company had successfully defended its scheduling practices in court, the parties were intending to ensure that the Company would be able to continue both using Must-Work Days and to solve Must-Work Days first. *E.g.*, Tr. 480:15-22 ...
>
> Indeed, after the parties tentatively agreed to this language, the Company gave presentations specifically about how it solved on Must-Work Days to help the Union understand how it would continue to do so going forward. Tr. 478:19-479:8. At no point during these presentations, however, did the Union ever comment or object on the basis that the language agreed to in Section 15 would require the Company to stop using Must-Work Days as part of its scheduling process.[32]

For several reasons, however, we conclude that the Company's reliance on the Union's silence is misplaced. The Board accepts fully the representation by Company negotiator Glass that "[t]he parties never agreed to the elimination of Must-Work Days. From this, the witness concluded that: "... Must-Work Days [were] and continue to be part of the contract."[33] But the conclusion that use of Must-Work Days during pre-contract

---

[illegible] parties' negotiations, who testify, credibly, that the Union never suggested the scheduling language would require the Company to stop using Must Work Days and the Company never agreed that it would have that effect. Tr. 294:23-295:3, 296:23-297:2-5, 298:21-24, 300:4-8, 306:23-307:25, 295:4-7, 480:8-15. (Company Closing Brief, at 18.) See also, Tr. 308:1-3 & 308:18-25 (Mr. Porter), 480:23-481:7 (Mr. Glass). (Company Closing Brief, at 17).

[32] Tr. 479:9-17.

These were labor negotiations that dealt with an imposing variety of issues, some hotter than others, during negotiations that spanned years. Among the most pronounced of the big issues, leading to litigation at both the District and Appellate court level, was the precise question of Must-Work Days. On the basis of this record, we cannot conclude that the Union's silence concerning language the Union itself had drafted[34] should require the conclusion that it had (quietly) given up on a very vigorous, contentious quest to combat MWDs. It is for these reasons we conclude that the bargaining history does not, in this case, provide the necessary support for the Company's conclusion that the Union had acquiesced: The existence of the tumultuous arguments surrounding the issue and the fact that the Union itself supplied the language that ultimately appeared in the labor agreement leaves room for no other conclusion.

Concerning the litigation itself, the Company notes that "the scheduling language was tentatively agreed to almost immediately after the Company had prevailed on both of the federal lawsuits regarding its scheduling practices."[35] The Company's claims that its use of the contested scheduling system had been "successfully defended in the federal litigation"[36], while technically accurate, must be clearly understood: The litigation that

---

[33] *Id.*, at 12-13, cited in Company Closing Brief, at 17-18.

[34]. The IBT's proposed language for what ultimately became Section 15.I stated: "All initial Bid Awards shall be accomplished in Seniority order and by each eligible Pilot submitting his Bid Preferences in accordance with subsection 14.B, Bid Period Timeline." These terms were incorporated, virtually unchanged, into the final agreement. It is at least arguable that the Union did, in fact, negotiate language that supports its case in this proceeding. As such, the Union submission of this draft cannot reasonably be viewed as evidence that "the parties were intending to ensure that the Company would be able to continue both using Must Work Days and solve Must Work Days first. It may well be that the IBT submitted the language not to enshrine the Company's scheduling practices but to preclude them.

ensued during the course of bargaining had nothing to do with the issue before this Board. As accurately described by the Company's proposed issue: The question here is: "Whether the matter in which the Company solves Pilot schedules in the Bid award process for "must-work" days is in violation of Section 15.I.1." The issue facing the courts, on the other hand, was whether, during bargaining that preceded an initial CBA, the Company could legally implement the system here contested. The courts' conclusion was that such actions by the Company *during bargaining* did not amount to a violation of the Railway Labor Act. The courts did not rule on any contract implications since, among other things, there was no contract.

The Company's assertion that the Union offered "no evidence of its own regarding the parties' negotiations"[37] is also accurate but, for reasons discussed below, not dispositive of the issue at hand. As the Company properly notes, the facts relevant to the parties' bargaining history are not seriously in dispute.[38] In the final analysis, the parties reached a compromise agreement, in 2016, one that included recognizing PBS under the contract. As witness Porter noted, however:

> The Union proposed and we ultimately agreed that we would be looking at ... our PBS software system and looking at if we needed to replace it, that we would take into consideration the Solver or the CBI platform that we were using as well as other PBS software systems that were out there ....[39]

---

[35] Company Closing Brief at 17.
[36] *Id.*
[37] *Id.*, at 55.
[38] *Id.* at 16.

The existence of this LOA, we conclude, reflects at most, an agreement that in no way endorsed the MWD process but, instead, recognized, absent a challenge, its use during the search for a possible replacement. Surely, that understanding neither modified the Company's 15.I. obligation to award bids in Seniority order "by awarding each eligible Pilot his Bid Preferences ..." nor permanently deprived the Union of the opportunity to oppose the application of the scheduling language before a System Board impaneled with just such jurisdiction.

Summary

The Union's burden in this case is to prove (1) that the labor agreement requires preferences to be awarded in seniority order and (2) that the Company's practice of solving first for MWDs, in the assignment of those preferences, violates the bargained terms of the agreement. We find that burden to have been sustained. The premise here proposed by management – that bidding will be based on seniority, with listed preferences considered sequentially in all cases *except MWD's* – has not been supported by the evidence.

The basic obligation to consider seniority in distributing preferences is uncontested. The Company does not here deny the import of seniority. It argues,

[39] Transcript 287. Ultimately the parties negotiated a letter of agreement ("LOA") on "scheduling automation." The parties agreed, therein, that:

> ... the PBS Committee will meet with the Company for the purpose of reviewing an selecting a Preferential Bidding System (PBS) vendor, including the consideration of the current in-house solution.

instead, that it has met that obligation by turning to the most senior Pilot first in cases where, as here, the solving process reveals the necessity of a Must Work Day. It is clear, however, that, in solving first for an MWD day, the Company departs from the well-established and (except in the case of MWDs) continuing current practice of considering bid preferences sequentially. Moving Must Work Days to the head of the line for purposes of solving has the clear potential of devitalizing a pilot's other preference bids, (choices that conflict, in one way or another, with the MWD scheduling), resulting in a junior pilot's winning a bid the senior pilot would otherwise have gained.

The Company contends this significant exception was understood by the Union during bargaining. But, while we accept fully the Company representations and evidence that, during bargaining, Allegiant was both vocal and consistent in expressing its intention to continue MWDs, we cannot conclude, in this case, that such position, however clearly announced, should by itself be considered binding. Allegiant claims the Union's silence in response to these repeated proffers should be seen as acceptance. There are situations wherein fact finders have concluded that one party's silence should, under the specific facts of the case, be considered acceptance.[40] It suffices, in this case, to note that, however vigorous the apparently one-sided colloquies were in this area, we may not presume acceptance in the wake of the Union's equally forceful challenge to the

practice in the form of litigation and strike threats. In this light, we cannot infer a purported lack of resistance, verbal or otherwise, to be a convincing indice of mutual approval. In the final analysis, if the parties had intended to include this manifestly substantial exception to the otherwise unqualified language of Article 15, it was incumbent upon them to have so indicated.

As discussed earlier, our holding as to the arbitrability of this dispute is premised on the conclusion that, in the overall, the search for a mutually acceptable PBS system was properly considered a work in progress. That fact reflects recognition by both parties that the *status quo*, including the MWD process, would remain in force until the advent of a new system or at least one sufficiently modified to meet both parties needs or, as was the case here, until the talks were abandoned . For these reasons, while we grant the request to cease and desist, we deny the request for a remedy as to any occurrences prior to the date of the grievance filing.

The Company raises procedural objections concerning compliance with the CBA's grievance filing requirements, including claims that various Pilots failed to supply sufficient statements of the factual allegations and, in certain cases, failed to register their objections within a contractually-defined "Protest Period".

Section 18.C - Grievances and Grievance Hearings - provides a relatively precise process for advancing the matter through the required discussion and ultimate resolution steps. Subsection C.2 addresses the scenario where, following informal discussions, common ground has not been achieved.

[1] See, for example, ACSEA and USAirways, Grievance No. 06-05-2009 (LaRue) wherein the Arbitrator noted, *inter alia*, that "In the instant matter, there is evidence only as to what the Company intended during negotiations." Opinion, at 23. For that reason alone, the referenced case is inapposite.

18.C.2

> If the decision of the Company, as provided in Subsections ... 18.B.2., is not satisfactory to the Pilot or the Union, the dispute shall be appealed to the Vice President of Flight Operations, or designee, submitted on a Grievance form provided by the Union, within fifteen (15) days after the Pilot or the Union, as applicable, receives notice of such decision. The Grievance shall contain a statement of the facts involved, the remedy sought and the specific provision of the Agreement alleged to have been violated.

The concluding sentence of the above-cited language reflects the reasonable requirement that a complaint specify, among other things, "the facts" underlying the alleged violation. From a global standpoint, the protest at issue is the Company's having opted to solve MWD's first, a situation that, as discussed above, can lead to senior pilots losing a scheduling choice to a junior colleague. From a factual standpoint, that practice, and that possible result, taken alone, are not disputed in this case, although the contractual propriety of the practice is very much at issue. As such, a grievance targeting the practice as a violation of the CBA's seniority requirements should be considered sufficient for purposes of putting the Company on reasonable notice of the issue, thereby complying with the overall notice intent of Section 18.C.2. And if, as here, the evidence and arguments support the claimed contract violation, it is appropriate that a cease and desist order be issued.

That, however, does not, in and of itself, resolve the question of whether a particular pilot was improperly denied a particular bid. For *that* purpose, the protest must be both specific and, by agreement of the parties, timely. The CBA deals with such

request in explicit terms: In Section 2 of the CBA, the parties have defined a window which "shall be used [by the Pilot] to identify Company errors" and thereby put the Company on notice of claimed faults concerning his or her Bid Line award:

> Protest Period – The defined period of time within the Bid Period when a Pilot, who has been awarded a Bid Line, may submit to the Company potential errors with his award for the purpose to remedy potential errors.

Section 15.B. – Monthly Bid Period Timeline states:

> 5. Protest Period
>
> The Protest Period following the posting of the Initial Bid Line Awards shall be used to identify Company errors in the PBS integration and construction parameters (e.g., missed Vacation slide request, missed Training Days, incorrect PCH for individual Trip Pairings, etc.)

The apparent intent of this negotiated, and notably compressed[41], time restriction is to ensure that challenges to the bidding process are dealt with expeditiously. For the reasons stated herein, we find that Allegiant erred in its conclusion that Must-Work Days constituted an exception to the contractual mandate to honor seniority in scheduling. But, as concerns claims for individual remedies, nothing in the labor Agreement states, or even suggests, that the Company's conclusion should somehow be excluded from the reference to Section 15.B.5's reference to "Company errors in the PBS integration and construction parameters". It follows that a pilot's claim for a specific remedy must, of necessity, be detailed (e.g., which bid was lost) in a claim registered inside the Protest Period. This conclusion, beyond being contractually mandated,

[41] The sample Bid Period Timeline (Section 15.B.3) reflects a 24-hour window for registering the protest.

squares with overall concepts of contract remedies. In such matters, the question of remedy proceeds on a make-whole basis seeks to put the injured party in a position they would have been in had the violation not occurred. Central to the time-critical nature of scheduling (reflected in §§2 and 15) is the assumption that, had the Company known of the claim in time to take appropriate steps, it could have avoided the loss, an assumption fully consistent with their agreement that timely and precise notice be provided under such circumstances. For this reason, the mere submission of a Grievance, *sans* specifics as to the claimed seniority inversions and, significantly, *sans* compliance with the Protest Period window, will make an individualized remedy unavailable.

AWARD

The grievance is sustained as set forth below:

Seniority must be observed in solving for Must Work Days. In that process, expressed bid preferences must be awarded, seniority permitting, in sequential order. The Company is ordered to cease and desist from practices that interfere with those requirements.

Make-whole remedies shall apply to claims violations occurring after the filing date of the Union's grievance.

Richard I. Bloch
Chair

I Dissent

Tom J. Pozdro
Union-Appointed Member – Concur

Dustin Call
Company-Appointed Member

see attached for my Dissent

June 19, 2020

Carrier Member's Dissent

Introduction

The decision issued by the Board ignores material and undisputed facts, is contrary to settled arbitration precedent, and is internally inconsistent. By issuing a decision that departs so far from the contract language and hearing evidence, the Board has completely failed to carry out its fundamental task of interpreting the parties' collective bargaining agreement, with respect to both the untimeliness of the grievances and the merits of the case.

Procedurally, the majority admits that under the plain terms of the collective bargaining agreement, the union's grievances were untimely. However, it then proceeds to ignore that language by concluding that there was an implicit waiver of the contractual deadline – a position that the union did not even raise, that is utterly unsupported by the record evidence, and that Allegiant had no opportunity to refute, which it would have done had this argument been raised.

On the merits, the majority did not base its decision on the undisputed evidence about what the parties did – or did not – agree to at the bargaining table. Instead, it invented a new contract rule that it acknowledges the parties never agreed to. The collective bargaining history evidence, all of which was presented by Allegiant and credited by the majority, established that Allegiant never agreed to depart from its longstanding practice of solving pilot schedules on Must Work Days first. Based on that undisputed evidence, the Board was required to deny the union's claim. Instead, the majority created new contract principles guided not by the parties' agreement, but by the majority's own flawed views about how the company might "improve" its process for creating pilot schedules.

In both respects, the majority's decision violated the fundamental precepts of RLA arbitration. For these reasons, I dissent. [1]

Analysis

The Board's task in this case was straightforward. It was asked to determine whether the parties agreed in their current collective bargaining agreement ("CBA") that Allegiant was required to stop solving Must Work Days first – as it had done prior to, during, and since the parties' contract negotiations. The simplicity of this task was highlighted by the fact that the material facts were not even remotely in dispute. Allegiant put on its two lead negotiators in the negotiations, Jerry Glass and Trent Porter. Both provided unequivocal and unchallenged testimony that the union never even proposed to require that Allegiant had to stop solving Must Work Days first, or that Allegiant had to solve schedules by awarding pilot preferences purely in sequential order without regard to Must Work Days. They also testified that Allegiant never agreed to change the way it solved pilot schedules in this fashion – and that it never would have

[1] In contrast to the majority's rulings on the merits and timeliness, its analysis of the Protest Period and specificity requirements stand out as an example of how this process is supposed to work. The company raised those issues, presented unrebutted evidence that they preclude most of the Union's claims from obtaining monetary relief, and – in accordance with the settled principles of arbitration – applied those terms in accordance with the parties' intent. My dissent, therefore, does not apply to those aspects of the award.

agreed to do so, given the impact it would have on Allegiant's ability to run its operations and its unique and successful business model. This is further supported by the fact that while the parties' negotiations over the issue were taking place, Allegiant successfully defended its scheduling practices in federal court against a union argument that its method of solving pilot schedules did not honor seniority.

The union offered no rebuttal to this testimony, and no negotiating history evidence to contradict that presented by Mr. Glass and Mr. Porter. The union's sole witness was Andrew Robles – who was not part of the union's bargaining team, who was not present at any of the bargaining sessions where the language was negotiated, and who did not possess or offer any information about what the parties discussed at the table. Captain Robles's testimony amounted to little more than a presentation in which he opined that the company could change how it scheduled on Must Work Days without substantially eroding its ability to operate. That is, his testimony was that he believed there was a better way to run the airline. Not only were Captain Robles's hypotheses refuted by the company's scheduling expert and other witnesses, his testimony on this point was entirely irrelevant. As the Board itself stated at the beginning of the hearing, its role was solely to determine what the parties intended when entering into the present agreement – not to partake in an interest arbitration about how the system might be improved.

Despite the Board's accurate statements about its role in determining the parties' intent, that is not what it has actually done. As arbitrators have repeatedly observed, in cases of contract interpretation, it is the union's burden to show that its proffered interpretation is what the parties' intended at the bargaining table, and that there was a "meeting of the minds" between the parties on the union's interpretation. *E.g.*, *American Eagle Airlines, Inc.*, 2014 AAAD 257, at 2 (Arb. Briggs, 2009) ("[T]he Union has the burden of proof. It must demonstrate through a preponderance of the evidence that the parties mutually intended" the contract to mean what the union now claims). The direct corollary to this rule is that the company does not bear any burden to show agreement on its interpretation of the challenged language. *E.g.*, *Philips Consumer Elecs.*, 91 BNA LA 1040, at 1043 (Arb. Nolan, 1988) ("To win the case . . . the Union must prove its charge; the Company is not obliged to prove its innocence.").

The majority simply and utterly ignores these principles in finding for the union. The award expressly acknowledges that "Allegiant was both vocal and consistent in expressing its intention to continue MWDs" during the parties' negotiations, and that it was adamant on this point because "Must Work Days [are] a critical part of the airline's business." In other words, during bargaining Allegiant made clear that it did not agree to the interpretation now advanced by the union, that pilot preferences must be solved sequentially without regard to Must Work Days. Likewise, the Board concedes that throughout collective bargaining, the union remained silent on this point and never suggested that the contract language at issue here would require the company to change how it solves schedules on Must Work Days. Given these undisputed facts, it is impossible to conclude that there was a meeting of the minds as to the union's interpretation.

Aware of this, the majority applies an entirely different standard. In effect, the majority concludes that the parties' intent does not matter. Rather, it finds that the union is entitled to require Allegiant to make a significant change to its operations that it indisputably did not agree to. In the normal case, this would simply be wrong. In this case, given the Board itself has

found that the material facts in the company's favor are undisputed, the majority's conclusion is shocking.

The majority's decision could have disastrous implications for the collective bargaining process. Under the majority's approach, a union may sit silently throughout negotiations, never explaining its intent, and then claim after the fact that the parties' agreement should be interpreted pursuant to the union's unstated meaning. Companies will therefore be faced with the unsettling notion that unless it expressly puts in writing that the parties' agreement will not prevent it from conducting each and every critical aspect of its business, the union's positions – unstated and never agreed to – will be imposed by an arbitrator years after bargaining has concluded. This will only prolong negotiations, make the task of reaching agreement more difficult, and lead to countless disputes as unions seek to impose their previously unspoken interpretations into the parties' agreement through the arbitral process.

The majority's errors do not stop here. Equally fundamental to labor arbitration is the principle that arbitrators must confine their rulings to the parties' agreements and may not substitute the intent of the parties for their own "brand of industrial justice." *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). Thus, arbitrators may not ignore the plain language of the parties' agreements, or render decisions that are entirely unsupported by the record. Here again, the majority ignored these principles. Indeed, the majority's core holding that the contract requires the sequential awarding of preferences is based entirely on its own notions and assumptions about how a scheduling system might work rather than what the parties actually agreed to. It thus concludes that even though the parties never even used the word "sequential" in their agreement and had no meeting of the minds on this point, sequential bidding must be required because it is necessary to safeguard "important wage and quality of life implications of molding schedules to suit one's preferences."

The majority's holding on timeliness is flawed as well. Here again, the award repeatedly contradicts itself and creates rules out of thin air in order to circumvent the CBA's clear and unambiguous terms.

As the award correctly observes, under Section 18 of the CBA, the union's claim must be barred when the union does not raise an issue with the company "within thirty (30) days after the Pilot or the Union became aware, or reasonably should have become aware, of the event from which the dispute arises." Additionally, it imposes a second limitation: if the union is dissatisfied with the Company's response to its initial complaint, it has 15 days to file a grievance once it "receives notice of such decision." The contract contains no exceptions to either of these requirements; not for disputes over pilot scheduling or anything else.

These provisions are dispositive of the union's claims. And again, the material facts are not in dispute. In November 2016, the union complained to the company about the way it was constructing pilot schedules on Must Work Days. The company responded, telling the union it intended to continue solving Must Work Days first – thus rejecting its complaint. In an email response immediately thereafter, the union made clear that it believed that this violated the parties' agreement. Yet the union did not file a grievance over this practice within the 15-day period required by the parties' agreement. Indeed, it did not file a grievance within 30 days, or

60 days, or 180 days, or even a year after it was well aware of the event underlying this dispute and the company had rejected its claim. Instead, it waited more than 15 months to file its first grievance over the company's method for building schedules on Must Work Days. It is impossible to accept these facts as true – which the majority has done – and find that the union has satisfied the CBA's mandatory timeliness requirements.

Rather than apply these clear terms to the undisputed facts, the majority concludes that the parties "intended to waive applicable time limits for filing a grievance on the subject of PBS" while the parties were negotiating over a replacement scheduling system. That is, the majority concludes that the parties intended to extend the applicable time limits as they applied to these claims. The union never argued or even suggested that the parties agreed to such an extension, either during the hearing or in its post-hearing brief, and there is not a shred of evidence in the record to support it. Indeed, it cannot be squared with the undisputed facts, including that the contract requires that all extensions of the grievance time limits be in writing, and that the union began filing the claims at issue in this case several months before the parties' negotiations over the replacement PBS were terminated. In addition, had the union made such an argument, Allegiant would have forcefully responded with evidence that no such "exception" existed. The majority's unilateral creation of this exception foreclosed Allegiant's opportunity to do that.

Finally, although I dissent from the majority's decision, it is worth noting that the Board is in agreement that the "Award" in this case is extremely narrow. The decision provides that:

> Seniority must be observed in solving for Must Work Days. In that process, expressed bid preferences must be awarded, seniority permitting, in sequential order. The Company is ordered to cease and desist from practices that interfere with those requirements.

That is, the company must stop solving Must Work Days first because, the majority concludes, this violated pilot seniority. But of course, as the Board has expressly acknowledged, this does not guarantee any particular result or require the company to award work that would violate either contractual or regulatory legalities. Likewise, as the Board has noted, this award does not mean that so-called seniority inversions – which will unfortunately increase as a result of this decision – violate the parties' agreement. The Board has been clear regarding its intent on these points. Thus, so long as the company awards assignments on Must Work Days in sequential and seniority order, whatever the result, "there will be no violation."

July 14, 2020

Dustin Call
Carrier Member