ARBITRATION PROCEEDINGS BEFORE THE
ALLEGIANT AIR PILOTS SYSTEM BOARD OF ADJUSTMENT
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In the Matter of the Arbitration Between

ALLEGIANT AIR
- and -
INTERNATIONAL BROTHERHOOD OF TEAMSTERS
(APA Teamsters Local Union No. 2118)
****

Subject: GRIEVANCE No. 3586 (PBS II): MERITS

SYSTEM BOARD OF ADJUSTMENT

William Fishburn – Allegiant Board Member
Ryan Joseph, – IBT Board Member
Dana Edward Eischen, Impartial Chairman

APPEARANCES

For the Union: THE URBAN LAW FIRM, LLP
By Michael A. Urban, Esq.

For the Carrier: JONES DAY LLP
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ALSO PRESENT

For the Union: Ryan Fogelsanger,
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CA Kenneth Seiden, Scheduling Chair
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For the Carrier: Zackary Ames, Director-Ops. Research
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Cristal Vega, Mngr. Lab. Rel.

PROLOGUE

Allegiant Air ("Allegiant", "Company" or "Carrier") is a low-cost scheduled and charter air carrier focused on transporting passengers from some small and mid-sized cities to/from leisure and vacation destinations over some 400 daily routes. The International Brotherhood of Teamsters Airline Division ("IBT" or "Union") was certified in 2012 as the exclusive bargaining representative for the Pilot craft or class of Allegiant employees. The 2016-2021 collective bargaining agreement ("CBA" or "Agreement") governing this case, the first such Agreement between these parties, currently is being renegotiated in Railway Labor Act Section 6 bargaining.

The Allegiant fleet, which includes the MD-80, the Airbus 320, and a few Boeing 757s, operates out of 24 pilot crew bases, the largest of which are located in Sanford, FL (SFB) and Las Vegas, NV (LAS). However, many other Allegiant pilot domicile bases, such as Cincinnati/Northern Kentucky International Airport (CVG), Savannah/Hilton Head (SAV) or Nashville (BNA), have only a handful of domiciled pilots. Because Allegiant's business model is skewed toward holiday and seasonal vacation travel, that multiple small-base demographic exacerbates the effects of a phenomenon inherent in all airline crewmember scheduling systems: the need to staff scheduled flight coverage on particularly busy days and during holiday/vacation seasons, *i.e.*, the very days and times when many employees also seek time off from work. Stated another way, on particularly busy days and times, *e.g.*, Christmas, Thanksgiving, Memorial Day, Spring Break, Labor Day, *etc.*, few if any expressed preferences for time off may be granted for pilots at a particular base. On such dates, every or nearly every pilot at the base who is contractually and legally available to work may be denied requested time off and assigned to cover scheduled flying.

Prior to 2014, Allegiant used "line bidding" to create monthly schedules by constructing lines of flying pre-populated with specific flight pairings, reserve periods and days off. Pilots then would choose from and be awarded those pre-constructed work/day off lines in seniority-ordered priority. Because line bidding allowed Allegiant to create each of the lines that the pilots could choose from, management placed only work assignments lines and no time off on "Must Work Days", *a.k.a.* "MWDs" *i.e.*, those dates when the number of assignments to be staffed at a base equaled or exceeded the number of legal and available pilots at the base.

Like most of the commercial airline industry, Allegiant abandoned line bidding and transitioned to a flight and cabin crew work assignment bidding methodology known as a Preferential Bidding System ("PBS") after the 2013 modification of Federal Aviation Regulations ("FARs") regarding pilot hours of service and rest periods. Thus, since January 2014, Allegiant has used a triad of home-grow computer programs and tailored Excel© spreadsheets to accomplish the PBS task of solving and awarding monthly bid schedules for flightcrew and cabin crew employees. The Crew Bidding Interface ("CBI") is the keyboarding system that pilots use to input their preferences. The so-called "Mavis Solver" houses the proprietary computer code that creates pilot schedules based on availability, legalities, and pilot preferences. And the third in-house system—referred to as "Merlot"— displays the flight pairing, reserve assignments or combination lines that have been awarded to each pilot. Simply stated, flight deck employee input their preferences using CBI, the Mavis solver creates the schedules, and Merlot displays awarded assignments or days off on Excel spreadsheets.

There are three types of PBS awardable lines at Allegiant: (1) "pure Regular" lines, which consist only of flight pairings; (2) "pure Reserve" lines, which consist only of

Reserve Availability Periods or "RAPs"; and (3) "Composite" lines, which can consist of both flight pairings and RAPs. In advance of each bid period, the Company posts information about available work for the upcoming month, including scheduled flights, duty times, and the Line Credit Window ("LCW").[1] Allegiant pilots use the CBI to express their preferences for the type of work they want to perform in the next month, what days of the month they prefer to work or take a day off, what times on a particular day they prefer to work, and many other preferences. After pilots are assigned a line type, the Mavis Solver, as currently configured since July 2020, "identifies" the Must Work Days ("MWDs")[2] for the base and then starts to award specific assignment or day off preferences sequentially and in accordance with relative seniority.

Ostensibly, any PBS bidding array should produce a schedule that gives each pilot, sequentially and in accordance with his/her seniority, as many stated preferences as possible; provided only that the preference is "available" at that pilot's seniority level and compliant with CBA contractual and legal/regulatory requirements. That said, no known PBS configuration guarantees that every such expressed preference will be awarded. From 2014 to 2020, senior Allegiant pilots' expressed day off preferences falling on a MWD were routinely denied and nearly every legally and contractually available pilot was assigned to cover the flights scheduled to operate out of his/her base on such a MWD date.

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[1] The LCW is a range of hours set by the Company; pilots awarded a regular line must bid for enough work to get into that range. Tr. 88:24-89:10. The LCW for each month is communicated to pilots prior to bidding. See JX 1 § 15.F.

[2] In the parlance of Allegiant's scheduling system solver, a Must Work Day ("MWD") is identified when the number of pilots legally and contractually available to cover flying assignments at a crew base on a particular day or days is equal to or less than the number of flying assignments to be covered on those days.

BACKGROUND

This "PBS II Merits" arbitration case presents only the latest in a decades-long string of CBA §15 Scheduling disputes over Allegiant's administration of MWDs under its proprietary Preferential Bidding System. No useful purpose is served by delving deeper into that tangled litany of disagreement, negotiations, mediation, arbitration and serial litigation around the vexatious issue of MWD's. For present purposes, our case history begins with the following June 19, 2020 "PBS I Award" of this SBA, then chaired by impartial arbitrator Richard I. Bloch - the so-called " Bloch Award".[3]

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.*

Following that decision, Allegiant's Managing Director-Flight Crew Planning sent all CBA-covered Pilots a July 17, 2020 memo, which reads, in parts most pertinent:

> . . . The arbitrator ruled that our CBI PBS system cannot solve for Must Work Days first in creating pilot schedules, but instead it must solve pilot schedules in sequential order.
>
> In compliance with this award, the solver has been modified so that Must Work Days are no longer automatically solved first (*i.e.,* "leap frogged" to the front of a pilot's bid). Instead, schedules wil be solved in the sequential order of a pilot's bid, based on the pilot's seniority, availability of the trip or day of bid for, and contractual and regulatory legalities. These changes will be effective for the August schedules. We encourage you to take the time to consider how to rank your global preferences within CBI in light of these changes.. . .

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[3] *See* **Attachment A** for pertinent CBA provisions and **Attachment B** for Arbitrator Bloch's PBS-I Opinion and Award.

The Union promptly protested, claiming that Allegiant's post-Bloch changes violated CBA §15 and asserting that the Bloch Award required Allegiant to "to turn off the MWD logic". When Allegiant then asked Arbitrator Bloch to "clarify" his Award, the IBT asked him to assert jurisdiction over its new claims that Allegiant's continued use of Must Work Days was, *per se*, a violation of CBA Article 15 and the June 19, 2020 SBA "Bloch Award".

By letter to respective Counsel, dated September 14, 2020, Arbitrator Bloch denied both of those requests, as follows:

* * * * *

> This letter is in response to your recent correspondence, including briefs, concerning the Company's request for "clarification" of the System Board opinion on the PBS matter relating to the contested practice of "solving first" for Must Work Days (hereinafter, occasionally, MWDs). The Union objects to a clarification (only), arguing that a full evidentiary presentation is required to resolve the parties' differences surrounding the company's new method of awarding day-off preferences.

* * *

> In the final analysis, the complaints) at issue surround matters that (1) arose after the issuance of the original award and (2) involve new facts that necessarily require new evidence. Taken together with the conclusion that the written Award reflects no ambiguity, either as to the source of the contract violation or the response of the System Board to that breach, the finding is that the Board is properly considered *functus officio* and that both the Company's and the Union's requests should be, and are, denied.

Thereafter, the Parties resorted once again to litigation in the U.S. District Court for the District of Nevada; with Allegiant suing to vacate the Bloch Award and the IBT countersuing to enforce it. On March 2022, U.S. District Judge Andrew Gordon issued a consolidated order, denying Allegiant's motions for summary judgment *vacatur* and granting IBT's motion to enforce the Bloch Award. (**ATTACHMENT D**):

* * *

> . . . The [Bloch] SBA arguably construed the CBA in granting the Award. Therefore, I must enforce the Award. But this does not, and I will not, address the minor issue of whether Allegiant violated or is currently violating the Award. . . I order Allegiant to comply with the Award at issue in this case. My order does not opine on whether Allegiant is currently violating, or ever violated, that Award.

* * *

Allegiant's appeal of that that District Court order was denied by a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit in a March 30, 2023 Memorandum Opinion that reads, in parts most pertinent (**ATTACHMENT E**):

* * * * * *

> The [Bloch] Board did not exceed its jurisdiction when it found that the terms of the CBA require Allegiant to devise schedules sequentially based on seniority. The Board permissibly ascribed weight to the fact that the Union proposed, and the parties included, a provision in the CBA stating that "Bid Lines shall be awarded . . . in order of Seniority." With the inclusion of that text and the lack of any provision regarding MWDs, the Board permissibly interpreted the contract to require that work schedules be assigned based on preferences and in order of pilots' seniority, without taking MWDs into account. In doing so, the SBA also permissibly drew upon industry practice and Allegiant's custom in all cases except those involving MWDs. *See* Stead Motors of Walnut Creek v. Auto. Machinists Lodge No. 1173, Int'l Ass'n of Machinists & Aerospace Workers, 886 F.2d 1200, 1205-07 (9th Cir. 1989). Because the arbitrators' award drew its essence from the contract, we may not substitute our judgment for theirs.

* * * * * *

In the meantime, IBT Grievance #3586 had been filed on October 15, 2020, claiming a system wide violation of the CBA and the Bloch Award for every denied day off preference on a Company-identified MWD when solving and awarding the November 2020 PBS bid. *(***ATTACHMENT C**). After the protracted litigation, that unresolved grievance dispute eventually was appealed to this System Board of Adjustment for final and binding determination in a bifurcated procedural/merits arbitration.

STIPULATED PHASE II MERITS ISSUE

> Do the changes that Allegiant made in July 2020 to the manner in which it creates Pilots' schedules violate the terms of the CBA cited in Grievance 3586 (Article 15, §§ 15.B.2, 15.G.1, 15.I.1, and 15.I.2) or the Bloch Award?

PROCEEDINGS

Both Parties were represented by Counsel and each presented testimony, documentary evidence and oral argument in support of their positions at virtual arbitration Phase II-Merits hearings by this SBA on July 5, 6, and 7, 2023. After the record was closed in December 2023, the Parties graciously granted the Board additional time for rendition of this decision. This Opinion of the Impartial Chairman and the attached Award of the Board are based upon my due consideration of the voluminous evidentiary record, with the valued benefit of executive session consultation with my SBA colleagues.

POSITIONS OF THE PARTIES

The following summations of the countervailing positions are extrapolated and edited from the respective posthearing briefs:

Union:

> The last sentence of Section 1.J of the CBA makes clear that Management Rights shall not be exercised so as to conflict with any express provision of the CBA. That is exactly what the Company is trying to do here; claim that management rights allows then to ignore the express language in Section 15 they agreed to in the CBA and the interpretation of that language by the Bloch Board. The evidence presented by the Union clearly shows that the Company changes in 2020 and continued rejected Day off preferences once MWDs are identified is a violation of Seniority and Preferences. These violations are most clearly shown by the treatment of Pilot #4815 (PIT), in Union Exhibits 65, 66, 81 Excel spreadsheet and 87.
>
> The evidence at the hearing also shows that by not considering Composite Lines in their calculations of Pilot coverage, creating more Must Work Days, and rejecting all Pilot requests for a specific Day Off (the number one preference after Bid Line type and PCH value), the Company is in fact still "solving" first for MWDs and also increasing the number of violations of Seniority and Preferences.
>
> The language in the CBA is clear and unambiguous. The Bloch Board clearly stated how the Company violated the CBA from 2016- 2020. Notwithstanding this clear Award, the Company chose to make further changes to its Scheduling System that further violated the CBA and Pilot Seniority and Preferences. The actions by the Company are a continuing violation of the CBA and the Bloch Award and should be stopped by the Board of Adjustment with an appropriate remedy to all Pilots.

Employer

In July 2020, Allegiant complied with the Bloch Award by making changes to its scheduling system so that it no longer solved Must Work Days first. The PBS solver now starts with the most senior pilot's first overall preference, always goes in each pilot's sequential preference order, and awards every preference that is legal and available at each pilot's seniority level. The Union's primary contention in this case—that Allegiant cannot deny a pilot's day off request on a Must Work Day—directly conflicts with the Union's stipulation that it is not challenging Allegiant's use or consideration of Must Work Days.

Even if those arguments were not barred by its stipulation, the Union's position is not supported by CBA §§ 15.B.2, 15.G.1, 15.I.1, and 15.I.2. or the Bloch Award. Moreover, the Union's grievance fails as well under § 1.J.1, the CBA's express Management Rights clause, which gives Allegiant the right to continue any practice that it had prior to the CBA unless "expressly limited or modified by a specific provision of this Agreement." Neither the CBA or the Bloch Award require Allegiant to grant day off requests on Must Work Days—let alone do so through "clear and unmistakable language".

For each of these reasons, this System Board should deny the Union's grievance in its entirety, hold that Allegiant's method for calculating and solving Must Work Days does not violate the CBA or the Bloch Award, and put this issue to rest so that the parties can move forward from this years-long dispute.

DISCUSSION

This SBA's unanimous Jointly Stipulated Procedural Award reads as follows:

> 1. The Union is not challenging, *per se,* Allegiant's use or consideration of Must Work Days in creating Pilot's schedules.
>
> 2. The Union is withdrawing the portion of Grievance No. 3586 relating to alleged violations of Section 15.A.9.
>
> 3. The issue for the System Board to decide at the merits stage shall be: "Whether the changes that Allegiant made in July 2020 to the manner in which it creates Pilot schedules[4] violates the terms of the CBA cited in Grievance No. 3586, or the Bloch Award".

[4] In addition to the post-Bloch Award changes in MWD assignment announced in Allegiant's July 17, 2020 memo, the stipulated Phase II issue also contests the contractual propriety of an unannounced change made by Allegiant in the PBS system's method of calculating the number of available pilots and identifying necessary MWDs prior to making the initial bid runs.

Jurisdiction and Authority

The precisely written jointly stipulated Phase-I Procedural Award, *supra*, presents for our Phase II merits arbitral determination whether certain specifically identified post-Bloch Award changes Allegiant made in its in-house PBS system violate specifically-identified provisions of the governing CBA or three (3) plainly worded directives set forth in the Bloch Award at p. 31 of the SBA's June 19, 2020 "PBS I Decision". (Attachment B). Each of the Parties mistakenly contends that its position in Phase II Merits arbitration is supported or enhanced by selectively quoted text lifted from sources collateral to that PBS I Bloch Award. However, none of that surplusage played any part in our determination of the stipulated merits issue(s) in this case.

In short, cherry-picked *dicta* from Arbitrator Bloch's PBS I opinion/analysis, from the Carrier Member's dissenting opinion, and from gratuitous, unwarranted and uninformed purported interpretations of the Bloch Award by the federal judiciary in the vacatur/enforcement litigation provides comfort for neither Party. [Beyond simply affirming the June 17, 2020 SBA PBS I Award, the Nevada District Court and the Ninth Circuit of Appeals had no business opining on the "meaning" of the Bloch Award. It is black-letter law that Federal court jurists are without jurisdiction or authority to interpret such adjustment board awards][5].

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[5] *See* IBEW System Council No. 7 v. Metro-N. R. Co., 2013 WL 5788688, at *3 (S.D.N.Y. Oct. 25, 2013); *see also, e.g.*, Ciarleglio v. Metro-N. R. Co., 2008 WL 160957, at *3 (D. Conn. Jan. 15, 2008) ("The RLA's mandate that district courts enforce arbitration awards is 'neither a duty nor a license to interpret it.'" (quoting Bhd. of Ry. Carmen v. Atchison, Topeka & Santa Fe Ry., 956 F.2d 156, 160 (7th Cir. 1992)). Thus, "disagreement about the meaning of the award . . . must resolve without judicial aid." Loc. 808, Bldg. Maint., Serv. & R.R. Workers v. Metro-N. Commuter R. Co., 1995 WL 432629, at *2 (E.D.N.Y. July 24, 1995).

Some Basic Principles

In analysis of this case record, the System Board of Adjustment applied generally accepted labor-management arbitration principles for interpreting and applying disputed contract language, summarized as follows:

1) Arbitrators and courts alike presume that understandable language in a collectively negotiated agreement or prior arbitration award says what it means and means what it says, despite the contentions of one of the parties that something other than the apparent meaning was intended. Independent School Dist. No. 47, 86 LA 97, 103 (1985) (Gallagher). Thus, when Parties to a collectively bargained agreement posit different *post hoc* understandings of what certain mutually agreed language means, it is generally recognized that the party whose understanding is in accord with the common, ordinary, everyday meaning of that language should prevail in the absence of misrepresentation, fraud or mistake. *See* Hanon & Wilson Company, (S. Katz 1967), 67-2 ¶ 8583. *Accord*, Stewart Hall Company, 86 LA 370, 372 (Madden, 1985).

2) The better-reasoned cases hold that contract provisions should be given their ordinary and popular meaning unless the evidence, taken as a whole, persuasively shows a mutual intent to convey some contrary, specialized or technical meaning. *See* D. Nolan, Arbitration Law and Practice (1979), N.8 at 168; Walter Jaeger, Williston on Contracts, § 618 at 705 (4th Ed. 1961). It should be noted the Restatement (Second) of Contracts. (Section 212, comment b, 1979) is in accord:

> *"In the absence of contrary indication, English words are read as having the meaning given them by general usage, if there is one. This rule is a rule of interpretation in the absence of contrary evidence, not a rule excluding contrary evidence."*

3) When words of a contract provision really are vague or ambiguous, an arbitrator may rightly consider parol evidence to resolve disputes over the meaning of the unclear contract language. Brigham Apparel Corp., 52 LA 430 (1969). Several kinds of collateral evidence may be utilized in order to determine the meaning of words agreed to in a contract, commonly including "negotiating history", *e.g.,* draft proposals and statements or representations made back and forth across the bargaining table. *See,* Milk Producers Ass'n, 95 LA 1184 (Kanner, 1990). Implicit meaning also often is inferred from persuasive evidence of a mutually binding "past practice" *i.e.*, a long-standing, consistent, open and mutually acknowledged course of conduct administering or applying disputed contract language. *See* Great Atlantic & Pacific Tea Company, 46 LA 372. 374 (Scheiber, 1966).

5) An arbitrator is not bound in any *res judicata* or *stare decisis* sense to follow the decision of a predecessor, even on the same issue. As a practical matter, however, when a prior decision, covers the same parties, issues and contract language (as does the PBS I Bloch Award in this case), a subsequent arbitrator frequently will consider a colorable interpretation laid down in that earlier award a binding part of the agreement, unless and until the parties change the language.

6) Because the submitted issue of disputed interpretation/application of the CBA and the Bloch Award was generated by a grievance filed by the Union, the IBT bears the burden of proving, by a preponderance of the evidence, that its interpretations are correct.

7) Preponderant evidence does not mean the greater number of witnesses or the greater length of time taken by either side but rather probative, convincing quality--the weight and the effect that it has on the mind of the objective impartial decision maker. To satisfy this standard of proof, IBT must present sufficient reliable evidence to convince an impartial arbiter that its version of the facts, language and controlling authorities most probably is the correct one. <u>Philips Consumer Electronics Co.</u>, 91 LA 1040, 1043 (Nolan, 1988).

<u>ANALYSIS</u>

In these Phase II Merits proceedings, the IBT challenges the following July 2020 changes Allegiant made in its proprietary PBS system after receiving the Bloch Award [6]:

> (1) The PBS software no longer considers Composite Lines together with "pure" Regular Lines and "pure" Reserve Lines when counting/calculating the numbers of available pilots and assignments used to identify Must Work Days.
>
> 2) The PBS software now identifies such MWDs first and then awards work assignment and available days off by seniority as it progresses sequentially through each Pilot's CBA §15.H "global list" of expressed preferences.

The provisions of CBA Article 15 cited in Grievance #3586 as allegedly violated by those changes are §15.B.2 <u>Monthly Bid Period Timeline</u>, §15.C. <u>Regular, Reserve and Composite Bid Line Construction</u>, §15.G. <u>PBS Bid Line Construction</u>, and §15.I. <u>PBS</u>

[6] The Company made several other PBS system coding changes in July 2020, including changes to automate certain buffers applied to the LCW, the elimination of so-called "dummy" composite lines that had become obsolete during the COVID-19 pandemic, and the implementation of an automatic process to assign pilots to different line types if they could not get into the LCW (or the newly added LCW buffer). The Union did not contest those particular changes in this Phase II Merits arbitration.

Initial Awards. (By joint stipulation, the allegation of §15.A PBS Committee violations was withdrawn by IBT).

The essence of the SBA majority's "PBS I Bloch Award" is distilled in three plainly stated interrelated sentences that explain contractually compliant CBA §15-Scheduling PBS-solving for MWDs. Those plain and unambiguous directives of the Bloch Award constitute a categorical logical syllogism:

Major Premise:	CBA §15 requires that seniority must be observed in solving for MWDs.
Minor Premise:	Seniority permitting, CBA §15.H expressed bid preferences must be awarded in sequential order.
Conclusion:	Company practices that interfere with either of those requirements violate CBA §15.

Further, the wording of the Phase I Award stipulated merits issue, *supra*, demonstrates mutual recognition that this interpretive arbitral gloss, applied to Article 15 §§B.2, 15.G.1, 15.C and 15.I.1 by the Bloch Award, is now part and parcel of CBA §15-Scheduling. *See* Pan American Refining Corp., 2 ALAA ¶ 67,937, ¶ 69,464 (Whitley McCoy, 1948):

> "Where a prior decision involves the interpretation of the identical contract provision, between the same company and union, every principle of common sense, policy and labor relations demands that it stand until the parties annul it by a newly worded contract provision."[7]

[7] Time and again, such respected practioners have reaffirmed that an arbitrator with a proper regard for the grievance resolution process and stability in collective bargaining should accept an interpretation by a prior arbitration--if based in the same agreement language and not determined to be "palpably erroneous"--as binding. *See, e.g.,* O & S Bearing Company, 12 LA 132, 125 (Russell Smith, 1949); Brewers Board of Trade, Inc., 38 LA 679, 680 (Burton Turkus, 1962), Lehigh Portland Cement Co., 46 LA 133, 137 (Clair Duff, 1965); Timken Roller Bearing Company, 32 LA 595, 597-599 (George Boehm, 1958).

Burden of Persuasion

As the moving Party, IBT must prove by preponderant record evidence its generic claim of system-wide CBA Article 15-Scheduling and Bloch Award violations at all 23 pilot domicile bases on each November 2020 day-off denial/MWD date listed in its Grievance #3586. If the relevant record evidence does not support the Union's allegations or if it weighs so evenly that an impartial arbiter is unable to determine preponderance, then the submitted question must be decided against the Union. *See* School District No. 1, County of Denver, 120 LA 816, 825 (Gaba, 2004) *("Movant must present evidence that is more credible and convincing than that presented by the other party, sufficient to show that the facts to be proven are more probable than not"*). *See also* Occidental Chemical Corp., 114 LA, (Brunner, 2000, emphasis and parenthetical in original): "*In a contract interpretation case, the [moving party] meets its burden by showing (through evidence and testimony) that its **own** view is correct, not that the other side's is wrong.*"; *See also*, U.S. Dept. of Agric., 120 LA 1560, 1566 (Briggs, 2005), Lewis & Clark County, 114 LA 35, 38 (Calhoun, 2000) and Beverage Concepts, 114 LA 340, 344 (Cannavo, (1999).

IBT proffered few specific facts about its all-encompassing claim of 1,047 such separate violations. Rather, as discussed in detail, *infra*, the Union presented documentary and testimonial evidence concerning November 2020 MWD day off preference denials experienced by the most senior Pilot bidders for Regular Lines on identified MWD dates at only two (2) bases: Pilot #5086 at Cincinnati/Northern Kentucky International Airport ("CVG") and Pilot #4815 at Pittsburgh International Airport ("PIT").

<u>Post-Bloch Award Composite Line Solving Changes</u>

Before the Bloch Award, Allegiant included Regular flying pair bidders, Reserve period bidders and Composite line bidders all together when counting available pilots/assignments and identifying MWDs. Post-Bloch Award, the Allegiant PBS solver considers only Regular line and Reserve line bidders when identifying MWDs prior to the initial solve for Regular and Reserve preferences. Before and after the Bloch Award, Allegiant continues to solve expressed preferences for Composite lines separately, after the protest period and Schedule Adjustment Period ("SAP") during which pilots who receive regular lines may pick up, drop, or trade assignments. In that regard, it is noted that CBA §§ 15.B.3, 15.C.7, and 15.K.3.b.iv, read together, specify that the Composite Line pilot preferences cannot be solved until the protest period closes and after completion of the SAP.

Unfortunately, the removal of Composite lines from the pre-solve MWD identification step evidently does appear to increase the probability of day off preference denials. But nothing in this evidentiary record supports the notion that July 2020 change of pre-solve MWD calculation/identification, *per se*, violated either the cited CBA provisions or the Bloch Award directives. Indeed, nothing in Article 15 §§B.2, C, G.1, I.1 or the Bloch Award even mentions, let alone requires, that Regular, Reserve and Composite bidders be grouped together in the pre-solve calculation and identification of MWDs.

Consistent with the stipulated issue submitted for determination in this case, "the Union is not challenging, *per se,* Allegiants use or consideration of Must Work Days in creating Pilots' schedules". IBT's unsupported assertion that merely identifying MWDs prior to solving Regular and Reserve preferences is a *prima facie* violation of Article 15 and/or the Bloch Award's sequential/seniority directives also is a dog that will not hunt. In my considered judgment, no express CBA contractual provision cited in Grievance #3586 and no Bloch Award mandate was breached by Allegiant's managerial decisions to identify MWDs prior to the initial solve and discontinue the inclusion of Composite bidders in the count of available pilots in that pre-solve identification of MWDs.

Nor can that July 2020 managerial change in pre-solve calculation/identification of MWDs properly be considered a violation of any mutually binding "past practice". In a classic frequently cited decision, Arbitrator Jules Justin observed: "In the absence of a written agreement, 'past practice' to be binding on both Parties, must be 1) unequivocal; 2) clearly enunciated and acted upon; and 3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties." Celanese Corp. of America, 24 LA 168, 172 (1954). No such implicitly agreed and contractually binding course of conduct regarding the inclusion of Composite lines in the initial MWD calculation/identification is persuasively established by the Union in the voluminous evidentiary record of this case. Rather, that disputed July 2020 change appears to be a classic example of the sagacious holding by former Harvard Law School Dean Harry Shulman in Ford Motor Company, 19 LA 237, 241-242 (1952):

> . . . A practice, whether or not fully stated in writing, may be the result of an agreement or mutual understanding. . . A practice thus based on mutual agreement may be subject to change only by mutual agreement. Its binding quality is due, however, not to the fact that it is past practice but rather to the agreement in which is based. But there are other practices which are not the result of joint determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to the convenient methods at the time. In such cases there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things. . . A contrary holding would place past practice on a par with written agreements [and would] create the anomaly that while the parties expend great energy and time in negotiating the details of the Agreement, they unknowingly and unintentionally commit themselves to unstated and perhaps more important matters which in the future may be found to have been "past practice".

Post-Bloch Award Allegiant PBS MWD Solving

Each known PBS array builds lines one at a time sequentially, taking into account not only relative seniority levels but also regulatory and contractual legalities, what preferences are available, and the airline's operational needs for flightcrew staffing coverage of all scheduled flights. It necessarily follows that a pilot cannot be guaranteed to receive each and every stated preference under any known PBS bidding array, including the proprietary Allegiant PBS.[8] Rather, as explained by NAVBLUE™, the commercially available dedicated PBS bidding system used by most commercial airlines, PBS architecture inevitably reaches a "critical unstacking point" when it must deny expressed preferences and make unpreferred "coverage awards" *i.e.,* when the number of remaining assignments to be filled equals (or is greater than) the number of legally and contractually available pilots who can be assigned to perform that work.

Allegiant has always referred colloquially to its functional equivalent of "unstacking", whereby pilots are required to work on certain days even though their expressed bid preference was to take that day off, as "Must Work Days". Since July 2020, under post-Bloch Award rubric, if the initial pre-solve count or the sequential solving process itself shows equilibrium in available pilots and necessary assignments, *e.g.*, eight (8) pilot assignments to be staffed and eight (8) legally and contractually available pilots to staff them, even the most senior pilot(s) will be denied a day off preference(s) for that MWD date and assigned available work.

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[8] *See* Joint Exhibit 3, the Bloch Award, p. 14, n. 16: *"Without question, the existence of a Preferential Bidding System does not guarantee a Pilot access to all preferred assignments during a given bidding period."*

However, if the initial pre-solve count or the sequential solving process identifies more pilots than assignments, *e.g.,* eight (8) assignments and ten (10) pilots who can legally and contractually be assigned to staff them, two (2) expressed preferences for an identified MWD as a day off must be granted sequentially by seniority. After that, every remaining day off preference for the identified MWD date(s) will be denied and each remaining legally and contractually available pilots will be assigned work on those MWD(s). Finally, at the end of the process, any remaining junior pilots who cannot legally and contractually be scheduled to work on an identified MWD will be scheduled off duty for that date.

PIT Pilot #4815--November 29, 2020 MWD

It is undisputed that Pilot 4815, the number one seniority Pilot in the CVG base during the October 2020 bid for November 2020 schedules, had his expressed preference for a day off on identified MWD November 29, 2020 denied by the PBS. In that regard, Captain Kenneth Seiden, the Union's principal subject matter witness testified, as follows:

> *". . .**[T]here are 12 flying trips on that day and 15 regular line pilots who are available.** So that means that there is a guarantee . . . **[T]here's a simple math guarantee that three of those regular lines have to have the day off**. There are not enough trips, flying trips, for all 15 of those pilots."* (*See* Tr. pp. 161-177, 271-275, 674-75 and 761-765 -- emphasis added)

On that basis, the Union contends that "*Pilot #4815 should have had his preference for a November 29 Day Off honored and not automatically rejected"*.[9] *See* IBT Brief at p. 39. However, that attempt by the Union to establish a *prima facie* violation in the case of Pilot #4815 did not survive cross-examination and rebuttal.

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[9] Regarding Pilot #4815, the Union's also postulates "*by not considering the three (3) identified Composite Lines in the Bid process, the Company intentionally created more MWDs, identified two MWDs prior to the initial solve (November 29 and November 30) and rejected all Day off requests for all Pilots.*"

First, as explained, *supra*, the Union's theory that Article 15 and the Bloch Award required continued inclusion of Composite lines in the pre-solve count of pilot availability and required assignments is not supported by probative record evidence. Further, careful examination of the evidentiary record demonstrates that critical components of the Union's calculations concerning the counting of "pure" Regular and "pure" Reserve pilots and the counting of both Regular flying and Reserve period assignments to be staffed around pre-solve identification of MWD on November 29, 2020 are mistaken or inconsistent.

Specifically, the direct examination and rebuttal testimony of Captain Seiden on those critical data points was refuted effectively by the direct, rebuttal and surrebuttal testimony of Ms. Melody Backsteen, the Company's principal subject matter witness. (Tr. pp. 791-794-emphasis added); Union Exhibit 81):

> *Q.* . . . ***[W]hen the company determines whether there are an equal number of available pilots to assignments, how does it treat fly lines and reserve lines?***
>
> *A.* . . ***.[I]t takes into consideration*** *the total available pilots during that initial solve, which would be* ***pilots that have a pure fly line or a pure reserve line and are available,*** *meaning they don't have vacation or training or anything else preventing to be able to work. And* ***then it takes a look at the total assignments for that day, which include both trip assignments and reserve assignments as a total.***
>
> *Q.* *And was that true pre-Bloch that fly lines and reserve lines were considered together during that calculation?*
>
> *A.* . . . ***[P]ure fly lines and pure reserve lines have always been part of that first initial solve together****.*
>
> * * * * * *
>
> ***Q.*** . . . ***[C]an you tell us how many total available regular and reserve line pilots there were on 11/29?***
>
> ***A.*** ***That would have been a total of 19, which includes 15 available fly lines and 4 available reserve lines totaling 19 total available pilots during the initial solve.***
>
> * * * * * *

Q. *And if we scroll over to [UX-81] Column AD, which is, I believe, the column that Captain Seiden looked at, in Rows 27 through 30,* ***can you tell us how many total assignments there were on 11/29?***

A. *Sure. So in Column AD in Row 28, we can see the Number 12 there, which indicates that* ***there is a total of 12 trip assignments on that day, and in that same Column AD in Row 30, we can see that there is a total of 7 reserve assignments. This equals 19 total assignments for November 29.***

* * * * * *

Q. *And so just to round back up, do you agree with Captain Seiden's testimony that there were three available days off on that day?*

A. *I do not, no.*

<u>CVG Pilot #5087--November 1 and November 2, 2020 MWDs</u>

It is undisputed that the Allegiant PBS denied the expressed preferences of Pilot #5087, the most senior Regular flying line bidder at the CVG base, for days off from work on identified MWDs November 1 and 2, 2020. Specifically, his Preferences Number 1 through 9 to work trip pairs all were awarded sequentially until Preference Number 9 (November 1 as a day off) and Preference Number 10 (November 2 as a day off), both of which were denied because each of those dates was an identified MWD.

According to the Union witness' direct testimony, "*there are 12 total pilots with ten items. Two days off should be the minimum guarantee. . . .there are two days off guaranteed to be awarded amongst those 12 pilots because there are only ten items on that day*. (CA Kenneth Seiden, Tr. 401, 405; UX-66). Aside from those bare assertions, the Union's proffered evidence that Article 15 and the Bloch Award were violated in the facts and circumstances of Pilot #5087's expressed preferences is sparse, inconsistent and mistaken in certain important respects. Indeed, the Union's asserted 12 pilot/10 assignment calculation regarding Pilot #5087 apparently is tainted by the same misperceptions concerning "pure" Regular lines, "pure" Reserve lines and Composite lines that undermined the IBT's PIT Pilot #4815 violation claim.

Again, careful analysis of Excel spreadsheet foundation document data (UX-82) reveals there actually were eight (8) assignments to be staffed and eight (8) contractually and legally available pilots [*i.e.,* five (5) "pure" Regular trip bidders and five (5) "pure" Reserve period bidders; two (2) of whom were on pre-approved leaves]. Since the number of available pilots and number of assignments to be made was equal, no MWD days off were available to be awarded to any CVG pilot in the November 2020 bid, irrespective of relative seniority ranking. The ineluctable conclusion must be no violation of Article 15 or the Bloch Award was proven in the Allegiant PBS denial of Pilot #5087's expressed preferences for days off on the November 1-2, 2020 MWDs.

AWARD OF THE ALLEGIANT AIR PILOTS' SYSTEM BOARD OF ADJUSTMENT

GRIEVANCE No. 3586 (PBS II): MERITS

1) Allegiant's revised PBS process of identifying MWDs as the first pre-solve step does not violate the CBA provisions cited in Grievance No. 3586 (Article 15, §§ B.2, 15.G.1, 15.I.1, and 15.I.2) or the Bloch Award.

2) Allegiant's revised PBS process of identifying MWDs on the basis of "pure" Regular lines and "pure" Reserve lines, without factoring in Composite lines, does not violate the CBA provisions cited in Grievance No. 3586 (Article 15, §§ B.2, 15.G.1, 15.I.1, and 15.I.2) or the Bloch Award.

3) The claims that the CBA provisions cited in Grievance No. 3586 (Article 15, §§ B.2, 15.G.1, 15.I.1, and 15.I.2) and the Bloch Award were violated by the Allegiant PBS denial of expressed preferences by PIT Pilot #4815 and CVG Pilot #5087 for day offs on November 2020 identified MWDs are dismissed for failure of proof.

Dana Edward Eischen

Dana Edward Eischen
Impartial Arbitrator and Chairman

STATE OF NEW YORK
COUNTY OF TOMPKINS SS:

On this 17th day of May 2024, upon my oath as Arbitrator pursuant to Section 7507 of the Civil Practice Law and Rules of the State of New York, I, DANA E. EISCHEN, do hereby affirm and certify that I executed and issued the foregoing instrument and acknowledge it is my Opinion and Award in IBT Grievance #3586.

William Fishburn s/ William Fishburn, Carrier Member **Concur**	Ryan Joseph s/ Ryan Joseph, Union Member **Dissent**
Date: May 20, 2024	Date: May 20, 2024