

In the Matter of the Arbitration Between

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Allied Pilots Association  
and  
Air Line Pilots Association  
and  
American Airlines, Inc.  
and  
American Eagle Airlines, Inc.

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Supplement W/3  
Case No. FLO-0107

Hearings held February 20 and 21, 2008  
Before Richard I. Bloch, Esq.

Appearances:

For the APA:

David P. Dean, Esq.  
Emilie S. Craft, Esq.

For ALPA:

Wayne M. Klocke, Esq.

For American Airlines, Inc.

Harry A. Risetto, Esq.  
Michelle A. Peak, Esq.

For American Eagle Airlines:

John J. Gallagher, Esq.  
Intra L. Germanis, Esq.

OPINION

Facts

This grievance, filed by American Eagle (hereinafter "Eagle") concerns Supp. W/Letter 3 (hereinafter "Supp.W"), a four party agreement among American Airlines ("AA"), Eagle, the Air Line Pilots Association ("ALPA") and Allied Pilots Association ("APA"). The Agreement, which controls movement of

pilots (flow-throughs) between AA and Eagle, expired May 1, 2008.<sup>1</sup> At issue are the post-expiration flow-through rights, if any, of affected pilots. The four signatories to the agreement have met from time to time to attempt to resolve differences concerning Supp. W and to review the possibilities of its extension. But these attempts were unsuccessful and, on July 16, 2007, American Eagle (hereinafter "Eagle") filed a grievance directed to the impending expiration. The letter noted:

Pursuant to Section VII.C. of Letter 3 the Supplemental Agreement between and among itself, that airline pilots in the service of American Airlines, Inc. ("American") as represented by the Allied Pilots Association and AMR Eagle, Inc., Executive Airlines Inc., Flagship Airlines, Inc., Simmons Airlines Inc., Wings West Airlines, Inc. (AMR Eagle") and the airlines pilots in service of AMR Eagle Inc., Executive Airlines Inc., Flagship Airlines Inc., Simmons Airlines Inc., Wings West Airlines Inc., as represented by the Airline Pilots Association, International, dated May 5, 1997 (hereinafter "Letter 3"), the undersigned on behalf of AMR Eagle hereby files the following submission for resolution.

In the past, the four parties have discussed the issues related to what effect the termination of Letter 3 (May 2008) will have regarding the American Eagle pilots' employment at American Airlines. At the time of the discussion, the parties' position on the issue did not occur.

American Eagle needs this issue to be resolved expeditiously so that it can accurately determine and/or plan on how it will meet its pilots staffing needs.

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<sup>1</sup> The spate of opinions generated by Supp. W over the years has adequately explored the purpose and performance of this 4-party agreement, and those elements will be revisited only to the extent necessary to respond to the issue raised in this case.

Eagle posed the following issue for resolution:

What effect does the expiration of Letter 3/Supp 3[sic] in May 2008 have with respect to the American Eagle Pilots' employment opportunities at American Airlines under that agreement?<sup>2</sup>

On February 4, 2008, APA moved to dismiss the grievance which, it claimed, "does not, and cannot at this time, state a real and substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant an arbitral judgment."<sup>3</sup> Hearings were held February 20 and 21, 2008 in Washington, DC. All parties to the agreement were present and represented by counsel. Witnesses were presented for examination and cross-examination and, following the hearing, the parties submitted post-hearing briefs. The hearing was directed to both the APA's Motion to Dismiss and (in the event the Motion was denied) the merits of the question.

### Relevant Contract Language

#### III. Employment Opportunities at AA for AMR Eagle, Inc. Pilots

A. At least (1) out of every two (2) new hire positions per new hire class at AA will be offered to CJ Captains who are line pilots and who have completed their IOE at AMR Eagle, Inc. Such positions will be offered to the CJ Captains who are line pilots in order of their AMR Eagle, Inc. seniority.

B. If a CJ Captain is unable to fill a new hire position at AA in accordance with Paragraph III.A. above, due to a training freeze or other operational constraint, (see Paragraph III.J. below) such CJ Captain will be placed on the AA Pilots Seniority List and will count

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<sup>2</sup> July 16 letter from Cathy McCann to Representatives of ALPA, AA and APA, p.2.

<sup>3</sup> February 4, 2008 Motion.

toward the number of new hire positions. The pilot's AA occupational seniority date and number will be established as if he were able to fill such new hire position at AA and had attended the new hire training class referenced in paragraph III.A. above. Such pilot's length of service for pay purposes, date of hire for pension purposes, and length of service for vacation accrual will be established in accordance with III.C. below. The number of such CJ Captains will not exceed the difference between the number of CJ Captains who are able to fill new hire positions at AA and the number of new hire positions which must be offered to CJ Captains in accordance with Paragraph III.A. above. (emphasis added)

C. A CJ Captain's (1) placement on the AA Pilots Seniority List (except as provided in Paragraph III.B. above which is only applicable for placement on the AA Pilots Seniority List in order to establish an AA occupational seniority date and number); (2) length of service for pay purposes; and (3) "date of hire" for pension purposes will be based on the date such pilot is entered on the AA payroll. Such pilot's length of service for vacation accrual will be based on the cumulative total of the pilot's service at AMR, Eagle, Inc. and AA.

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E. Each of the first 125 AMR Eagle, Inc. pilots who successfully complete transition training as a CJ Captain must fulfill a training freeze for a period of eighteen (18) months from the date said pilot completes IOE. All other pilots who successfully complete training as CJ Captains must fulfill a training freeze for a period of two (2) years from the date each pilot completes IOE, unless released from such training freeze by AMR Eagle, Inc.

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## VII. Duration

A. This Supplemental Agreement shall be effective on signing and shall continue in full force and effect through the later of:

1. The amendable date of the next ensuing Basic Agreement between AA and APA.

2. Ten (10) years from the date of signing of this Supplemental Agreement, at which time this Supplement Agreement shall become null, void and of no further force and effect.

B. Prior to the later of Paragraph VII.A.1. or VII.A.2. above, the parties will meet and confer regarding their desire, if any, to perpetuate this Supplemental Agreement for a further period of time; provided, however, that the fact that such discussions are ongoing will not extend the duration of this Supplemental Agreement. In the event that this Supplemental Agreement terminates, then all other provisions of the collective bargaining agreement between AA and APA, and AMR Eagle, Inc. and ALPA remain in full force and effect.

### Analysis

The question of Eagle pilots' rights to flow-up, following Supp. W's expiration, is a real, not a hypothetical, question. To be sure, pilots do not now flow up from Eagle to AA and have not done so for some seven years. And, no one can predict with certainty when enabling events – additional hiring by AA, for example – will occur. But that problem is itself an issue that potentially impacts Eagle pilots and, because Eagle has responsibility to schedule properly, and to assume responsibility when it does not, it affects Eagle management, as well. Supp. W's deadline has passed and, because the contractual landscape has changed, the parties have meaningful and current questions relevant to their respective obligations under their labor agreements: For purposes of scheduling considerations, from the Company's standpoint, and career decision making for the pilot force, the parties need greater certainty in the face of the dramatic change occasioned by expiration of this document.

APA and ALPA have dramatically differing views as to the existing rights of Eagle pilots and, indeed, the companies, while joining ALPA in its belief that

certain flow-up rights continue, differ as to which pilots may exercise them.<sup>4</sup> Paragraph VI(B) of Supp. W – Dispute Resolution Procedures – provides that “The jurisdiction of the neutral shall be limited to disputes involving the interpretation or application of this Supplemental Agreement.” Disputes do currently exist, and it is appropriate that this Opinion and Award respond to set them to rest.

On June 20, 2008, APA filed an additional Motion to Supplement the Record. It bases its claim on recent developments it contends bear directly on the ripeness issue, involving capacity reductions at AA and AE and the treatment of AA furlougee pilots at Eagle. The arbitrator has reviewed the respective positions of the parties on the motion and finds, first, that the presence or lack of imminent flow-up opportunities for Eagle pilots does not control the question of whether the respective parties’ rights should be clarified sooner rather than later. The case is strong for issuance of an award now to satisfy all parties’ bona fide needs for guidance on this current contract issue.

Nor does the recent treatment by Eagle of AA flow-backs provide controlling, or even meaningful, evidence to the arbitrator as to the proper interpretation and application of Supp. W. In the overall, the existence of the continuing controversies suggests that postponing a response on these issues will

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<sup>4</sup> Eagle maintains it is sufficient for the pilot to have completed CJ Initial Operating Experience before May 1, 2008. American takes the position that Eagle pilots must have or be entitled to AA seniority numbers by that date. (AA post-hearing brief, pp.7-8.) From this, one infers AA would require the existence, as of May 1, of a new hire class (and there was none.). See Section III(G) of Supp. W, which states, in relevant part: “A CJ Captain who is awarded a new hire position at AA, will be issued the lowest seniority number at AA in the applicable new hire class...”

only exacerbate the situation. For these reasons, APA's Motion to Supplement the Record is denied.

Whether Supp. W deals at all with post termination rights is the subject of substantial controversy. APA says the parties made it abundantly clear, by virtue of a termination clause<sup>5</sup> in Supp. W, that all rights cease immediately upon expiration of the agreement in May of 2008:

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The admonition that the agreement shall become "null, void and of no further force and effect," says APA, does more than simply cutting off any effects based on a "vested right" that a pilot might assert post-termination. Indeed, it claims, the "null and void" language prevents a vested right from ever accruing in the first place.<sup>6</sup>

That contention by the AA Pilots union is at the heart of this matter. ALPA, joined by AA and Eagle, claims Eagle pilots who have elected to forego Eagle Rights<sup>7</sup>, and who have thereby exposed themselves to potential

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<sup>5</sup> Section VII(A)(2).

<sup>6</sup> APA brief, p. 11.

<sup>7</sup> Section IV(D) says: "Eagle Rights CJ captains are not subject to displacement by furloughed AA pilots, or any pilot who has been awarded an AA seniority number pursuant to Paragraph III.B. above."

displacement by flow-down American pilots, have fulfilled their part of the risk/reward system that underlay the entire agreement. As such, an initial question for resolution is whether Eagle pilots accrued any rights that should somehow be considered “vested” and, if so, when?

Contrary to APA’s argument, the “null, void and no further force and effect” language is not dispositive of the question. It is abundantly clear the provision was intended to foreclose pilots from initiating the process beyond May 1, 2008. It is by no means as clear the parties wished to remove a pilot’s post-expiration right to flow up where, as here, the pilot had taken all necessary steps (more about these, below) for eligibility and was awaiting only the opening in an AA new hire class. The termination date marks the point beyond which no further flow-through rights may be gained. But neither that language nor any other words in Supp. W suggests that all previously earned, albeit currently unexercised, rights are to be forfeited. On the question of such forfeiture, the agreement is silent.<sup>8</sup>

Resolution of this interpretive dispute centers on a careful review of the parties’ expectations and intentions at the time of bargaining. The four parties saw, and subtitled, the Supplemental Agreement as the genesis of “American Airlines Employment Opportunities and Furlough Protections”.<sup>9</sup> The

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<sup>8</sup> APA does not challenge, and this Opinion does not question, the status of pilots who have successfully flowed through. Nothing in this Opinion should be read, therefore, as divesting former Eagle pilots who flowed up of the 18 months seniority accrued by virtue of Supp. W prior to flying at AA or the status of AA furloughees who flowed down to Eagle of their rights to maintain their Captain positions pending recall by AA.

<sup>9</sup> Supp. W, p.1



possibilities of those opportunities and protections<sup>10</sup> for the two pilot groups were implemented by constructing various flow-through opportunities wherein an AA pilot could move to Eagle in case of furloughs and an Eagle pilot could travel to AA, assuming he completed CJ Captain Initial Operating Experience (IOE) and chose to forego Eagle Rights, which would insulate him against displacement by an AA furlougee from an Eagle CJ Captain position. But no party to the process foresaw, in 1999, the industrial and economic hell to be raised by the events of 9/11. Indeed, the bargainers contemplated, generally, that movements between carriers would be completed in a matter of a few years.<sup>11</sup> It was the consensus, among the bargaining parties at the time, that ten years (estimated to be the length of a full economic cycle)<sup>12</sup>, would be an appropriate duration for Supp. W because, during that time, current Eagle pilots could flow through and AA pilots who might be furloughed could flow down. After that, the parties intended to re-evaluate the entire process, thus the termination date of May 1, 2008.

Supp.W is characterized by two salient factors: The first is “visibility”: The parties agreed, in 1998, there should be no “phantom” numbers and that in the interests of predictability, the addition of a new Eagle entrant to the seniority list should be made immediately apparent to all concerned (particularly AA pilots)<sup>13</sup>, even if his or her ascension to the AA work rolls were to be delayed by a

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<sup>10</sup> During the tenure of Supp.W, 124 Eagle pilots flowed up to AA, 524 AA pilots flowed down.

<sup>11</sup> See APA brief, p. 15.

<sup>12</sup> Tr.,p. 360 (testimony of Carl Battis.)

<sup>13</sup> The parties addressed their common visibility concerns by ensuring that Eagle pilots who opted to be eligible to flow up to American would receive actual AA seniority numbers on the AA seniority list. In this manner, incumbent AA pilots would be clearly advised of the existence of other pilots who might, at a later date, inhabit the AA seniority list. According to the evidence,

training freeze or, as in this case, the lack of new hire slots. The second factor is that the operation of the agreement is manifestly time-limited. Both these elements are relevant in attempting to reconstruct the parties' intentions as to the proper operation of this agreement in the context of its termination.

There are, in this case, serious competing interests residing between and among the pilot and company groups. The companies' interests can be accommodated, in large part, by an answer to the filed grievance, thus providing some degree of certainty in terms of its administrative responsibilities.<sup>14</sup> APA and ALPA have a somewhat more direct interest. As indicated above, APA says all aspects of Supp. W expire, including any right to flow up at a future time. The ALPA-represented Eagle pilots claim they have a vested right to flow up at the appropriate time, even post-termination. Those individuals, it is claimed, earned that benefit by having renounced Eagle Rights, an act that resulted in their becoming vulnerable to displacement by a furloughed American pilot.<sup>15</sup> But, having fulfilled their part of the bargain, says ALPA, these pilots should not be stripped of rights earned prior to May, 2008.

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APA raised the spectre of Continental pilots who, some years earlier, had been awarded "phantom" seniority numbers under a flow-through agreement between Continental and Continental Express. Express pilots, under the terms of that agreement, later jumped ahead on the Continental list without warning. It was agreed by the parties that placement of Eagle pilots on the AA seniority list at the time they secured AA numbers responded to those concerns.

<sup>14</sup> Beyond that, Eagle does vigorously support the cause of its pilots, arguing, generally, that they have paid their dues, and have exposed themselves to the vulnerability of displacement by American pilots. As such, they should reasonably be entitled to the benefit of the bargain, even if the payoff occurs post-termination of Supp. W.

<sup>15</sup> See Section IV(D), cited supra, n.7 .

There is considerable force to the Eagle pilots' equitable arguments. There are additional considerations, however, with respect to the AA pilot work force, which will be discussed below. These competing considerations have been considered in constructing this Opinion and Award.

While Supp. W says nothing about rights "vesting", the concept is useful in evaluating the *quid pro quos* that make up the core and character of this agreement. The bargain agreed to by the four parties is aptly described as having centered around risk and reward.<sup>16</sup> There is no reason why, from an equitable or legal standpoint, Eagle pilots should not be seen as having vested rights under Supp. W to flow up in response to their having fulfilled their half of the bargain. APA's claims (1) there is no vesting process at all and (2) even assuming vesting, those rights are extinguished at the point Supp. W becomes null and void. But, when a pilot has completed training and received a seniority number, the clear mandate of the agreement is that he be allowed to move up at the point a new hire class is available for assignment at AA.<sup>17</sup> There is no delay, including a training freeze or the timing of such classes that will devitalize this earned right prior to Supp. W's expiration.<sup>18</sup> Nor is there language compelling the conclusion those previously earned rights should vanish with termination of the agreement.

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<sup>16</sup> AA Capt. Ralph Hunter testified in FLO-403/503 that:

There was an important decision that had to be made by the American Eagle pilot ... the central principle of this agreement was, in order for the American Eagle pilot to have an opportunity to come to American Airlines, they were putting themselves at risk for the other side of this balances agreement. (At. Tr. II, 121-122, cited in Eagle Post-hearing brief, p.7.)

Eagle's lead negotiator Michael Costello testified similarly in FLO-210/301/401/501, remembering ALPA's characterization of "risk equals reward." (Tr. IV, p. 917.)

<sup>17</sup> See Section III.A., *supra.*, p. 3.

<sup>18</sup> See Section III.B., *supra.*, p. 3.

Had the parties intended that result, it would have been easy enough to so provide.<sup>19</sup> Moreover, APA's claim that some seniority rights *do* vanish, is inapt. APA cites for the arbitrator's consideration the fact that, under a prior labor agreement, an AA pilot on furlough for ten years or on extended medical leave would lose seniority rights.<sup>20</sup> But those examples prove the point: The loss of seniority in cases of that nature result from specific agreement of the parties via the collective bargaining agreement, a result detailed in precise language that is wholly absent from Supp. W.

This focus on the nature and endurance of seniority rights suggests the necessary answer to the question of *when* flow-up rights vest. In considering the timing question one must recognize the existence of two groups of Eagle pilots at issue. 388 pilots received AA seniority numbers between August 1999 and August 2001 but have not flowed up to AA; no pilot has flowed up since 9/11. There are also 438 Eagle pilots who, subsequent to 2001, elected to participate in the flow-through process, but who have not yet been given AA seniority numbers as a result of the hiring freeze at AA.<sup>21</sup> Thus, the Eagle pilots who inhabit the current limbo are divided into two groups -- those who received AA seniority numbers and those who have not.

Eagle and ALPA argue vigorously that flow-up rights vest at the time the pilot has done everything he or she may do to earn the right. They identify, for

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<sup>19</sup> Note, for example, Eagle's observation that nothing in the agreement forecloses one who received a seniority number within two years of the termination date from exercising the right, one that will necessarily be exercised after the termination date, due to the 2-year training freeze.

<sup>20</sup> APA post-hearing brief, p. 16.

<sup>21</sup> See Eagle Ex. 1.

that purpose, the moment the pilot, having renounced Eagle Rights, completes IOE.<sup>22</sup> At that point, a pilot may or may not receive a seniority number, depending on availability of AA new hire classes. ALPA and Eagle deem the receipt of a number at that point irrelevant.<sup>23</sup> This position, however, fails to accord appropriate weight to the profoundly important role of the actual seniority number not only in the context of the airline industry in general but also, specifically, in ensuring a primary goal of Supp. W -- visibility. At the point the seniority number has been awarded, AA pilots stand better informed of their relative positions on the AA seniority list and, therefore, in a better position to make necessary career decisions and projections during their tenure with AA. Given that the central premise of Supp. W is about moving pilots between companies and ahead of other pilots, the import of receiving the seniority number cannot be underestimated. It is wholly appropriate to identify that as the moment the flow-up right has vested. The result of this conclusion, therefore, is that the right to flow up is to be restricted to those pilots possessing an AA seniority number as of May 1, 2008.

The argument favoring a broader view as to when the right should attach is by no means frivolous. The 438 pilots who opted against receipt of Eagle Rights and who therefore remained vulnerable to displacement by furloughed AA pilots have, undeniably, done everything required of them under Supp. W to be

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<sup>22</sup> This is a commitment that, according to the mandates of Supp. W, must be made "not later than the completion of IOE for a CJ Captain position." Supp. W, Section III (F).

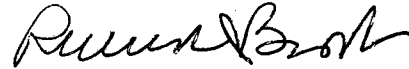
<sup>23</sup> Implicit in that position is the assumption that the possible lack of an awarded seniority number at that point should not be considered relevant, since that is an essentially a ministerial function that flows naturally at the point hiring resumes and new hire classes are scheduled.

considered eligible to receive a seniority number. But to allow that group, at some unspecified date in the future, to attain a seniority number and the corresponding right to flow up, would be to, effectively, assign a "phantom" seniority number at some unspecified time in the future, and leaving room for a "surprise" that closely parallels the Continental/Continental Express scenario the parties discussed during bargaining and expressly wished to avoid. As such, that arrangement is potentially antithetical not only to that specific problem but also to the negotiated and clearly expressed desire of the parties for a date certain that would mark the end of this ten-year experiment.

In sum, the finding here, for the reasons set forth above, is that expiration of Supp. W did not extinguish flow-up rights of Eagle CJ Captains who, prior to May 1, 2008, completed IOE and received AA seniority numbers. Pilots who had not received AA seniority numbers by that date do not retain rights to flow up under Supp. W.

AWARD

The effect of the expiration of Supp.W in May 2008 on Eagle pilots' employment opportunities at American Airlines is as follows: The right to flow-up is to be retained by Eagle CJ Captains who, prior to May 1, 2008, completed IOE and received AA seniority numbers.



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RICHARD I. BLOCH, ESQ.

June 30, 2008