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AA Flow-Thru Pilots Coalition
<http://aafloowthrupilots.org>

FLO-0108 Remedy Award Appeal

Introduction

The FLO-0108 remedy award was a huge setback to the Flow-through Pilots (FTP)s. Just when it seemed we had jumped through every hoop, and for the 3rd time an arbitrator had ruled that the Flow-through Pilots should have been allowed to transfer to AA in classes starting June 2007, and all that needed to happen was for the arbitrator to clean up the remedy details, arbitrator Nicolau came out with a ruling that not only failed to make the Flow-through Pilots whole for the wrongs done to them, but instead harmed them further. We want to help you understand what actually occurred in that hearing, how your vested rights were bargained away, why what occurred is illegal, and the reasons it is so important for the FTPs to get what was supposed to simply be a neutral arbitrators remedy award, overturned in court.

One of the basic tenants of arbitration is that it is separate and stands apart from negotiations or settlements. One must not be confused or mixed with the other, and for very good reason. During settlements the negotiators are working for the party that they are representing, with the responsibility for either accepting or rejecting any agreement borne by that party. By contrast, in arbitration, since a meeting of the minds has not occurred in settlement negotiations, strict rules of engagement prevail, with the eventual outcome being made based on the interpretation of formally presented evidence and a clear record of what evidences was used for the arbitrator to render his decision. Thus the burden of determining what is a fair outcome for each side is shifted from the disagreeing parties to the arbitrator.

When a pilot union is negotiating for their pilots, often that pilot group contains subgroups that have competing interests. It is therefore imperative that the union adheres to a strict code of ethics to fairly represent all of the parties. In negotiations if those in charge of the union were not entirely ethical and they wanted to take away vested rights of Group A to give them to another group, say Group B, perhaps that being a group that those in charge are in, they would be stopped from doing by the fact that the union could be sued by Group A for a breach of their duty to fairly represent those pilots, and wrongfully taking something that that group owned.

If however it is possible to have those vested rights of Group A taken away to the benefit Group B in an arbitrators award, everything changes. Now Group A has nowhere to go to recover what was stolen from them. They cannot sue the unethical union for breach of their duty to fairly represent them, and there is little chance of successfully challenging a properly executed arbitrator's decision. That is why it is so important that an arbitrator not allow the line between arbitration award and negotiated settlement to be crossed. In

fact, it is illegal for him to allow that to occur. It is also the reason that when it can be shown that that line has been crossed, the arbitrator's award will be vacated.

Background

On May 11, 2007 in FLO-0903 Arbitrator John B. LaRocco ruled that the TWA pilots that were added to the AA list who had not commenced active employment (attended class) at AA, were de-facto new hire pilots for the purposes of Letter 3 / Supplement W (L3/SW), and as such when those TWA pilots were allowed to attend AA class it should trigger the requirements to generate AA seniority numbers for AE pilots as well as allow transfer of AE FTPs awaiting AA new hire classes.

AA then began running "new hire" classes that should have contained Flow-through pilots, but instead the classes contained only TWA pilots. Additionally no new AA seniority numbers were issued to AE pilots in those classes. A grievance was filed.

On October 20, 2008 in FLO-0903 Supplemental Opinion and Award on Remedy Arbitrator John B. LaRocco ruled that additional AA seniority numbers should have been issued to AE pilots for the AA classes that had been filled with TWA "new hires".

Still no Flow-through pilots were allowed to transfer to AA in the "new hire" classes and another grievance was filed.

On October 18, 2009 in FLO-0108 Flow-through Pilots Wrongfully Withheld from Transfer to AA, Arbitrator George Nicolau ruled that Flow-through pilots should have been allowed to attend AA training classes beginning in June of 2007. He then left it up to the parties to craft a remedy, and he retained jurisdiction in the event they were unable to do so.

Still no Flow-through pilots were allowed to transfer to AA, and the remedy question was remanded back to arbitrator Nicolau where he was charged with issuing an opinion and award to answer a very specific question; Given the fact that it was already determined that Flow-through pilots should have been allowed to attend AA new hire classes beginning in June of 2007 and had not been allowed to do so, what is the appropriate remedy?

The answer should have been very simple. You make them whole for the damage done to them by:

1. Letting them attend AA class immediately
2. Make sure that they are given proper length of service credit for their compensation, their retirement, vacation accrual, and sick time as if they had been allowed to transfer on the correct date.
3. Make sure that they are allowed to bid into the equipment that they would have been able to hold had they been allowed to transfer properly.

What happened next was a travesty. As you read his award, keep in mind that the arbitrator was required to answer a very specific question. What is the remedy for these

harmed pilots? By law the arbitrator absolutely cannot institute his own form of “industrial justice”, and he’s strictly forbidden from issuing anything characterized as an award, that is instead actually a settlement. In fact, knowing this Arbitrator Nicolau stated “what follows is my Award; it does not represent the “agreement” of any of the four parties”.

On April 9, 2010 in FLO-0108 Remedy, Arbitrator Nicolau issued the following ruling:

1. Harmed pilot’s compensation “years of service” date will start on the date he should have been allowed to transfer to AA. – Makes sense.
2. Harmed pilot’s A-Plan retirement “credited years of service” does not start until actual AA class date, not the date the pilot he would have received if he had not wrongfully withheld. – What? That’s not making the pilot whole for being intentionally and wrongfully bypassed.
3. Harmed pilot will receive the greater sick bank and vacation he would have earned as if he had been at AA on the date he should have transferred. – The FTPs got slaughtered, while AMR was handsomely rewarded. Remember FTPs lost all of their supplemental sick time that they accrued for years at AE as they transferred to AA. Now as they transfer they only get the difference between what they earned at AE and would have earned at AA for 3 years. The FTPs’ AA vacation bank should have been credited for the entire bypass period over at AA not substituted for a 50 cent / dollar pay-out from AE.
4. Harmed pilot’s B-Fund retirement contributions made from date pilot should have transferred. – Makes sense.
5. First 35 harmed pilots awaiting transfer go to AA class immediately. – Why just 35? All of the bypassed pilots should be allowed to transfer. Since the company knowingly put the wrong pilots in class, they should either carry some extra pilots, or furlough the junior ones and pay them for their damages. This is even more ridiculous when viewed in light of the fact that any further transfer delay further harms the FTPs by virtue of elements contained in Nicolau’s own “remedy” award.
6. 154 junior TWA pilots allowed recall to AA before any more harmed Flow-through pilots. – Why? This continues to further harm to the FTP’s to the benefit of the pilots that were improperly given class slots. No remedy at all.
7. Preferential hiring given to 824 AE pilots not covered by Flow-through Agreement. – Where did this come from? It has nothing to do with the remedy question asked and is outside of L3/SW. Remember, an arbitrator’s award cannot be a settlement. That would be against the law. He is also not allowed to institute his “own form of industrial justice”.
8. 286 of the harmed pilots must make an irrevocable choice on whether or not to go to

AA at some undefined point in the future, with no guarantee that transfer will be soon or even ever. – Where does this come from? Once again there is nothing in L3/SW that requires an irrevocable choice. An arbitrator is not supposed to redraw an agreement in an award.

9. No allowance is made for the damage to the FTPs incurred by not being allowed into bid statuses that they would have been able to hold if they had been allowed to transfer in the proper class. This resulted in many FTPs being placed in much lower paying equipment and bases than they should have been. - Once again, FTP's not made whole, AMR rewarded. It is important to remember, the company intentionally ignored 3 prior arbitrators awards as they placed TWA furloughees, instead of Flow-through pilots into class. So now if they need to run a displacement bid to get the wrongfully withheld pilots into the correct status, so be it.

What Happened in the FLO-0108 Remedy Hearing

The question asked of Arbitrator Nicolau was simple. Given the fact that 244 AE pilots were improperly denied entry into AA classes beginning in June 2007. What is the appropriate remedy? How did Arbitrator Nicolau come up with such a convoluted and damaging award given that simple question? To answer that, we must go to the transcripts for FLO-0108.

Given that an arbitration hearing is a very formal affair, similar in almost all respects to a court of law, an official reporter is required to record all testimony, evidence, motions and pertinent discussion, and to compile these into transcripts. FLO-0108 remedy was no different, and since this was an official arbitration complete notes needed to be taken of all evidence leading up to the arbitrator's decision.

Shortly after the FLO-0108 remedy award was issued several ALPA members in good standing requested those transcripts, as they are entitled to, yet ALPA refused to produce them. It was not until doing work on the Equity Distribution arbitration in December 2013 that we were finally given a copy of the FLO-0108 transcripts from APA. What we discovered was shocking.

On what became the last minutes of the last day of the arbitration hearing, only 34 minutes into that hearing, which should have gone on for several days, one of the attorneys, Mr Rissetto said on record, "there was a dinner (meeting) last night of the principals, one from each party ~ that may be relevant to how to proceed today". ALPA attorney, Wayne Klocke, immediately made a request that everything from that point be "off the record". While still on record, there ensued a conversation as to how they were going to take notes yet still have these notes be confidential, and how they would pay the court reporter to take the secret notes. They then went on recess for a lengthy period. Upon return the arbitrator stated that there was no longer a need for briefs to be filed, and that he would take what he had to render his decision.

The deal had been struck. The Flow-through pilots vested rights, bargained away. The only problem is, it was supposed to be, and it was characterized as an arbitrated decision, not a negotiated settlement. This is not just improper. It is illegal.

When one looks for the motive for the crime, it is easy to find. Each of the four parties had something to gain by ALPA trading away what was supposed to be the harmed Flow-through pilot's vested rights. AA was able to get rid of 4 years of A-fund obligations, avoid substantial accrued sick time and vacation compensation, and not be required to place the FTPs into proper bid statuses on transfer. AE was able to meter over the FTPs much more slowly, if at all, as they were having staffing problems. APA was able to deliver a windfall of benefits to the TWA pilots in accelerated recalls as well as AA seniority numbers being metered to FTP's in a manner contrary to the agreement. Lastly, the ALPA negotiators were able to secure AA job positions for themselves, totally outside of L3/SW.

It was ALPA's legal fiduciary responsibility to work diligently to ensure that the harmed pilots were made whole. Instead the ALPA leadership allowed the other parties to feast on the Flow-through pilot's rights in exchange for their own personal gain. ALPA was then successful in garnering legal cover by getting the arbitrator to call their handiwork an award instead of a settlement.

Legal Challenge

Thankfully, there is definitive case law that specifically prohibits an arbitrator from straying far from the agreement when crafting a remedy award. Furthermore, there is law that dictates that certain rules of procedure must be followed. What transpired in this arbitration falls far outside of those parameters.

In October of 2010 Captains Gavin Mackenzie and Mark Burnett filed a lawsuit in the Northern District of Texas District Court seeking to vacate the FLO-0108 Nicolau Remedy award.

The lower court dismissed the case claiming Nicolau did not exceed his jurisdiction when he made sweeping changes to Letter 3, changes that harmed versus making whole, the majority of the FTPs holding AA seniority numbers.

In November 2011 the District Court's decision was appealed to the 5th Circuit Court of Appeals. The court has just recently begun working on the appeal as AA had managed to stay the appeal while it was in bankruptcy.

What Overturning FLO-0108 Remedy Means to the Flow Through pilots

If the Appeals Court agrees with the Flow-Through pilots, reverses the District Court, and vacates the Nicolau "remedy" Award, some of the harm suffered by the Flow-Through pilots can begin to be corrected.

We have grouped the affected Flow-through pilots into three (3) distinct tranches based on their position on the AA Pilot System Seniority list. To just begin to remedy the harm

to these pilots the following would need to be corrected immediately:

Group 1 V. Basset 373398 – J. King 178881

These Flow-Through pilots were supposed to transfer to AA beginning in June 2007 but were illegally withheld until 2010.

- A Fund retirement credited years of service start date should be moved forward to the date this pilot was supposed to attend class instead when he actually attended class. The average credit would be three (3) years.
- Equity distribution pension silo needs to be corrected to reflect the correct date the pilot should have been in class. Average three (3) years.
- Vacation and sick time accrual needs paid so as to make the pilots whole for being wrongly withheld.

Group 2 M. Hope 156679 – P. Nystedt 319136

These Flow-Through pilots should have transferred to AA on a one-out-of-every-two basis concurrently with the TWA LLC pilots.

- Their LOS for pay purposes needs to be corrected to the date they should have transferred to AA under Letter 3, and not the date they transferred under the Nicolau “remedy” Award.
- Adjusting these Flow-Through pilots “date of hire” at AA to the correct date would result in the pilots receiving a greater payout from the AA Equity Distribution.

Group 3 J. McMurterie 146724 - D. Smith 461127

These Flow-Through pilots are similar to the Group 2 pilots. The major difference being that every pilot in Group 3 would have received a payout from the AA Equity Distribution had the correct transfer date been utilized.

- This Flow-Through pilot group was harmed when AA and APA began to adjust the cut-off date for the AA Equity Distribution to restrict the number of Flow-Through pilots receiving an equity payout. Overturning FLO-0108 Remedy, would require an equity distribution payout for this group.

In Conclusion

The FLO-0108 “remedy” award was extremely damaging to the FTPs. In what was supposed to be a remedy hearing by an impartial arbitrator to make the FTPs’ whole for having been wrongly withheld from transfer to AA, the due process was corrupted and the FTPs vested rights were instead traded away for the gain of the negotiators. The AAFTPC is assisting in challenging this matter at the Federal Appeals Court level, with the goal of having the award vacated.

The AAFTP coalition has set up a legal defense fund to help pay legal fees for this challenge and other critically important issues facing the FTPs. Please go to the website to donate.

We will pursue this matter until the FTPs vested rights are restored, or until the responsible parties are forced to compensate the FTPs for the harm they did to them.