In The Matter of the Arbitration Between

Southern Air Inc.

And

International Brotherhood of Teamsters,
Airline Division & Airline Professionals Association,
Teamsters Local Union No. 1224

Hearing held October 16,17,18, 2018

Before the System Board of Adjustment
Richard Bloch, Esq., Chair
Jennifer Chernichaw, Esq. – Company-Appointed Member
Daniel Katz Esq. – Union-Appointed Member

APPEARANCES

For the Company
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For the Union
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OPINION

FACTS

The case before this System Board of Adjustment involves a merger between Southern Air Inc. ("Southern") and Atlas Air, Inc. ("Atlas"). The current 2012 Collective Bargaining Agreement ("CBA") between Southern and the International Brotherhood of Teamsters ("Union" or "IBT") addresses the prospect of a merger, noting, in

Section 1.B.3[1] that, "in the event of a merger, this Agreement shall be merged with the merging air carrier's crewmember Collective Bargaining Agreement....." If the merging parties are unable to arrive at a combined agreement within 9 months "from the date an Integrated Master Seniority List is submitted to the surviving entity, the parties shall submit all outstanding issues to binding-interest arbitration. " [2]

Management seeks to proceed with the bargaining process toward a combined agreement. However, the IBT has, to date, declined to supply an Integrated Seniority List ("ISL") or to participate in taking steps toward achieving a Joint Collective Bargaining Agreement, contending, among other things, that it has no obligation to participate in bargaining that would lead to binding interest arbitration. The Section 1.B.3 process, says the Union, applies only in the event a merger has been fully and finally accomplished. It directs the System Board's attention to the Section 1.B.2 definition of "Merger":

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[1] See p. 5, *infra.*

[2] The term "Interest Arbitration" denotes a process where unresolved issues are resolved through arbitration on the outstanding issues. In a February, 2016 letter to the Company, (see Union Exhibit 45), the IBT expressed its position:

> During our meeting last week, we heard that the Company intended to merge the AOC's ["Airline Operating Certificates"] of Atlas and Southern. I am glad that you have made a clear determination for the future of AAWW, one that both I and the Teamsters believe would have great potential. However, we are disheartened that the Company proposes to use a method that will – if pursued – undermine your old and new employees, result in a long, contentious battle, and all the long while, undermine the very benefits of a merger. This letter to you is an entreaty to you to consider a better path.
>
> [...] there is no "requirement" to enter into the process [negotiations culminating in Interest Arbitration] suggested at our meeting, unless we both agree. As you detected from our reaction to the presupposed plan, the Union does not agree. But we do believe – and the Union would be amenable to – a merger that was effectuated in [a] way that is beneficial for all the stakeholders and the future of the airline.
>
> My proposal to you is that we negotiate an agreement in the form of an LOA – under the current Atlas CBA – which would at once combine the pilot groups, mitigate the negative training effects of bringing new pilots and aircraft to one certificate, and end Southern Section 6 negotiations.....

> A "merger" as used in this Section, shall refer to a transaction in which the functional departments of the Company (e.g., operations, marketing, finance, human resources, etcetera) are integrated with those of another certificated air carrier employing crewmembers, and in such a manner that only one unified corporate entity remains.[3]

There is room for responsible differences as to the precise meaning of "merger," as utilized in this CBA. The Union reads the above definition as requiring full and final completion of all attributes of the merger prior to any obligation to construct a joint seniority list and move forward with a Joint Collective Bargaining Agreement ("JCBA"). The Company contends that the obligation is for the Union to provide an Integrated Seniority List (ISL) and to join in constructing a JCBA.

As a result of the Union's refusal to provide either Atlas or Southern with an integrated Atlas/Southern pilot seniority list, the Company, concluding the IBT had engaged in an unlawful refusal to follow contractually-mandated procedures, filed a management grievance.[4] The Union responded that the grievance was, in its judgment, non-arbitrable and, accordingly, declined to schedule the matters for arbitration before the System Board of Adjustment. In response, Southern filed a federal court lawsuit on February 7, 2017 to compel arbitration. In March 2018, the US District Court for the Southern District of New York granted Southern's Motion for Summary Judgment and compelled arbitration of its grievance.[5]

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[3] Section 1.B.2, *infra*, at p. 4.

[4] Co. Ex. 38. Atlas and Southern had filed separate management grievances and filed jointly in the federal court suit.

[5] Co. Ex. 39. The matter was brought before this System Board in hearings held October 16, 17 and 18. Following the hearings, the System Board met in executive session on May 28 and June 7 and issued this Opinion and Award.

ISSUES:

1. Does the System Board of Adjustment have jurisdiction over the Company's grievance?
2. Does the Union violate the Section 1.B.3 of the current CBA by declining to present an integrated seniority list and by refusing to engage in negotiations (and interest arbitration on unresolved issues) for a joint collective bargaining agreement?

RELEVANT CONTRACT PROVISIONS

SECTION 1

SCOPE, SUCCESSORSHIP AND RECOGNITION

A. Scope. Any and all revenue flying performed by the Company on aircraft on the Company's operating certificate(s) will be performed by Crewmembers on the Master Seniority Lists.

B. Successorship.

1. This Agreement will be binding on the successors and assigns of the Company, including any merged Company or companies, assignee, purchaser, transferee, administrator, receiver, executor, trustee of the Company, unless otherwise changed in accordance with the Railway Labor Act. A successor shall be defined as an entity that acquires all or substantially all of the equity of the Company through a single transaction or multi-step related transactions that closes within a twelve (12) month period. Unless "otherwise provided in this agreement, the Company shall require a successor to assume and be bound by all the terms of this Agreement as a condition of any transaction that results in a successor;

2. In the event of a merger between the Company and any other Company or business that employ crewmembers of aircraft, there shall be an integration of the two crewmember groups in accordance with Sections 3 and 13 of the Allegheny-Mohawk Labor Protective Provisions. The Company, if it is the surviving entity, agrees to accept and implement conditions and/or restrictions resulting from this process except for those conditions and/or restrictions that otherwise would result in retroactive monetary liability or would require upgrade, transition or other training of crewmembers of either Company. A "merger" as used in this Section shall refer to a transaction in which the functional departments of the Company(e.g.,

operations, marketing, finance, human resources, etc.) are integrated with those of another certificated air carrier employing crewmembers, and in such a manner that only one unified corporate entity remains;

3. In the event of a merger, this Agreement shall be merged with the merging air carrier's crewmember collective bargaining agreement, if any; if such merged agreement is not completed within nine (9) months from the date an integrated Master Seniority List is submitted to the surviving entity, the parties shall submit all outstanding issues to binding interest arbitration.

4. The aircraft and aircraft operations of each merging Company shall remain separated until the crewmember seniority lists and agreements (if necessary) are integrated pursuant to paragraphs 2 and 3 above.

5. Nothing in this Section shall require the Company or any successor to merge with, or otherwise integrate the operations of, any commonly owned or controlled air carriers or other companies.

SECTION 19

SOUTHERN AIR GRIEVANCE PROCESS AND SYSTEM BOARD OF ADJUSTMENT

A. Grievance Process

1. The Company is committed to treating Crewmembers fairly and respectfully. The grievance process is part of this commitment and intended to ensure that grievances are resolved quickly and fairly.

2. Only a non—probationary Crewmember may use the grievance process to obtain review of discipline. All Crewmembers may use the grievance process for the interpretation or application of any of the terms of this Agreement. Non-probationary Crewmembers shall not be disciplined except for just cause.

3. Discipline within the meaning of the grievance process consists of (a) verbal warnings memorialized in writing, (b) written warnings, (c) disciplinary suspensions without pay, and (d) termination.

4. Only those grievances deemed meritorious will be submitted by the Union to the Company.

5. If any decision made by the Company under the provisions of this Section is not appealed by the Union within the time limit prescribed for such Grievance, the decision of the Company shall become final and binding. If the Company fails to hold a hearing or render a decision within the time limit prescribed, the grievance shall be considered denied, and the grievance shall proceed to the System Board of Adjustment. All time limits in this Section may be extended, in writing, by

mutual agreement between the Union and the Company.

Non-Disciplinary Grievance Procedure

1. A grievance herein is defined as a dispute arising out of the interpretation or application of any of the terms of this Agreement. The Union may file a grievance, which must be in writing and must state in reasonable detail the facts upon which the grievance is based, the Section(s) of the Agreement in question, and the relief sought.

2. Any complaint upon which a grievance may be based shall first be brought to the attention of the Vice President of Operations, or his designee, for discussion and possible resolution.

3. Grievances must be filed with the Vice President of Operations, or his designee, within thirty (30) days after the affected Crewmember had knowledge or reasonably should have had knowledge of the alleged violation of the Agreement.

4. Grievances under this Section will be handled in accordance with the following procedure:

D. System Board of Adjustment

1. In compliance with Section 204, Title II, of the Railway Labor Act, as amended, there is hereby, established the "System Board of Adjustment" herein referred to as the "Board."

2. The Board shall have jurisdiction over disputes growing out of grievances or out of the interpretation or application of any of the terms of this Agreement. The jurisdiction of the Board shall not extend to proposed changes in hours of employment, rates of compensation, or working conditions.

3. The Board shall consider any dispute properly submitted to it when such dispute has not been previously settled in accordance with the terms provided for in this Agreement. ... The Board has the authority to grant, modify or deny the appeal, consistent with the scope of its authority.

SECTION 20

PROBATION

Probationary Period

1. Except as provided in the Transfer to Management or Non-Flying Position Section, a Crew member shall be on probation until successful completion of three hundred sixty-five (365) days of service with the Company. The date on which the Crewmember first attends initial training as a Crewmember will start the probationary period.

2. The probationary period may be extended by written agreement of the Company, the Union and the Crewmember.

a. The Company shall immediately notify the Union of its intent to discharge a Crewmember under this Section, and provide the Union with information relevant to that intent.

B. Discipline

A Crewmember on probation shall not be entitled to utilize the grievance and System Board of Adjustment procedures of this Agreement with respect to any disciplinary action taken against him, including discharge.

SECTION 27

DURATION

A. This Agreement shall become effective on November 6,2012 and shall continue in force and effect until November 6, 2016 and shall renew itself without change thereafter, unless written notice by either party of intended change is served in accordance with Section 6, Title I of the Railway Labor Act, *as amended,* no more than three hundred and sixty-five (365) days prior to November 6, 2016 or ant time thereafter.
B. The parties shall engage in direct negotiations for six (6) months after November 6, 2015, inclusive of the month referred to herein, or the parties reach a tentative agreement, whichever occurs first.
C. If the parties do not reach a tentative agreement during the period referenced in Section 27.B, the parties shall participate in the National Mediation Board's expedited facilitated negotiations program until November 6, 2016 or the parties reach a tentative agreement, whichever occurs first.
D. If the parties do not reach a tentative agreement during the period referenced in Section 27.C, either party may request a proffer of arbitration from the National Mediation Board on or after November 6, 2016.

ANALYSIS

The Union says Management's grievance must be dismissed because, it is claimed, this collective bargaining agreement nowhere provides Management the right to file a grievance. Section 19.A[6] of the CBA, maintains the Union, speaks only to the Union's processing claimed CBA violations by way of the contractual grievance procedure.

It is true the Section 19 grievance process is described in terms that uniformly speak to complaints by the Union. Thus, for example:

- ..."*all Crew Members* may sue the grievance process for the interpretation or application of any of the terms of this Agreement. ... (Section 19(A)(2)
- ...4. Only those grievances deemed meritorious will be submitted *by the Union* to the Company.
- If any decision made by the Company under the provisions of this Section is not *appealed by the Union* within the time limit prescribed for such Grievance, the decision of the Company shall become final and binding...
- (B) Non-disciplinary Grievance Procedure

    1. A grievance herein is defined as a dispute arising out of the interpretation or application of any of the terms of this Agreement. The Union may file a grievance, which must be in writing and must state in reasonable detail the facts upon which the grievance is based....

[6] *Supra*, p.5.

3. Grievances must be filed with the Vice President of Operations, or his designee, within thirty (30) days *after the affected Crew Member* had knowledge or reasonable should have had knowledge of the alleged violation of the Agreement.

5. The *Union may file* an individual grievance on behalf of the Crew Member or a group grievance on behalf of Crew Members similarly situated in relationship to a violation of this agreement.[7]

The Company, for its part, however, directs the Board's attention to Section 19.D[8] – System Board of Adjustment, which states, in relevant part:

> 2. The Board shall have jurisdiction over disputes growing out of grievances or out of the interpretation or application of any of the terms of this Agreement.

The genesis of this language, Southern observes, is Section 204 of the Railway Labor Act, 45 U.S.C. § 184, which provides that "either party" may submit "disputes ... growing out of grievances, or out of the interpretation or application of agreements ... to an appropriate adjustment board...." As such, Southern argues, there is both a statutory backdrop and a contractual basis for management's ability to file a complaint under the current collective bargaining agreement. Moreover, say the Company, the procedural issue of whether management may properly proceed in this forum was resolved by the Federal District Court for the Southern District of New York when, in March of 2018, it ordered the parties to arbitrate before this Board. [9]

In its argument to the Court, Southern claimed its grievance concerned interpretation and application of the Southern Air collective bargaining agreement

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[7] Section 19, *supra*, p. 5-6, italics supplied.
[8] *Supra*, p.6.
[9] Atlas Air, Inc. and Southern Air, Inc. v. International Brotherhood of Teamsters, International Brotherhood of Teamsters, Airline Division, and Airline Professionals Association of the International Brotherhood of Teamsters,Local Union No. 1224, 17-cv-903 (KBF) March 13, 2018.

which, according to the requirements of the Railway Labor Act[10] must be arbitrated before the Southern Air System Board. Because the Union had refused to arbitrate Southern's grievance, the Company requested an order compelling the Union to arbitrate before the Southern Air System Board, pursuant to Section 19 of the Southern CBA and the mandate of the Railway Labor Act.[11] The Union responded, among other things, that the IBT-Southern Labor Agreement contains no language authorizing a management grievance.[12]

In its decision granting management's request to compel arbitration, the Court clearly mandated the parties to proceed to arbitration on the question of whether the Union must "negotiate for a new JCBA pursuant to the terms of [the CBA.]"[13] Said the Court:

> Although the facts underlying this action are complicated, the Court's resolution is not. It is absolutely clear that the present dispute, - i.e., whether defendants must negotiate for a new JCBA pursuant to the terms of their respective CBAs – is a minor dispute under the RLA, and is therefore subject to mandatory arbitration by the appropriate adjustment boards.... First, it is undisputed that the Atlas and Southern pilots are subject to the Atlas and Southern CBAs, respectively. As such, the issue here is whether those pre-existing CBAs require defendants to negotiate a JCBA, not (1) whether defendants must negotiate a CBA in the first instance, or (2) what the terms of the new CBA/JCBA should be. ...§ 1.B.3 of the Southern CBA "[i]n the event of a merger, this Agreement shall be merged with the merging air carrier's crewmember collective bargaining agreement, if any[.]"[14]...[T]he actual terms of the JCBA are not at issue here, and neither Atlas nor Southern is seeking to unilaterally change the provisions of an existing CBA; the sole issue is whether defendants are required to negotiate for a JCBA or whether they can insist upon amending the terms of their existing stand

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[10] 45 U.S.C.A. § 184.

[11] Opposition to Motion to Dismiss, Ex. 4, at 11.

[12] IBT brief, submitted as Company Ex. 6, at 37-38. The Union continued:

> RLA Section 204, 45 U.S.C. § 184 does not provide any independent basis for such a right. RLA § 204 requires carriers and certified bargaining representatives to "establish a Board of Adjustment" or system board. ...the RLA does not, however, make it mandatory that both parties have the right to submit disputes to the system board. That is for the parties to determine in a labor contract. ...(*Id.*, at 38, n.10.)

[13] 293 F. Supp. 3d 457, at 467.

[14] 293 F. Supp. 3d 457, at 467.

> along CBAs. The answer to that question inexorably terms on "interpretation or application" of the existing Atlas and Southern CBAs...and therefore constitutes a minor dispute subject to mandatory arbitration under the RLA.[15]

Thus holding, the Court concluded the dispute was arbitrable.

Contrary to Southern's contention, [16] it is not as clear that the Court also ruled on the merits of whether a grievance by Management could be filed.

> The ... Southern Adjustment Boards will be called upon to interpret distinct provisions of the ... Southern [CBA] respectively. Defendants' arguments regarding whether those provisions actually require JCBA negotiations in this instance go to the merits of the management grievance, and should be decided by the appropriate adjustment boards in the first instance. To adopt any of defendants' arguments in this regard – e.g. that AAWH is not the "Company" for purposes of the Atlas CBA – the Court would have to interpret the underlying CBAs. The RLA makes clear that issues of interpretation and application are to be resolved by the relevant adjustment board and therefore defendants' arguments must be reserved for arbitration.[17]

In the final analysis, while the Court clearly referred the management grievance to arbitration, it is by no means clear that, in so doing, it had also answered the question of whether, under the CBA, the parties intended the Company to have the ability to grieve. We turn, therefore, to the merits of that question.

Southern concedes that the Section 19[18] grievance procedure provisions of the CBA explicitly detail the process by which Union grievances are to be filed, but this, the Company says, is to be expected, since most grievances are typically filed by the Union.

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[15] *Id.*

[16] The Company argues that the District Court ruled that Southern had the right to file a management grievance under the Southern CBA. It notes that the District Court granted summary judgment on the motion seeking to compel the Union to arbitrate the merits of the Southern's management grievance before the system board. "Had the District Court not already held that the management grievance was proper," says the Company, "it would not have ordered the merits of the grievance to arbitration." (Co. Motion to Dismiss brief, at 7.)

[17] *Id., at* 469.

[18] See *supra* at p.5-6.

But, Southern contends, this does not preclude the possibility of a management complaint under the CBA. For the reasons that follow, we agree.

Without question, the federal statute, taken alone, accommodates the possibility of a management grievance under a CBA. The Railway Labor Act is clear in providing that disputes between labor and management "growing out of grievances, or out of the interpretation or application of agreements" may, failing adjustment between the parties, "be referred by petition of the parties or by either party to an appropriate adjustment board, ...".[19] That provision, however, does not dictate the jurisdictional breadth of the bargained CBA; moreover, the task of this Board is to interpret the private contract, not the public law. As the IBT properly notes, while the System Board has been statutorily established as the appropriate forum for disputes over interpretation and application of the Labor Agreement, that, absent more, does not preclude the parties from exempting certain claims from arbitration.[20] We agree with the Union's observation that parties may, and indeed, have, excluded certain types of grievances from consideration by the System Board of Adjustment. However, we do not agree that the parties have precluded Management's ability to bring "disputes growing out of ... the interpretation or application of any of the terms of this Agreement to this Board."[21]

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[19] 45 U.S.C.A. § 184.

[20] Such is the case under this contract, for example, with "proposed changes in hours of employment, rates of compensation, or working conditions" as well as complaints by probationary pilots (see Section 19.A.2. which provides that "only a non-probationary Crew Member may use the grievance process to obtain review of discipline.

The Union directs the Board's attention to CareFlite v. Office & Professional Employees International Union, 612 F. 3d 314 (5th Cir. 2010).

[21] See Section 19.D, *supra*, p.6.

The Union directs the Board's attention to the 5th Circuit Court of Appeals' decision in *CareFlite v. Office & Professional Employees International Union*[22], wherein the Court considered the case of an airline pilot who claimed he had been wrongfully discharged for failure to obtain an Airline Transport Pilot certificate. The case highlights the rights of parties to a CBA to narrow or restrict access to the grievance procedure, including arbitration. But, while acknowledging that possibility, the Court also made clear that the parties' joint intent on that point was readily apparent from the explicit language chosen by the parties to convey their mutual intent.

The issue, in *Careflite*, was whether the grievant could lodge his complaint through the contractual arbitration mechanism, or whether that path was foreclosed as a result of the CBA's provision that "termination of employment resulting from a pilot's failure to obtain an ATP within the time requirements of this section is non-grievable and non-arbitrable."[23] The contract also provided that "[a] termination of employment [for failure to complete required training or certification, which includes a termination for failure to obtain or have an ATP] is non-grievable and non-arbitrable."[24] Having reviewed the negotiated language, specifically those portions excluding disputes surrounding a pilot's obtaining the ATP, the Court concluded it was within the parties' rights to provide such an exclusion, holding that:

> ... an air carrier and its employees' Union may, under basic contract and arbitration principles, agree to exclude certain disputes from grievance and arbitration. Once the parties have agreed to do so, any excluded dispute does not arise from any right conferred by the CBA. In this case, the parties agreed through the CBA's Arts. 12(1) and 13(4) to exclude terminations for failure to obtain an ATP from the arbitration process, and thus a dispute over a

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[22] 612 F. 3rd 314 (5th Cir. 2010).
[23] Careflite, citing CBA Article 12(1)
[24] *Id.*, citing CBA Art. 13(4)

> termination for failure to obtain an ATP does not arise from any right conferred by the CBA.[25]

In holding that a dispute of that nature could not be pursued under the contractual process, the court cited the precision with which the parties recorded their mutual intent to expressly exclude, as non-grievable, a discharge matter.

> "[T]he CBA is unambiguous on this point," the Court observed, " and is not capable of a construction that allows for arbitration of discharges for failure to obtain an ATP. ... the CBA does not give rise to any right to grieve a discharge based on a pilot's failure to timely obtain an ATP certificate - in fact, the CBA expressly negates any such right or grievance.[26]

Thus, premised on the fact the parties had explicitly directed themselves to carving out an exception to the System Board's jurisdiction, the Court held the matter was precluded not only from arbitration but also from the grievance procedure itself.[27]

Careflite draws its essence from the parties' clear expression of their mutual intent. This Board has reviewed the CBA language at issue with the same goal in mind – determining the parties' intent. As indicated above, there is no reference in Section 19 to a process for management's filing a grievance. Neither, however, is there CBA language precluding it, although the parties knew how to draft such an exclusion when they wanted it: For example, the labor agreement explicitly bars from the grievance and

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[25] *CareFlite,* at 323.

[26] *Id.*, at 321.

[27] The Court ultimately concluded that, because the parties had agreed such matter would not be arbitrable, the dispute was not a 'minor" one and therefore, according to the RLA, not grounded in the CBA. It would have been possible, we believe, for the court to have viewed the matter as a question of "just cause" for termination and, therefore, a minor dispute arising under the contract, but precluded from resolution therein because of the non-arbitrability language. See the concurring opinion of Judge Elrod noting that she "would analyze the ... grievance ... as a minor dispute arising from the interpretation of the CBA. But because the RLA does not prohibit *CareFlite* and the Union from agreeing to exclude certain minor disputes from arbitration, I would hold that the ... grievance challenging [the] termination is not arbitrable."

arbitration procedure any "proposed changes in hours of employment, rates of compensation, or working conditions."[28] Similarly, the parties agreed and included in their contract the stipulation that "only a non-probationary crew member may use the grievance procedure to obtain review of discipline,"[29] a prohibition reiterated in Section 20.B.[30]

The CBA at issue contains language that, we conclude, reflects the bargained intent to accommodate a management complaint. As discussed above, the seminal statute dealing with airline and railroad dispute settlement is the RLA, which, in discussing the scope of the parties' access to a private dispute resolution process, establishes that "either party" may submit "disputes ... growing out of grievances, *or out of the interpretation or application of agreements* ... to an appropriate adjustment board."[31] The parties to this CBA, in discussing their System Board's jurisdiction, agreed that:

> The Board shall have jurisdiction over disputes growing out of grievances or out of the interpretation or application of any of the terms of this Agreement.

To be sure, the words "either party" do not appear in the Southern/IBT provisions. But even if the current matter cannot, as the Union argues, be litigated under Section 19 ("Grievances"), it is, by any reasonable definition, a dispute "growing out of the interpretation or application" of terms of the Agreement. In the overall, in light of this language, taken together with recognition that the parties knew how to deny grievance procedure access when they so wished, it is appropriate to review the CBA for just as

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[28] See Section 19.D.2, supra, at 6.
[29] See Section 19.A.2, supra, at 5.
[30] See supra, at 7.
[31] 45 U.S.C. §184, italics supplied.

clear affirmation that the parties intended to preclude such access to Management. We find no such language. In sum, we cannot agree that Article 19 should be read as bilateral agreement to deny management access to the bargained private dispute resolution.

In the context of arbitrations under the National Labor Relations Act, it is true, as the Union observes, that Federal courts have frequently ruled, in the context of damage suits against Unions for illegal strikes, that management could be neither allowed nor compelled to utilize contractual arbitration processes prior to litigating the matter in federal court.[32] But, for the reasons that follow, we find those cases require no contrary conclusion.

In *Faultless v. IAM*[33], for example, cited here by the IBT, the Union sought to have the court mandate the employer to resolve a damage claim by means of arbitration. The employer, for its part, argued that the grievance and arbitration procedure was wholly employee-oriented to the extent that it neither contemplated nor provided a procedure for a Company-initiated grievance. In ruling that the Company had, in fact, been excluded from the arbitration route, the court first noted the congressional policy favoring private extra-judicial resolution of Labor-Management disputes, citing the

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[32] Union Motion to dismiss brief, at 10. The Union cites *Lehigh Portland Cement Co. v. Cement, Lyme, Gypsum, & Allied Workers Division*, 849 F.2d 820, 822 (3d Cir. 1988) wherein the court held the employer was barred from access to the arbitration process "when a contract contains no language which explicitly contemplates or permits the employer to initiate arbitration procedures, and the grievance structure is designed solely to afford the Union the right to arbitrate." See also *Latas Libby's Inc. v. United Steel Workers of America*, 609 F.2d 25 (1st Cir. 1979); *Faultless Div. v. Local Lodge No. 2040 of District 153 International Association of Machinists and Aerospace Workers*, 513 F.2d 97 (7th Cir. 1975); *Standard Concrete Prods., Inc. v. Gen. Truckdrivers, Office, Food & Warehouse Union*, 353 F.3d 668 (9th Cir. 2003). In these cases, the courts paid close attention to the drafting of the arbitration clause itself which, in all cases, appeared to reference only the Union rights and obligations in processing a grievance.

[33] *Faultless Div. v. Local Lodge No. 2040 of District 153 International Association of Machinists and Aerospace Workers*, 513 F.2d 97 (7th Cir. 1975)

Supreme Court's mandate in *United Steelworkers of America v. Warrior and Gulf Nav. Co.*,[34] which stated:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.[35]

The Circuit Court examined the CBA in that case "in order to ascertain the intention of the Company and the Union when they negotiated and signed the agreement, citing the Supreme Court's admonition to determine whether or not "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."[36] The Court in *Faultless* concluded:

> We believe that a fair reading of the above-quoted language compels us to conclude that the grievance and arbitration procedure applies only to employee- or Union-initiated grievances. We have not been cited to, nor have we been able to find, any language in the entire agreement which could reasonably call for a different conclusion. Thus we believe that it may be said with positive assurance that the grievance and arbitration procedure of this agreement is not susceptible of an interpretation that covers the asserted dispute. [37]

The instant case differs markedly. Here, as in *Warrior and Gulf*, we believe the broad statutory RLA presumptions toward access to the grievance procedure are important. Unlike *Faultless*, we find no language explicitly precluding a management complaint. Our review of the CBA in its entirety persuades us that these parties intended broader access than may be inferred from reading only Section 19, and that, therefore, Southern could properly grieve. We turn, then, to the merits.

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[34] 363 U.S. 574 (1960).
[35] Id., at 582-283.
[36] Faultless, at .
[37] Id.

The Union premises its case on the assumption that every aspect of achieving a unified corporate entity must be completed prior to any obligation to move forward toward a JCBA. In so doing, the IBT reads the Section 1.B.2 definition, requiring that the various functional departments "are integrated" with those of another carrier, to mean fully and finally integrated. Only upon achievement of that eventuality, the Union claims, need it begin the process of merging the respective collective bargaining agreements. But this, we find, is a wooden and, in the final analysis, unsupportable reading of the Section 1.B. language. Subsection B.3 speaks to a scenario wherein the process of achieving an integrated seniority list and a joint CBA are part of a continuum in completing the desired unified corporate entity. The language says that "in the event of a merger, this agreement shall be merged": The parties specified a 9-month time frame to achieve the combined CBAs. This specification responds to the obvious joint interest in moving the merger process along; nowhere does it suggest that such joint bargaining should be somehow postponed, held in abeyance beyond the time all other elements of the merger process are being pursued. Rather, the inference to be drawn from these words is that the parties anticipated a cooperative venture, including the vetting and resolution of labor/management issues, complete with a defined time limit to negotiations and an agreed upon interest arbitration mechanism, available in the event of an inability to achieve common ground.

The testimony establishes that, currently, administration and management of the two carriers has been meaningfully integrated so far as possible, prior to acquiring a Single Operating Certificate ("SOC"). Labor relations, Human Resources, Marketing, Legal, back office functions such as Accounting and all other functional departments

have been integrated. Atlas and Southern have adopted the same training programs for non-pilot employees[38] and employment policies and handbook, financial systems and processes, IT systems and operating systems have been combined.[39] The existing Flight Operations Manual ("FOM") is common to both carriers, although items specific to one carrier or the other are highlighted.[40] When the SOC is obtained, all FOM provisions will be standardized. The unrebutted evidence demonstrates that, among other things, the majority of Southern employees have already become Atlas employees and, in general, there is no question that widescale, continuing efforts are in place toward the goal of achieving the single operating certificate and finalizing the overall achievement of a unified carrier. To conclude that the necessary steps of combining the pilot workforce must await finalization of all other elements requires an interpretation that is nowhere apparent from the contract language and is, accordingly, unpersuasive. A contrary interpretation, one supporting the ability to condition participation in constructing a JCBA and an integrated seniority list on Southern's abandonment of the agreed-upon interest arbitration format would effectively read that bargained option out of the agreement.

The IBT contends, however, that, while §1.B.3 has force, the process specified therein cannot supersede § 27.B[41] of the current CBA, which, says the Union, requires the parties to initiate and complete RLA § 6 bargaining toward the goal of achieving a new Southern/IBT contract prior to merging it, by means of a joint collective bargaining

[38] Pilot training programs will be integrated after the SOC is issued.
[39] See Tr. 225-28.
[40] Tr. 515-16, 532-33; Co. Ex. 47.
[41] See p. 7, *supra*.

agreement (the JCBA), with the Atlas contract. Section 27.B is repeated below for ease of reference:

DURATION

A. This Agreement shall become effective on November 6,2012 and shall continue in force and effect until November 6, 2016 and shall renew itself without change thereafter, unless written notice by either party of intended change is served in accordance with Section 6, Title I of the Railway Labor Act, *as amended*, no more than three hundred and sixty-five (365) days prior to November 6, 2016 or any time thereafter.
B. The parties shall engage in direct negotiations for six (6) months after November 6, 2015, inclusive of the month referred to herein, or the parties reach a tentative agreement, whichever occurs first.
C. If the parties do not reach a tentative agreement during the period referenced in Section 28.B, the parties shall participate in the National Mediation Board's expedited facilitated negotiations program until November 6, 2016 or the parties reach a tentative agreement, whichever occurs first.
D. If the parties do not reach a tentative agreement during the period referenced in Section 28.C, either party may request a proffer of arbitration form the National Mediation Board on or after November 6, 2016.

As discussed above, Management seeks to invoke the relevant bargaining requirements of §1.B.3 which provides as follows:

> 3.In the event of a merger, this Agreement shall be merged with the merging air carrier's crewmember collective bargaining agreement, if any; if such merged agreement is not completed within nine (9) months from the date an integrated Master Seniority List is submitted to the surviving entity, the parties shall submit all outstanding issues to binding interest arbitration.

These provisions, and their negotiated time limits, differ dramatically. Significant to this dispute, they also apply to different collective agreements. The former deals with "Duration" of the stand-alone Southern/IBT CBA, and the bargaining surrounding those two signatories. The latter is applicable to the eventuality of Southern's merger with another carrier and its workforce, and the consequent necessity of an integrated

relationship with the Union. As to that, there is no dispute. Southern says the mutual intent of the parties was, in the event of a merger, to adopt the bargaining model designed to accommodate the merger: In that case, the parties, according to the Company, abandon Section 27's RLA § 6 talks, if any, proceeding instead with Section 1.B.3's 9-month bargaining timetable, followed by interest arbitration, if necessary. The IBT, however, claims both bargaining systems retain their force, operating in tandem: First, says the Union, Southern and the IBT must participate in § 6 negotiations, including, presumably, six months of "direct negotiations," (§ 27.B), six months of "expedited facilitated negotiations" (§ 27.C) and whatever time is required for processes involved with a "proffer of arbitration" from the National Mediation Board (§ 27.D). Only then, the Union urges, may the parties proceed to the bargaining schedule and dispute settlement mechanism agreed to in § 1.B.3.

For the reasons that follow, the Company's reading, we find, should be adopted. Section 27 speaks to the duration and modification of the existing 2012 Southern/IBT agreement. Section 1.B.3 clearly addresses itself to the potential merger of two carriers and the concomitant need to create a new, as yet inchoate, Joint CBA, the necessary product of a wholly different bargaining relationship, negotiations calendar and dispute resolution mechanism.

In sum, by seeking to link Section 27's processes to the JCBA negotiations, the Union misconstrues both the purpose and the mandate of Section 1.B.3. The IBT's demands to substantially postpone, in these circumstances, that Section's nine-month timetable and potential interest arbitration amount to an attempt to change mutually agreed language that, albeit contained in the existing Southern/IBT agreement, is

nevertheless directly applicable to, and controlling of, bargaining surrounding a new, unrelated JCBA and a new enterprise, both products of the current merger. For the Union to condition its cooperation in negotiating a JCBA, including the germinal step of producing an ISL, on the effective abolition, or at least devitalization, of § 1.B.3 of the current contract is to breach the obligation, inherent in that same section, to join with the Company in effectuating the critical part of the merger that directly relates to combining the respective pilot workforces.

These observations do not resolve all questions surrounding the Union's actions. Concluding, as we do, that participation in the process of merging is mandatory does not answer the question of "when?" If, on the one hand, there is no specified point at which the Union must supply the ISL and join with the Company to negotiate a JCBA, neither is there any suggestion the Union may decline to participate in the process. While it is clear enough that preparation of an ISL can involve some complexities, the fact that such production is explicitly agreed to and required in the current agreement makes unavailable the argument that it may be regarded as a bargaining chip in the process of attempting to modify existing contractual promises. Instead, proceeding on a premise codified in Sections 1.B.2 and 3 – that the merger process encompasses the work of both parties - it follows that they share a current obligation of joint cooperation. The expectation of timely performance rests on both: Toward the end of providing a stable merging process, the Company, in the process of merging, must move expeditiously to combine all business attributes of the two enterprises. The Union, for its part, must proceed, as soon as reasonably possible, with the difficult, at times daunting, and almost

always thankless task of producing an ISL and joining with Southern in negotiating a JCBA in accordance with the negotiated schedule set forth in Section 1.B.3.

In the absence of an identifiable "starting line" marker, the Board is left with the conclusion that the ISL should be supplied with reasonable dispatch in a manner that will contribute to the overall goal of concluding this difficult process in as timely a manner as is reasonable, given the complexity of the overall task. We cannot reconstruct or somehow pinpoint the moment the process was sufficiently advanced to conclude it was the point at which the Union was contractually obliged to produce the ISL or begin the JCBA talks. We can conclude with some certainty, however, that there has been a delay inspired by the Union's misapprehension of the contractual requirements and that they must now respond vigorously to the Company's request to proceed. There is no evidence in the record, nor is it likely anyone really knows, how long it will take to generate the ISL.[42] In response to that uncertainty, but with recognition that the combined workforces are relatively small - some 2,000 pilots - the Board will, by way of remedy in response to the observed violation, set a time of 45 days for the Union to produce the integrated seniority list.[43] At that point, in accordance with these parties' agreement, the 9-month negotiation window will commence.

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[42] The Union, according to the record, did suggest it could be done relatively quickly, but this was a time when it hoped to secure the Company's agreement on the interest arbitration issue.

[43] This time frame may, of course, be adjusted by mutual agreement of the parties.

AWARD

(1)The Collective Bargaining Agreement accommodates Management grievances.

(2) The grievance is granted, subject to the above findings.

Richard I. Bloch

Jennifer Chernichaw – (Concur)

Daniel Katz – (Dissent)

Date: June 12, 2019