Seniority Integration Rights of Furloughees

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In light of recent furlough announcements, many US Airways pilots have expressed concerns about the seniority integration rights of furloughees. For purposes of seniority integration, the bottom line is this: Should US Airways merge with another airline, *all* pilots whose names appear on the US Airways Pilots' System Seniority List will be included in any seniority integration. Under our contract, furloughees remain on the seniority list and retain recall rights unless they elect not to accept an offer to return to pilot duty for a minimum of 90 days if no junior pilot remains on furlough. Also, the ALPA Executive Board has confirmed the seniority integration rights of furloughees. In 1996, it passed a resolution in response to concerns about the status of furloughees in merger situations. The resolution reaffirmed that ALPA Merger Policy covers all pilots on an ALPA-represented airline's seniority list. US Airways pilots facing imminent furlough can rest assured that should US Airways be involved in a transaction resulting in a seniority integration, your merger representatives will represent the seniority interests of all pilots on the list, including furloughees.

This is not to say that furloughs are irrelevant to seniority integration. Under ALPA Merger Policy, the employment data the merger representatives are required to determine and exchange include each pilot's date of hire, date of birth, seniority number, and furlough time. In addition, one recognized method of integrating seniority lists is by length of service, which is usually defined to exclude time spent on furlough.

A pilot's status as a furloughee at the time of the merger announcement or arbitration hearing may also bear significantly on the pilot's placement on the merged list. Because reductions in force occur in inverse order of seniority, furloughs and juniority go hand in hand. Beyond that, the absence of current employment and uncertainties about future prospects are among the equities likely to affect a furloughee's seniority placement.

No pilot, regardless of furlough status, can be guaranteed any particular placement on a merged list. The only certainty in seniority integration is that the outcome is never certain until the merger representatives reach an agreement or, failing a negotiated solution, the arbitrator issues an award. Each case presents its own facts and equities, and each requires a resolution tailor-made to the situation presented. With that said, the past provides several examples of arbitrators and negotiators grappling with the proper seniority placement of furloughees. These precedents, while not determinative of future proceedings, shed light on the kinds of considerations likely to come into play.

Republic-Hughes Airwest

One of the most comprehensive discussions of the issue appears in the 1981 seniority integration arbitration decision by Arbitrator Richard Bloch in the Republic-Hughes Airwest merger. Republic acquired all of the stock of Hughes Air Corp., which operated Hughes Airwest, in October 1980. The previous year had been a difficult one for Hughes Airwest, which had furloughed 117 pilots, about 20 percent of the workforce. Although Republic, too, was facing financial difficulties, none of its pilots were furloughed, and it continued to hire pilots through August 1980. The ALPA Merger Policy Arbitration Panel adopted a length of service methodology, giving no credit for time spent on furlough prior to the merger, and assigned seniority numbers as of the merger

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date of October 1, 1980. In arriving at this methodology, Arbitrator Bloch acknowledged that furloughed pilots remain wedded to their airline, often choosing to forgo employment elsewhere in order to retain the potential to return to a high-paying and desirable job. He explained:

> The choice, difficult as it is, arises as a result of comprehensive employment protection incorporated as a significant contractual bargain. It is an alternative to full unemployment and gives the pilot the absolute right to return as soon as his number is reached. This is a right that often extends for many years. One may readily acknowledge the equities of protecting relative seniority within a given pilot seniority list, as is provided by contract. But in the context of comparing lists in the merger situation, the equities are different.
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> In the difficult business of analyzing respective strengths and weaknesses, furloughs become an important (and one of the few) objective indices of carrier performance. As between carriers, the fact that one keeps its workforce working is significant. This has been recognized in virtually every arbitrated dispute in this area.
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> In this case, Airwest contends . . . that its pilots have "paid their dues" through necessary layoffs and fleet regeneration. One may accept this argument as having contributed to Airwest's viability at the time of the merger. It is part of the basis upon which this Board has adopted the basic length of service approach. It would be inconsistent, however, to at once acknowledge these previous hardships as "dues paid" while at the same time crediting—"repaying"—the individuals for such time spent and thereby ranking them even higher on the final list. The relative positions of these pilot group and the equities of the case do not support such a result.

The panel therefore declined to extend even partial seniority credit for time spent on furlough before the merger.

In spite of the deduction of all furlough time, the chosen methodology resulted in the placement of some Airwest furloughees at the time the award was issued senior to working Republic pilots. This result was justified, in Arbitrator Bloch's view, "as a result of more extensive, albeit prior, active service by the furloughed pilot." He emphasized, however, that the award does not permit a furloughed pilot to displace a working pilot. And in order to avoid what he termed "a mechanical 'switching' effect wherein a pilot recalled for a minimal period of time displaces another," the award required a recalled pilot to remain active for 60 days before exercising displacement rights.

Significantly, the methodology employed by the Bloch panel did not distinguish in any way between furloughs completed years before the merger and those ongoing as of the merger date. Both pilot groups had experienced furloughs at different times, with a greater number of Republic pilots having had some furlough time. Hughes Airwest pilots, however, had experienced more total days on furlough and 76 of them had accumulated over four years of furlough time. One of the pilot neutrals wrote a separate concurring opinion in which he disagreed with the refusal to give partial credit for time spent on furlough. In his view, the Hughes Airwest pilots with the greatest furlough time were disadvantaged by this approach. Partial credit was warranted, he contended, to "allow them to move up the list to a position that is more commensurate with their age, job expectations, and date of hire." This position, however, did not carry the day.

American-Trans Caribbean

One case in which furlough status at the time of the merger played a key role is the influential 1974 decision of Arbitrator Russell Smith in the seniority integration arbitration relating to the pilots of American Airlines and Trans Caribbean Airways (TCA). Unlike in *Republic-Hughes Airwest*, in which only the Hughes Airwest pilot group included furloughees at the time of the merger, there were furloughees in both the American and TCA pilot groups. ALPA Merger Policy did not apply, because the American pilots had previously left ALPA to set up the Allied Pilots Association (APA). Acting under the Labor Protective Provisions imposed by the Civil Aeronautics Board in approving the merger, Arbitrator Smith integrated all of the furloughees together using a series of ratios. He explicitly adopted the contention of American and the APA "that it is appropriate to distinguish between those in active status and those in furlough status as of the date of the merger." He accordingly refused to give the TCA furloughees seniority positions based on their dates of hire, because to do so would have placed them senior to some active American pilots.

Arbitrator Smith also rejected the APA's contention that the TCA pilots' dismal recall prospects required them to be placed behind all of the American furloughees whose prospects for recall were quite good. Recall prospects,

while significant, are not the only relevant factor. Date of hire, too, is relevant, but also not determinative, in Arbitrator Smith's view. He concluded: "What I think is called for as to these pilot groups is a balancing of the factors of recall prospects and dates of hire along with some consideration of the fact that the American furloughs constituted a far smaller percentage of the total American pilot complement than did the TCA furloughs of the total TCA complement." To achieve this balancing act, he applied a series of ratios starting with a one-to-one ratio and ending with a ratio of one TCA pilot to five American pilots.

Both the TCA and American pilot groups included current furloughees. A future seniority integration involving US Airways pilots could present similar facts. For it is possible, if not likely given the industry's current state, that whatever the identity of a potential US Airways merger partner, some of the pilots on that airline's list will also be furloughees.

Appended to Arbitrator Smith's decision in the American-TCA case is a discussion of the relevant precedents cited by the parties. With respect to the treatment of furloughees as compared with active pilots, Arbitrator Smith concluded that the precedents did not establish a consistent pattern.

Seniority integrations involving pilots of US Airways and its predecessors

US Airways and its predecessors have over the years resorted to furloughs in order to reduce the pilot workforce during difficult times. The pilots' merger representatives and arbitrators called upon to integrate the lists in the absence of agreement have therefore grappled with the proper placement of current and former furloughees several times under ALPA Merger Policy. Here is a sampling of how the furloughee issue has been addressed in US Airways' own history:

Allegheny-Lake Central. When Allegheny acquired and merged operations with Indianapolis-based Lake Central in 1968, merger representatives from the two pilot groups negotiated a seniority integration agreement based on date of hire with conditions and restrictions. Although there were some Lake Central pilots on furlough at the time of the merger, they, too, were integrated based on their dates of hire.

Allegheny-Mohawk. When Allegheny purchased and merged operations with New York-based Mohawk in 1972, the merger representatives again achieved a negotiated solution based on date of hire with conditions and restrictions. Like the Lake Central pilots in the previous merger, the Mohawk pilot group included some furloughees at the time of the Allegheny-Mohawk merger. The seniority integration agreement adjusted the Mohawk furloughees' dates of hire to account for that furlough. It further adjusted their dates of hire to the extent necessary to place them below the most junior active pilot.

US Airways-US Airways Shuttle. The most recent seniority integration involving US Airways pilots resulted from US Airways' purchase in November 1997 of the US Airways Shuttle. In a decision authored by Arbitrator George Nicolau, the arbitration panel constructed a consolidated seniority list comprised of seven segments, plus a few conditions and restrictions. Of interest here is the sixth segment of the list, which was composed as follows, with all references to seniority numbers and positions as they appeared on the respective pre-merger October 1998 lists. This portion of the list includes 190 US Airways pilots, number 5031 through number 5310, who were recalled to the payroll effective October 6, 1998, and 18 Shuttle pilots, number 140 through number 157. These 18 were Shuttle second officers who began their employment at the Trump Shuttle in February 1989 and January 1990 and were furloughed for periods of 3–6½ years. They were ratioed with US Airways pilots who returned to the active payroll in October 1998, after furloughs of up to 7¼ years. Arbitrator Nicolau explained the integration of these two groups as follows:

> A balancing of the equities, which also takes into consideration the reasons behind the lengthy furloughs of those who have recently been recalled to US Airways' active rolls as well as the extended furloughs endured by 18 of the 28 Shuttle Second Officers, suggests to us that the 28 Shuttle Second Officers, beginning with . . . (USS number 130) and ending with . . . (USS number 157) should be distributed between US Airways unmerged number 4859 . . . and number 5310 . . . . This would place those who have experienced furloughs and have relatively similar service in comparable positions on the list.

Following this group was the seventh and final segment of the combined list, which was composed of the five junior Shuttle pilots, number 158 through number 162. This last group of five Shuttle second officers was essentially

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placed at the bottom of the list by agreement. Following them were hundreds of constructive notice pilots, i.e., those hired at either carrier after the announcement of the acquisition in November 1997. By stipulation, these pilots went on the merged list in date-of-hire order.

Constructive notice and furloughees

Although it can be argued that furloughees do not "bring jobs to the merger" in light of their lack of actual employment, there is precedent supporting their placement on a merged list senior to active pilots who are hired after the merger announcement. A case in point is the 1967 Braniff-Panagra pilot seniority integration, which was a negotiated solution except with respect to 14 Panagra furloughees who had been on furlough for over five years. The arbitration board, which was chaired by Arbitrator David Cole, placed the furloughees ahead of Braniff new-hires. Arbitrator Cole explained: "Surely, the likelihood of this merger was known to these recruits, and they must be assumed to have understood that Panagra pilots with greater length of service would be inserted in the seniority list ahead of them." In other words, the Braniff new-hires were deemed to have "constructive notice" of the merger with Panagra and of the likelihood that they would take their places on the merged list after all pilots on the seniority lists of the pre-merger carriers, including furloughees.

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The issue of constructive notice arises in almost every merger. As Arbitrator George Nicolau explained in the context of the Federal Express-Flying Tiger pilot seniority integration:

> In prior mergers, "constructive notice" dates have varied. On some occasions, the date has been agreed upon by the parties. At other times, an arbitrator has determined that it should be the date on which the merger was announced . . . .
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> While some dispute the existence of a "constructive notice" doctrine or the concept of a usual "constructive notice" date, that doctrine and its consequences are well understood and accepted in the airline industry. Moreover, it is widely recognized that the date on which a merger is announced as having been agreed to by two willing carriers, is, absent special circumstances, the most appropriate one. The reason is that once such an announcement is made pilots who are hired by either carrier are on notice, to paraphrase David Feller, that their seniority rights are subject to the claims of those previously hired by "the other partner to the prospective marriage."

Arbitrator Thomas Roberts likewise set the constructive notice date as the date of the announcement of the merger in the Northwest-Republic pilot seniority integration proceeding.

In the Alaska-Jet America seniority integration arbitration, the pilot groups argued for different constructive notice dates. The Jet America pilots took the position that the constructive notice date should be September 30, 1986, the date that Alaska's owner acquired Jet America. The Alaska pilots disagreed. All indications in September 1986, they argued, pointed to the maintenance of two separate operations. In their view the constructive notice date should be July 23, 1987—the date the merger was announced. Arbitrator Richard Bloch agreed. He explained:

> Constructive notice becomes meaningful, it is agreed, as the date when newly-hired pilots know, or should know, that their flying careers, and specifically their seniority status, will be determined in reference to an additional group of pilots . . . . We find that the July date is more realistically reflective of the time pilots were advised that their futures would be related. Prior to July of 1987, there was no reason to conclude that Alaska and Jet America would be a single carrier.

Accordingly, the date of the merger announcement, rather than the acquisition, was deemed the constructive notice date.

Application of the constructive notice doctrine is a common and essential component of seniority integration. A pilot group with furloughees at the time of the merger announcement can use the doctrine to support the furloughees' placement senior on the merged list to pilots hired after the merger announcement.