BEFORE THE SPIRIT AIRLINES –ALPA SYSTEM BOARD OF ADJUSTMENT ARBITRATION AWARD

In the Matter of the Arbitration	)	Case No. SPA-08-005
	)	Grievance: Four Days Off Dispute
	)	(Contract Interpretation)
Between	)	
	)	
AIR LINE PILOTS ASSOCIATION (ALPA)	)	
	)	
And	)	
	)	
SPIRIT AIRLINES, Inc.	)	
	)	

SYSTEM BOARD OF ADJUSTMENT
Joshua M. Javits, Chairman and Neutral Board Member
James Monahan, Company Board Member
Captain David Systema, Association Board Member

APPEARANCES:

For the Company: Peter J. Petesch Esq.
Littler Mendelson, P.C.

For the Association: Arthur M. Luby, Esq.

Place of Hearing: Fort Lauderdale, FLA

Dates of Hearing: October 6 and 7, 2008

Date of Briefs: December 5, 2008

Date of Award: February 20, 2009

ISSUE:

The parties were unable to agree to the issue presented in the instant case. The Association argues that the issue should be formulated as follows:

> "Whether the publication of bid packages with blocks of days off between lines with less than four days effective August 1, 2008, due to the Company's financial condition, or for other reasons unrelated to line construction problems, violated Section 25 of the Collective Bargaining Agreement? If so, what shall be the remedy?"

In contrast, the Company insists that the issue for consideration is the following:

> "Whether the Air Line Pilots Association (ALPA) can prove, by a preponderance of the evidence, that Spirit Airlines – in the face of unique financial pressures – breached the Collective Bargaining Agreement by making an exception and issuing pilot bid packages containing only one block of at least four days off for its pilots based in Fort Lauderdale and Detroit. If so, what shall be the remedy?"

In essence, the Board is being asked to determine whether or not the Company violated the parties' CBA when it decided, for financial/economic reasons, to reduce the number of consecutive days off for pilots below four (4) days. The Association's grievance has nothing to do with the first or the last three days in the month, a time frame during which, according to the agreement there

can be blocks of days off of less than four.

In the instant case, the Association (ALPA) contends that the Company, Spirit Airlines, violated Section 25.B3.g5 of the parties' Collective Bargaining Agreement (and other similar provisions relating to reserve pilots at Section 25.B3.h2 and 25.B3.i2).

Section 25 (Scheduling) of the Collective Bargaining Agreement provides in the relevant part:

> "25.B.3. The pilot bid package will contain all regular, reserve and an estimated number of relief lines grouped by aircraft-type at each domicile. It is not necessary that every domicile have reserve and/or relief lines. The package will also include the following:
>
> g. "Regular Lines" which shall contain:…
>
> (5) To the maximum extent possible, blocks of five (5) consecutive days off in domicile. In lieu of the above, to the maximum extent possible, no less than four (4) consecutive days off in domicile, except regular lines may contain blocks of less than four (4) consecutive days off in domicile on the first three and last three days of the month. Exceptions to multiple-day off blocks may occur with prior consultation of the Scheduling Committee Chairman.

h. “Relief Lines” which shall, at the time of publication of the bid package, contain the same range of days off as regular lines…By the time of award and publication of the final schedule, relief lines shall contain:

(2) To the maximum extent possible, blocks of five (5) consecutive days off in domicile. In lieu of the above, to the maximum extent possible, no less than four (4) consecutive days off in domicile, except regular lines may contain blocks of less than four (4) consecutive days off in domicile on the first three and last three days of the month. Exceptions to multiple-day off blocks may occur with prior consultation of the Scheduling Committee Chairman.

i. “Reserve Lines” which shall include:

(2) To the maximum extent possible, blocks of five (5) consecutive days off in domicile. In lieu of the above, to the maximum extent possible, no less than four (4) consecutive days off in domicile, except regular lines may contain blocks of less than four (4) consecutive days off in domicile on the first three and last three days of the month. Exceptions to multiple-day off blocks may occur with prior consultation of the Scheduling Committee Chairman.

Under the parties' Collective Bargaining agreement, the Company must "to the maximum extent possible" give pilots five (5) consecutive days off; short of five (5) days off, the company must "to the maximum extent possible" give the pilot four (4) days off. Thus, for each time during the month (other than over the first and final three days of a month) that a pilot goes off duty after a planned sequence of trips with intervening days off he/she is given either five (5) or four (4) days off in a row in domicile. Every bid line (monthly schedules pilots bid for by seniority) must "to the maximum extent possible" contain this five (5) or four (4) days off between trips. (Union Exhibits 10 and 11 for examples of monthly bid lines). Union Exhibits 10a and 11a show the five (5) or four (4) consecutive days off for pilots. Union Exhibits 10b and 11b do not show these five (5) or four (4) days off; these packages contain examples of the monthly bid lines which the Union is protesting in the instant case.

Beginning on August 1, 2008, for the Fort Lauderdale bid lines and on September 1, 2008, for the Detroit bid lines, the Company started to give less than the 5/4 days off for pilots following a trip. It is undisputed that the Company had consistently allowed for the 5/4 days off for all its pilots for over 10 years, since the 1999 Collective Bargaining Agreement had been agreed to. However, in August 2008 and September 2008, the Company decided, because of challenging economic conditions in effect at that time, to not allow pilots the 5/4 days off after every trip. Rather, the Company decided to give its pilots 5/4 days off after only one of their trips during the month. For all other trip a pilot made

during that month, he/she would be provided with less than the usual 5/4 days off by the Company. Sometimes the pilot in question would receive only 3 or 2 days off following a trip.

The contractual language above stems from the parties' collective bargaining agreement of 1999. During the collective bargaining negotiations which preceded this language, the parties made various proposals and counter proposals regarding the period of time pilots were to be allowed to take off following a trip.

The Association's first proposal (Association Exhibit 1) on the construction of regular lines, which was submitted to the Company on January 13, 1998, proposed the following:

> "Regular Lines" which shall contain:
>
> (1) A planned sequence of trips with intervening days off arranged in a schedule for the month; *to the maximum extent possible regular lines will contain five (5) consecutive days of duty followed by five consecutive days off*…
>
> (5) Days off at domicile arranged so as to provide multiple day off blocks and a variety of bid lines, except bid packages may contain single days off the first and last day of the month. Exceptions to multiple day-off blocks may *occur only with the concurrence* of the Scheduling Committee Chairman."

(Emphasis added).

The parties resumed their collective bargaining negotiations in July 1998. On July 13, 1998, the Association made a new proposal (Company Exhibit 2) regarding blocks of days off for pilots. This new proposal stated:

> "*To the maximum extent possible, blocks of five (5) consecutive days off in domicile, but no less than four (4) days off in domicile*, except regular lines may contain blocks of less then four (4) consecutive days off in domicile except on the first three and last three days of the month. Exceptions to the multiple-day off blocks *may occur only with prior consultation* of the Scheduling Committee Chairman."
>
> (Emphasis added).

On July 15, 1998, the Company counter-proposed that the provision be reduced to provide merely that regular lines contain "[t]o the maximum extent possible, blocks of five (5) consecutive days off in domicile," but deleted " no less than four (4) days off in domicile..." and all language from the union proposal which followed this clause." (Company Exhibit 15) No agreement was reached between the parties at that time.

The Company submitted a further proposal to the Union on November 11, 1998, which provided:

> "One block of four (4) consecutive days off in domicile, and, to the maximum extent possible, one block of three (3) consecutive days off in

domicile”

This proposal was rejected by the Association. On November 23, 1998, according to the notes of Brad Ellsworth, who was present on behalf of Spirit during a discussion of blocks of days off held that day, the Chair of the Association’s negotiating committee, Dennis Domin stated “to the maximum extent possible … don’t want to tie the hands of schedulers/operations…” (Company Exhibit 17). The collective bargaining negotiations on the issue of blocks of days off for pilots were discontinued for the remainder of 1998. In January 1999, the parties began the final round of negotiations on their collective bargaining agreement.

On January 27, 1999, the Association presented the Company with an updated proposal (Association Exhibit 4) for block days off for regular, relief and reserve line holders. This proposal provided the following:

> “*To the maximum extent possible, blocks of five (5) consecutive days off in domicile, but no less than four (4) consecutive days off in domicile*, except relief lines may contain blocks of less than four (4) consecutive days off in domicile on the first three and last three days of the month. Exceptions to multiple-day off blocks may occur with prior consultation of the Scheduling Committee Chairman.”
>
> (Emphasis added).

According to the testimony of Association attorney Neal Davis and the tentative agreements reflected in his records (Association Exhibit 4), the Company tentatively agreed to the above language on January 28, 1999. At the hearing, Association attorney Neal Davis further testified that he was approached by Company negotiator Bob Moreland shortly after this tentative agreement on January 28, 1998, and was informed that Company management was unsure whether or not it would be able to provide 5/4 blocks of days off to pilots "every time." According to Davis, Company negotiator Moreland informed him that the Company was concerned that it would not be able to construct lines with absolutely four (4) days off every month for pilots. Davis testified that Moreland told him that the Company was worried that the Association would file a grievance if the Company was only able to provide a block of three (3) days off between trips to certain pilots in a given month. The Company wished to have the modifier "to the maximum extent possible" to be applied to both the blocks of five days off and also to the blocks of four days off.

Neal Davis testified that the Association agreed to re-open the issue in order to accommodate the Company's concerns. He testified that the Association and the Company, at that time, had a good working relationship and they jointly agreed to make minor changes to the tentative agreement above to accommodate the Company.

However, Davis insisted that the Company's request to amend the

tentative agreement had nothing to do with financial hardship or economic concerns. Any less than blocks of 4 days off for pilots was only anticipated to occur in "rare circumstances," Davis stated. Davis argued that the amendment was only designed to address any operational difficulties the Company may have had in line construction. He also noted that the Company was required to "consult" with the Association (specifically Scheduling Committee Chairman) if it wished to provide pilots with less than a block of four days off. This, Davis explained, was to allow the Union to look at whether there were any alternatives available before reducing pilots' blocks of days off.

The final language the parties agreed to states:

> "Regular Lines" which shall contain:…
>
> (5) *To the maximum extent possible, blocks of five (5) consecutive days off in domicile. In lieu of the above, to the maximum extent possible, no less than four (4) consecutive days off in domicile*, except regular lines may contain blocks of less than four (4) consecutive days off in domicile on the first three and last three days of the month. Exceptions to multiple-day off blocks may occur with prior *consultation* of the Scheduling Committee Chairman.
>
> (Emphasis added).

Association attorney Neal Davis testified that the Union and the Company re-entered negotiations at the end of 2002 when the existing CBA became

amendable. In November 2002, the Company submitted a proposal (Association Exhibit 5) to change the language of Section 25 of the CBA relating to blocks of days off for pilots. The Company's initial proposal, dated November 19, 2002, simply proposed the deletion of all reference to the blocks of five or four days off for pilots in Section 25. At the time, the Company was experiencing economic difficulties, Davis testified, and it wished to make as many cost/efficiency savings as it could, including changes to its contractual scheduling commitments. Davis testified that the Association considered the Company's proposal to be "draconian" and responded by proposing the deletion of the "to maximum extent possible" limitation (Association Exhibit 6).

The parties re-entered negotiations later that year, negotiations that were precipitated by the Company's deteriorating financial position at the time. Prior to beginning these negotiations, the Company set a deadline of December 22, 2002, for any agreement.

On December 12, 2002, the Company presented a proposal (Association Exhibit 7) that would have deleted the existing language of Section 25 and replaced it with the following:

"g. "Regular Lines" which shall contain"

(1) A planned sequence of trips with intervening days off arranged in a schedule for the month and a variety of bid lines;

(2) No more than eighty five (85) block hours;

(3) No out of base trips;

(4) No reserve days;

(5) No less than five (5) days off for ten (10%) percent of the lines;

(6) Not less than four (4) days off for eighty (80%) percent of the lines;

(7) Not more than one three (3) day off period per line for ten (10%) percent of the lines…"

At the hearing, Association attorney Neal Davis testified that the Union debated the Company's above proposal and considered it to be a reasonable offer. However, he testified that the Association ultimately rejected the Company's proposal as it felt it was giving up more than it was prepared to do. According to Davis, the Association felt that obtaining blocks of five days off ten percent of the time was not enough. Similarly, the Association did not wish to grant the Company the right to award blocks of only three days off ten percent of the time either as this was more than it felt it needed to concede. Davis stated that the Association believed the Company's proposal ("5/4/3 blocks of days off proposal") was too complicated to look at its specifics, particularly given the time deadline imposed for any agreement by the Company. The Association responded on December 16, 2002, by retaining the current CBA language unchanged in its proposal. The contractual provision in the collective bargaining agreement remained the same, as no agreement between the parties to amend it

was ever reached.

In December 2005, Company management requested a meeting with the Association to present it with a concessionary proposal (Association Exhibit 9). At the time, the Company was experiencing severe economic difficulties and, as a result of this, it was seeking to implement a number of cost saving programs. Present at the joint Company/ Association meeting on December 7, 2005, were Company President, Ben Baldanza, Company Vice President of Employee Relations, Patricia Willis, Company Financial Manager, Beth Zurenko, and Association representatives Vince Heist and Jim Ryan.

During this meeting, the Company presented a document to the Association outlining a number of initiatives which the Company wished to implement, including a specific proposal dealing with blocks of days off for the pilots. The Company's proposal for changing blocks of days off provided the following:

> "Current Rule: Company must obtain ALPA's permission to construct Lines containing blocks of consecutive days off of less than (4) days.
>
> Change to: Pre-approval to construct no more than 10% of all the Lines with less than (4) consecutive days off."

At the hearing, Association representative, Captain Vincent Heist, testified

that he was present for this Company presentation in December 2005. Captain Heist testified that the Company's presentation document, quoted above, specifically acknowledged that it needed to first obtain the Union's permission before making any changes to the block line construction. Even under the new language which had been proposed by the Company, the Company would need the Association's permission to reduce the number of days off in a block below four (4). According to Captain Heist, the Association, however, rejected the Company's above concession proposal, thereby leaving the language of the current CBA unchanged. Heist insisted that the contractual provision guaranteeing pilots blocks of at least four (4) days off between trips "was an absolute floor" under the parties' contract and this had in no way been changed.

At the hearing, former Company Vice President of Inflight Operations, Patricia Willis, testified on behalf of the Association. Willis testified that she was not part of the Company's negotiating team during collective bargaining negotiations with the Association in either 1998 or 2002. However, Willis testified that she generated the Company's December 2005 proposal which requested a reduction in the number of days off in a block provided to pilots. Willis recalled that the Company was in need of concessions and that management was going through the CBA to look for areas where cost savings could be made. She testified that the Company was seeking "conditional relief" from the four (4) day block of days off rule for pilots, but the Association refused to accept the proposal presented.

According to Willis, “we [Company management] all believed that we had to get the Union’s OK to change” the block of days off rule in the CBA. She further testified that Company management “never interpreted the Agreement to allow for less than four (4) days because of economic circumstances.” It should be noted, however, that Willis acknowledged that there was no specific language in the contract which justified reduction in blocks of days off for operational or non-economic reasons.

During the following year, the Company’s financial condition began to progressively deteriorate to the extent that its continued operation was in question. Faced with these challenging economic conditions, the Company adopted a number of drastic cost-cutting measures which were designed to help the Company preserve cash. One of the areas which the Company believed it could make significant cost savings was from not providing blocks of four or more days off for pilots.

At the hearing, Company Manager of Crew Planning, Joseph Nystrom, testified that he was tasked with the job of computing the extent of savings the Company could obtain by reducing the consecutive days off to pilots. According to Manager Nystrom, the Company would be able to obtain substantial cost efficiencies if it reduced the number of days off in a block for pilots. Nystrom

testified that he developed a financial model which showed that the Company would be able to make savings of over $600,000 for the remainder of 2008 if it reduced the number of days off in a block between trips for pilots at its Fort Lauderdale and Detroit bases to less than four days By reducing the number of days off in a block for pilots at these bases, the Company would also be able to greatly reduce the amount of overtime paid, Nystrom explained.

According to Company Manager Nystrom, however, the Company did not reduce the blocks of days off to less than four days for pilots at other bases, as there were no cost efficiencies to be obtained by doing so. At other bases, such as La Guardia, the Company would not be able to make any cost savings by reducing the number of days off in a block. For that reason, the Company chose only to reduce the number of consecutive days off for Detroit and Fort Lauderdale based pilots. However, even pilots based at these two bases, were still guaranteed to have at least one block of four (4) days off in a row every month, Nystrom testified.

Before implementing this newly reduced bid package, the Company informed the Union of its intentions to reduce the number of days off in a block below four (4). Manager Nystrom testified that the Company explained to the Association what it intended to do and why it was taking this action. He further testified that the Union was invited to discuss the matter further and to present any alternative proposals it felt would have achieved similar cost efficiencies for

the Company. According to Nystrom, the Company was permitted to take the action it did under the CBA. He argued that Section 25 required the Company to "make an effort to provide blocks of four (4) days off" to pilots.

However, the contract was "not an absolute" and did not guarantee pilots at least four (4) block days off, Nystrom stated. Nystrom testified that the phrase "to the maximum extent possible" in Section 25 did not preclude the Company form taking financial or economic factors into consideration when deciding to reduce the number of days off in a block to less than four (4). In fact, Nystrom argued that the Company would be permitted to reduce the number of days off in a block below four (4) where such action would improve the Company's efficiency, even absent economic considerations.

Beginning in August 2008, the Company decided to implement a unilateral change to the blocks of days off which were provided to pilots at its Detroit and Fort Lauderdale bases. The instant grievance centers upon the Company's decision to reduce the number of days off in a block for pilots below four (4).

At the hearing, the Company's President, Ben Baldanza, testified about the difficult economic environment that was facing the Company and the potential devastating consequences these economic challenges posed to the Company. According to Baldanza, the financial hardships faced by the Company drove

management's decision to reduce the number of blocks of 5/4 days off which pilots had previously enjoyed. Baldanza testified that there were a number of economic factors which had caused the Company to change its existing practice of awarding pilots blocks of 5/4 days off following a trip.

First, he noted that, at the time the Company decided to reduce the blocks of days off for its pilots, the price of oil was over $140/barrel. He further noted that the prevailing credit crisis facing the US economy had presented strong headwinds for the US airline industry in particular. Baldanza explained that airline passengers typically buy their airline tickets well ahead of the expected date of travel on their credit cards. If an airline carrier is forced out of business between the date of the ticket purchase and the date of a customer's expected travel, the credit card company whose card was used to purchase the airline ticket will end up being stuck with the cost of the airline ticket. Because of this potential exposure to financial loss, credit card companies were now requiring airlines to provide them with cash to meet these costs for fear that the airline might end up in bankruptcy.

As a result, Baldanza explained, the Company was now required to devote a considerable percentage of its cash balance to this end. Company President Baldanza insisted that the Company had taken a series of cost-cutting steps which were designed to improve the financial position of the Company and to reduce costs during this difficult operating environment. He noted that the

Company had reduced the amount of fuel each aircraft would carry during air travel (within required safety limits), had attempted to put off payments the Company was required to make on its leased aircrafts, had reduced the number of staff at the Company, had chosen not to fill otherwise vacant positions within the Company, and had even eliminated seven (7) aircraft from the Company's existing fleet of thirty five (35). The Company had even furloughed over 165 pilots, as well as flight attendants and other employees, President Baldanza testified.

According to Baldanza, the only other area where the Company could possibly look to reduce operating costs and to save money was at the Collective Bargaining Agreement with the Association. It was against this background that the Company reluctantly concluded that it needed to reduce the blocks of 5/4 days off for its pilots.

Company President Baldanza testified that he and management were reluctant to unilaterally reduce the blocks of days off provided to pilots, as such an act "was counter to our objective to work collaboratively with our pilots." He even acknowledged that some members of management did not believe the company could reduce the days off in a block below four (4) based on economic factors alone.

However, he testified that the Company nonetheless had the right to do so if it so wished. Baldanza testified that the Company had no alternative but to implement this reduction in days off in a block in order to ensure the survival of the company. He insisted that it was "currently not possible" to continue to provide four (4) day blocks of days off to pilots given the Company's perilous economic position. When asked when the Company might re-introduce the 4 day blocks of days off, Baldanza testified that there were no specific criteria or test to be met. He stated that a number of factors needed to be considered, including profitability, growth, and the Company's competitive position. The Company's policy with respect to blocks of days off would be reviewed in the future, Baldanza stated.

POSITIONS OF THE PARTIES:

The **Association** contends that the nature of the bargain struck between itself and the Company in Section 25.B.3.g5 of the CBA is clear and unambiguous. According to the Association, it secured a commitment from the Company that it would construct as many lines as it could with five (5) day blocks of days off, but in lieu of that, it would provide a guaranteed floor of no less than four (4). During the final days of negotiations leading up to the CBA, the Association further agreed that the "no less than four (4) days off" requirement would not be absolute, but rather acknowledged that there might be a rare scenario where the company might not be able to meet this parameter. As a result, the Association agreed that the four day off floor would be respected by

the Company “to the maximum extent possible.”

The Association insists that this language was only included to cover the situation where the Company would need to provide less than four days off because of the number of available pilots and/or equipment. Only isolated operational reasons were exceptions to this minimum of four days off in a block for pilots.

The Association contends that current Company management has disregarded this good faith agreement previously reached between the parties. It asserts that the Company has sought to take a very narrow and limited exception (“to the maximum extent possible”) to the blocks of days off rule and reformulate it in such a way that the exception now swallows the entire rule. To interpret Section 25 of the CBA in the way the Company seeks would, in effect literally result in the no less than four days off rule ceasing to exist. According to the Union, the entire negotiating history of the CBA indicates that the parties anticipated that any exception to the blocks of days off rule would be strictly limited

The Association contends that the parties’ practice between the date of the initial CBA in 1999 and August 1, 2008, when the Company unilaterally abandoned the minimum block of 4 days off for pilots, indicates the nature of the bargain struck between them. There is no dispute, the Association notes, that the Company has always provided at least four (4) days off between trips to pilots during this nine (9) year period.

The Association argues that this practice matches the testimony presented by Union witnesses, that any leeway to deviate from the minimum four (4) day blocks was intended to be very narrow and related solely to line construction. It notes the testimony of Neal Davis, who testified that when he agreed to the Company's request that the CBA not make four (4) day blocks an absolute, he did so to accommodate the Company's concerns over isolated line construction problems that might arise; not for any potential economic or financial hardship reasons, as the Company claims. At no time did the Company ever claim that it had the right to reduce the number of days off in a block for financial reasons, even though the Company has been in severe economic difficulty at various times throughout this period.

The Association contends that the post 1999 bargaining history on the issue of blocks of days off support its interpretation of the contract. On two (2) occasions since the 1999 CBA was agreed, the Company proposed deleting or amending Section 25.B3.g5 of the CBA. At one point, the Company proposed amendments to the line construction provision far less extensive than currently in effect since August 1 (i.e. seeking only to provide 10% of its lines with days off blocks of less than four (4) days). On another occasion, the Company sought to eliminate the entire restriction relating to blocks of days off for pilots. Both of these proposals were rejected outright by the Union. According to the Association, the inference from the above bargaining history is clear and

inescapable; the Company knew and understood full well that it could not unilaterally construct lines with less than four (4) days off for its pilots except for rare operational reasons.

The Association argues that the Company is now attempting to obtain a right which it could not obtain through negotiation. It is attempting to impose a unilaterally declared right which it was otherwise unable to negotiate over a nine (9) year period. In fact, during this extended period of time, the Company did not at any time claim to have the right that it now claims at this arbitration hearing. To the contrary, the Company explicitly conceded during its presentation to the Association in December 2005 that the "Company must obtain ALPA's permission to construct Lines containing blocks of consecutive days off of less than (4) days." This document clearly reflects the Company's understanding of the application and meaning of the parties' agreement. The parties agreed that the only exception to the blocks of four (4) days off for pilots was if the Company had a line construction problem.

The Association rejects the Company's assertion that the term "maximum extent possible" allows for exceptions to the 5/4 day off blocks based on the Company's financial condition. It notes that the exception to the "days off blocks" language occurs at the end of the paragraph and, taken in context, refers to those situations in which it is not "to the maximum extent possible" able to construct lines with at least four (4) days off. It further notes that these lines are

constructed as part of the monthly bid package, a document which is subject to review by, but not agreement with, the Association's Scheduling Committee Chairman.

According to the Association, the provision concerning exceptions to the four (4) day blocks are no different from any other line construction parameter; the exceptions, like the package itself, can be implemented by the Company subject to review by, but not agreement with, the Scheduling Committee. While the Union can challenge this package if it believes the package does not conform to the CBA, the Company is nonetheless entitled to go forward in the interim time period. The Association argues that the Company's application of the "to the maximum extent possible" modifier is, like all other scheduling parameters in the monthly bid package, subject to review by an arbitrator.

The Association notes that the Company itself was unable to articulate what type of criteria would allow it to disregard the blocks of four (4) days off requirement in the contract. All the Company could offer was a vague and undefined rationale for denying pilots their blocks of days off protection. Moreover, Company management was unable to define the standard that would require it to reinstate the block of days off protection.

The Association insists that the Company's approach to this issue is an absurd and unworkable interpretation of the contact, which should not be

endorsed by the System Board. The entire bargaining history indicates that the sole legitimate reason for reducing the number of days off in a block for pilots to below four is for strict operational reasons – whether there are sufficient pilots, equipment, and hours of service available for the Company to meet its scheduling commitments. These issues can be reviewed and accommodated in the line construction process. According to the Association, its application of the term "to the maximum extent possible" is manageable, objective and in accordance with the parties' bargaining history. In contrast, the Company's construction entails a review of intangible financial and economic concerns which can not be assessed by any discernible standard. The Company's application of the term "to the maximum extent possible" is also at odds with the parties' negotiating history, the Association contends.

Thus, for the reasons outlined above, the Association requests that the Board sustain the instant grievance. By way of remedy, it requests that premium time pay be awarded to those pilots adversely affected by the Company's contract violation.

The **Company** contends that the clear language of the contract does not provide pilots with an absolute right to blocks of four (4) or more days off. There is no rigid requirement in the CBA that at least four days off be provided to pilots, as the union asserts. Rather, the language of Section 25 has a critical modifier that allows the Company to make an exception: "to the maximum extent

possible."

The Company argues that the Association, if it wanted an absolute guarantee of blocks of four (4) or more days off for its pilots, it should not have agreed to the insertion of the phrase "to the maximum extent possible." It notes that the Association had originally proposed stronger language mandating "no less than 4 consecutive days off" for its pilots. By voluntarily agreeing to the "maximum extent possible" language, the Union allowed for an exception to this block as it relates to 4 days off. As a result, the Company is permitted to make exceptions to providing 5/4 day blocks of days off without securing the Union's consent.

The Company also points to the change in language in the 1998-99 negotiations from "exceptions only with the concurrence of the Scheduling Committee Chairman" to exceptions "only with then prior consultation…" which it contends recognizes the Company's authority to unilaterally change the block days off.

According to the Company, the plain language of the CBA expressly allows the Company the inherent right to reduce the days off in a block when necessary. These contractual terms must take precedence over the Association's descriptions of past practice or alleged deals made away from the

negotiating table.

The Company rejects the Association's contention that the term "to the maximum extent possible" pertains only to operational factors, and not economic concerns. It notes that there is nothing in the contract which limits the phrase "to the maximum extent possible" to operational considerations. All the Association was able present to support its position were bold declarations that economics would not be an adequate reason to reduce the days off in a block below 4. There was no evidence that the parties ever discussed whether financial or economic considerations would constitute an exception to Section 25.

The Company notes that there is nothing in the language of Section 25 which would forbid it from taking economic factors into consideration. The phrase "to the maximum extent possible" is not modified by the words "operationally" or "logistically." According to the Company, the clear implication is that a variety of circumstances – economic, operational, and otherwise – may justify exceptions to making blocks of 4 days off available "to the maximum extent possible."

The Company argues that the Association was the party responsible for drafting and proposing the phrase "to the maximum extent possible." To the extent that a phrase is susceptible to two interpretations, the interpretation less favorable to the party proposing the language should be preferred, the Company

contends.

The Company insists that its past restraint in exercising its right to reduce the number of days off in a block below 4 should not be used against it. It maintains that it has always sought to provide its pilots with blocks of at least 4 days off as far as is practically possible. The fact that the Company never exercised its right to make exceptions to providing at least 4 days off does mean that it has otherwise surrendered that right. It insists that the mere non-use of a right does is not tantamount to losing that same right. According to the Company, the Association can not rely on the Company's history of restraint in this regard to impose a commitment of no less than 4 days off in a block in the future. Nothing in the CBA requires this.

The Company rejects the Association's suggestion that the nine (9) years practice proves that only operational factors are a legitimate exception to the block of 4 days off. First, it insists that it never acquiesced or concurred with the Association's interpretation of the provision. Second, while it accepts this practice may be a useful interpretative aid for ambiguous contractual terms, the Company nonetheless insists this practice is not on a par with the clear written terms in the CBA. The Association's reliance on past practice is not sufficient to overcome its burden of proof in this case. According to the Company, the Association has failed to prove that the suspension of at least 4 days off in a row for pilots violated the terms of the CBA. Based on these various factors, the

Company maintains that the instant grievance should be dismissed in its entirety.

DECISION:

The central issue for consideration in the instant case is whether or not the Company violated Section 25.B3.g5 of the CBA (and other similar provisions relating to reserve pilots at Section 25.B3.h2 and 25.B3.i2) when it unilaterally decided to reduce the number of days off in a block for pilots.

Under the parties' Collective Bargaining agreement, the Company must "to the maximum extent possible" give that pilot five (5) consecutive days off; short of five (5) days off, the company must "to the maximum extent possible" give the pilot four (4) days off. Thus, for each time during the month (other than the first and final three days of the month) that a pilot completes a trip, i.e. a "planned sequence of trips with intervening days off" (See 25.B.3.g.1 and companion sections) the intervening days must be either five (5) or four (4) consecutive days off in a row. Every bid line (those monthly schedules pilots bid for by seniority) must "to the maximum extent possible" contain this five (5) or four (4) days off for a pilot once he/she completes a trip. At the end of the trip, the monthly bid line must show a consecutive five (5) or four (4) days off (Association Exhibits 10 and 11 for examples of monthly bid lines). Union Exhibits 10a and 11a show the five (5) or four (4) consecutive days off for pilots. Association Exhibits 10b and 11b do not show these five (5) or four (4) days off; these are the monthly bid lines which the Association is protesting in the instant

case.

Beginning on August 1, 2008, the Company started to give less than the 5/4 days off for pilots following a trip. It is undisputed that the Company had consistently allowed for the 5/4 days off for all its pilots for over 9 years, since the 1999 Collective Bargaining Agreement had been agreed to. However, because of the perilous economic circumstances it found itself in at the time, the Company decided to not allow pilots the 5/4 days off after every trip in order to achieve cost efficiencies. Rather, the Company decided to give its pilots 5/4 days off after only one of their trips during the month. For all other trips a pilot made during that month, he/she would be provided with less than the usual 5/4 days off by the Company. Sometimes the pilot in question would receive only 3 or 2 days off following a trip.

The Association argues that the prevailing economic environment is not a justification for changing the parties mutual agreement that pilots should be provided with blocks of 5/4 days off following a trip. Economic circumstances do not constitute a legitimate reason under the "maximum extent possible" language found in Section 25 of the CBA. Rather, the Association says, only the operational or technical inability to construct a schedule for pilots that meets the Company's flying requirements constitutes a valid reason under the proviso "to the maximum extent possible." If there is some valid operational reason present, the Company may reduce the 5/4 day off requirement (although it must

still consult with the Union's Scheduling Committee Chairman first). But, the Association contends, economic reasons are not adequate to absolve the Company from its contract requirements.

To support its case, the Association relies heavily on the collective bargaining negotiations between the parties in 1998 and 1999 which produced the "to the maximum extent possible" language in Section 25. Since that time, the Company has made repeated attempts to eliminate or reduce the effect of this provision, the Union notes. According to the Union, the Company's efforts to negotiate away this language ("to the maximum extent possible") constitutes a tacit admission on the part of the Company that it needed ALPA's permission before reducing the blocks of days off for pilots below four (4).

As in any contract interpretation case, the starting point is with the plain language of the parties Collective Bargaining Agreement. The language of the contract itself is ordinarily the most reliable and persuasive evidence of what the parties intended when they reached their agreement. Where the words are plain and clear, conveying a distinct idea, there is no reason for the Board to resort to outside or extrinsic evidence of what the parties intended in their agreement. In such cases, the words themselves will outline the clear meaning of the parties.

However, often the parties fail, for various reasons, to adequately detail the exact nature of the bargain they intended to reach. This can be due to sloppy

draftsmanship or simply due to the fact that the parties did not thresh out a contractual provision as they could not reasonably foresee problems that might arise in the future. Sometimes parties agree to ambiguous language simply to move on in negotiations, hoping that a conflict over application never arises.

In this case, the parties agreed that a minimum of four (4) days off in a block should be provided to pilots between trips "to the maximum extent possible." Unfortunately the parties did not articulate what they expected phrase "to the maximum extent possible" to include. Both parties forwarded interpretations of this term which were reasonable. Where the parties have presented different yet equally valid interpretations of the same phrase/term, it becomes necessary for the System Board to consider extrinsic evidence to ascertain its true meaning. By examining the parties' collective bargaining negotiation history and the circumstances of the agreement, it should be possible to discern the actual contractual intent of the parties.

The Association's position on the bargaining history was that the parties had tentatively agreed in January 1999, that the Company "[T]o the maximum extent possible, blocks of five (5) consecutive days off in domicile, but no less than four (4) consecutive days off in domicile" (Association Exhibit 4). At the hearing, Association attorney Neal Davis credibly testified, and the testimony on this point was not rebutted in any way by the Company, that he was approached by Company negotiator Bob Moreland shortly after this tentative agreement was

reached and was informed that Company management was unsure whether or not it would be able to provide blocks of 5/4 days off to pilots “every time.” According to Davis, Company negotiator Moreland informed him a few days later that the Company was concerned that it would not be able to construct lines with absolutely four (4) days off every month for pilots. Davis explained that the Company was worried that the Association would file a grievance if the Company was only able to provide a block of three (3) days off to some pilots in a month. The Company wished to have the modifier “to the maximum extent possible” to be applied to both the blocks of five days off and also to the blocks of four block days off. It is generally undisputed that the Association accepted the explanation forwarded by the Company and agreed to water down the previous “agreement.”

It should be noted that this testimony was entirely unrebutted by the Company. The Board found this testimony of Association attorney Neal Davis to be both credible and compelling. Davis testified in great detail that the reason for the modification of the tentative agreement was because the Company might, on a very rare occasion, need to reduce the number of days off in a block to three (3). Any such reduction in the block of days off was intended only to apply in those circumstances where the Company was unable to otherwise provide pilots with 4 days because of operational/scheduling concerns. There was no discussion or reference to the overall economic condition of the Company at that

time. By Davis' account, the flexibility provided to the Company under this revised agreement was to facilitate only technical or operational factors. Certainly there was no intent that this "to the maximum extent possible" should be construed to be such a wide exception that it should overturn the meaning of Section 25.

It appears that the modification requested by the Company was for a very limited purpose. Based on the sequence of events above, the Board is satisfied that the intent of the parties was for any exception to the block of 4 days off to be narrowly construed. The Board can find nothing on the record that would suggest otherwise.

It is worth noting that the parties discussed the issue of blocks of days off for pilots a number of times following this initial agreement. At various times in the years that followed, the Company proposed that the language in Section 25.B3.g5 be diluted during the course of bargaining negotiations. For example, when the existing CBA became amendable at the end of 2002, the Company proposed the deletion of all reference to the block of five or four days off for pilots in Section 25 (Association Exhibit 5). This proposal was rejected out of hand by the Association, which considered the proposal "draconian."

Later that same year, the parties re-entered negotiations to amend the CBA. In a proposal (Association Exhibit 7) it submitted to the Union on

December 12, 2002, the Company presented a proposal that would have deleted the existing language of Section 25 and replaced it with the following: no less than five (5) days off for ten (10%) percent of the lines; no less than four (4) days off for eighty (80%) percent of the lines; and no more than one three (3) day off period per line for ten (10%) percent of the lines. Once again, the Association dismissed this proposal outright, preferring the existing language in Section 25.B3.g5 of the CBA to remain as it stood.

Moreover, there was no evidence that the Company ever asserted in these negotiations that it believed it had the right under the existing language to reduce the 5/4 days off block for other than operational reasons. It could have, for instance in writing or orally, insisted that while it believed it had the right to reduce the 5/4 days off blocks for other reasons, it was seeking to change the contract language for other reasons e.g. clarity.

Despite its repeated attempts to modify the blocks of days off provision, the Company was unable to do so. The language remained unchanged from the date it was originally agreed with the Union in 1999. In the almost ten (10) year period that followed, the Company provided at least 4 day blocks of days off to its pilots between trips. At no point during this extended period of time did the Company ever reduce the number of consecutive days off to 3. This clearly suggests to the Board that the Company understood that the flexibility it may have had to reduce the number of consecutive days below 4 was only to be exercised in extremely limited circumstances.

It is also worth noting that the Company was in economic distress at various points during this ten (10) year period. Still, the Company honored its commitment to provide blocks of at least 4 days off. While the Board is not satisfied that this "past practice" rises to the level of a binding contractual term, it is nonetheless compelling evidence of what the parties believed their contractual obligations to be under the CBA. It is well established in the arbitration arena that while a practice may not be so uniform to rise to the level of "past practice," it may nonetheless be afforded interpretative weight by an arbitrator. The repetitive handling of similar situations can often shed light on ambiguous contractual terms.

In this case, there is no question that the Company believed that it was contractually bound to provide at least 4 day blocks of days off to its pilots. Perhaps the most conclusive proof of this can be found in the Company's own presentation (Association Exhibit 9) to the Association in December 2005. At the time, the Company was experiencing severe economic difficulties and, as a result of this, it was seeking to implement a number of cost saving programs. During this meeting, the Company presented a document to the Union outlining a number of initiatives which the Company wished to implement, including a specific proposal dealing with blocks of days off for Association pilots. The

Company's proposal for changing blocks of days off provided the following:

> "Current Rule: Company must obtain ALPA's permission to construct Lines containing blocks of consecutive days off of less than (4) days.
>
> Change to: Pre-approval to construct no more than 10% of all the Lines with less than (4) consecutive days off."

This document details what the Company believed was the "current rule" regarding blocks of days off for its pilots. Interestingly the Company's "admission" of the then current practice comports with the Association's interpretation in this arbitration. By all accounts, the flexibility to be afforded by the "maximum extent possible" language was to be strictly construed, limiting any reduction in blocks of days off to operational factors.

While the Company's desire to reduce its financial costs in this difficult economic climate is entirely understandable, its position that it could simply reduce the blocks of days off at its discretion is entirely unsupported by the evidence presented at the hearing. All of the evidence of the parties' intent when agreeing to the "maximum extent possible" phrase was that it should be extremely narrowly interpreted. Economic or financial considerations are not valid motivations for unilaterally reducing the blocks of days off for pilots. The bargaining history between the parties undoubtedly suggests that marketing/operational considerations resulting in line construction problems are

the only basis for reducing the minimum number of consecutive days off below 4. To interpret the provisions in any other way would effectively allow the exception to swallow the rule. For that reason, the Board concludes that the grievance is sustained.

Turning to the issue of remedy, the Association requests premium pay for all time flown in derogation of the 4 day block requirement. The Board, however, is not satisfied that such a remedy is appropriate in the instant case. It should be noted that the Company informed those pilots at both the Fort Lauderdale and Detroit bases what their blocks of days off for the month would be. These pilots received pay for the work which they did during the month. Moreover, they were not required to perform any additional work beyond that outlined in the monthly bid packages. It is the Board's belief that no financial remedy would be appropriate in these circumstances. An appropriate remedy should neither provide the pilot employees with an economic windfall nor unduly punish the Company.

The Board directs the Company to cease and desist for engaging in any further contractual violations of this type in the future. In the event that the Company fails to change its practice regarding blocks of days off for pilots, then a financial remedy would be required. However, given the financially precarious position that the Company currently finds itself in, it would be injudicious to impose a further economic burden on it. The Board, however, shall retain

jurisdiction over this matter should the parties have any difficulties implementing the findings of this decision and award in the future. Therefore, the grievance is sustained, but the remedy requested by the Association is denied.

_____ _____
Joshua M. Javits, Chairman and Neutral Board Member Date

_____ _____
David Systema, Association Board Member Date

_____ _____
James Monahan, Company Board Member Date