

CHAPTER 9

POST-MERGER SENIORITY RIGHTS IN THE AIRLINE INDUSTRY

I. THE EVOLUTION OF EMPLOYEE SENIORITY INTEGRATION RIGHTS IN UNITED STATES AIRLINE MERGERS

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The airline industry has long been critical to the vital interests of the United States from an economic and strategic standpoint. In 2009, according to the Air Transport Association, the airlines themselves generated \$155 billion in revenues and provided more than 500,000 jobs.² And the transportation of passengers and cargo by air represents the glue that holds commerce together in the United States, while the fleets maintained by the airlines service the military's needs during times of war and carry the U.S. mail every day of the year.

Airline mergers, acquisitions, and similar corporate transactions require governmental approval and historically were allowed only when they served the public interest. Today such deals abound as the airlines jockey for positions of strength (and for survival) in a highly competitive, global marketplace. Labor strife can dilute or destroy the public and corporate benefits sought in these transactions. And the integration of seniority lists for pilots, flight attendants, and other airline workers in connection with a merger can be a key to the efficient and effective consolidation of two airlines or a locked door that blocks the path to a successful realization of the potential synergies that the merging airlines seek.

The historical development of airline employees' legal rights concerning seniority integration when airlines merge is traced in Part I below. Significantly, resolution of seniority integration disputes through arbitration has been a pillar of the legal structure established by the U.S. Congress, federal administrative agencies

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²See AIR TRANSP. ASS'N, 2010 ECONOMIC REPORT 6, 9 (2010).

and airline employees' unions. Part II addresses the specifics of arbitrators' decisions in flight attendant seniority integration cases between 1979 and 1990. Although all of these decisions applied the "fair and equitable" standard, the variations in results demonstrate the uniqueness of each of these cases and the complexity of such determinations.

I. The Legal Protection of Airline Employees' Seniority Integration Rights in Airline Mergers

The protection of employee seniority rights in connection with airline mergers has varied over the decades, as has the sensitivity that the country has shown to the welfare of those who work in the industry. In 1934, President Roosevelt canceled the air mail contracts his predecessor had entered into with the airlines and dispatched U.S. Army pilots to take over airmail flying from the airlines. The failure of this experiment strengthened the position of airline pilots, who had formed their first union, the Air Line Pilots Association (ALPA), in 1931. Prior to the negotiation of the first collective bargaining agreements with airlines in the 1930s, ALPA's first president, David Behncke, supported FDR in the political maelstrom that followed the cancellation of the airmail contracts and received White House support for federal standards for pilots' minimum pay and maximum hours.³ The right to bargain collectively, as well as minimum pay and maximum hours, were protected for airline workers by law in the Air Mail Acts of 1934 and 1935 and the Civil Aeronautics Act of 1938.⁴ With the guarantees in these laws and the Railway Labor Act, the coverage of which was extended to airline pilots and other workers in 1936, pilots negotiated collective bargaining agreements with seniority protection in the 1940s. But these laws and contracts did not provide any procedures or protection for seniority rights in airline mergers.

In fact, until 1950, integration of employee seniority lists was not considered a matter for governmental intervention, but only for negotiation between the affected parties.⁵ As a result, pure economic force often controlled the outcome of seniority integration battles in the 1930s and 1940s. In mergers in this era, agree-

³GEORGE E. HOPKINS, *FLYING THE LINE* 21–22, 55–59 (1982).

⁴*See Union of Prof'l Airmen v. Civil Aeronautics Bd.*, 511 F.2d 423, 427 (D.C. Cir. 1975).

⁵*See, e.g., Monarch-Challenger Merger Case*, 11 C.A.B. 33 (1949).

ments or unilateral action integrated the acquired carrier's pilots into the existing seniority list by giving full or one-half credit for their prior length of service with the acquired carrier, or by means of an arithmetic ratio or ratios, or by simply adding them to the bottom of the existing seniority list.

In 1950, the now-defunct Civil Aeronautics Board (CAB or Board) first adopted labor protective provisions (LPPs) in approving the sale of Western's Denver–Los Angeles route to United under the public interest standard of the Civil Aeronautics Act of 1938.⁶ Although fewer than 30 pilot jobs were at stake in the route transfer, the Board adverted to the potential benefits of the transaction to the airlines' stockholders and the traveling public and explained: "Very often, these benefits to the stockholders and to the public will be at the expense of some of the employees of the companies involved. We think it only equitable that in such circumstances the hardships borne by adversely affected employees should be mitigated by provisions for their benefit."⁷

Relying on a decision of the U.S. Supreme Court upholding similar protective provisions imposed by the Interstate Commerce Commission in railroad consolidations, *United States v. Lowden*, 308 U.S. 225, 234 (1939), the CAB observed in the *United-Western* case, "There is also an obvious interest in taking steps to see that route transfers and mergers which are in the public interest should not be prevented or delayed by labor difficulties arising out of hardships to employees incidental to such route transfers or mergers."⁸ Although the Board did not require the transfer of Western pilots into the United seniority list, its dual concern for employee welfare and for the successful effectuation of the corporate transaction in question paved the way for the federal government to begin protecting employment and seniority rights in connection with airline mergers.

The CAB also approved the merger of Pan American World Airways and American Overseas Airlines in 1950, a transaction that led to the Board's increased involvement in the integration of employee seniority lists. Several crafts, including clerks and meteorologists, resolved the problem of seniority integration by agreement. Other groups, including dispatchers and pilots, arbitrated their disputes on the seniority issue—with the encouragement

⁶ *United-Western, Acquisition of Air Carrier Prop.*, 11 C.A.B. 701 (1950), *aff'd sub nom. Western Air Lines v. Civil Aeronautics Bd.*, 194 F.2d 211 (7th Cir. 1952).

⁷ *Id.* at 708.

⁸ *Id.*

of the CAB and the National Mediation Board—and the courts upheld the federal government’s authority to involve itself in this manner.⁹

When the Pan Am flight engineers refused to arbitrate, the CAB decided the seniority integration itself.¹⁰ The judiciary upheld this action as a proper exercise of the Board’s jurisdiction to regulate the airline industry.¹¹ The seniority integration controversy became heated, complicated, and prolonged, however, and the agency never again attempted to combine employee seniority lists itself.

Instead, in 1970, when the American pilots’ union refused to arbitrate over seniority integration in connection with American’s acquisition of Trans-Caribbean Airways, the Board ordered the carrier to arbitrate the seniority dispute with the union representing the incoming pilots, regardless of whether the American pilots’ bargaining representative participated in the arbitration and despite that union’s threats to engage in a strike. The Second Circuit approved the Board’s approach: “To say that the Board could direct an arbitral resolution but not make that resolution binding on all concerned parties would leave the Board with powers that would be more apparent than real.”¹² The court also recognized that it was appropriate that the CAB’s “scarce resources should be husbanded for the tasks for which it considers itself to be expert, rather than frittered away in an area more suitable for an experienced labor arbitrator.”¹³

The CAB standardized its formula for LPPs in the *United-Capital Merger Case*.¹⁴ It revised the standard set of LPPs again in the *Allegheny-Mohawk Merger Case*.¹⁵ Section 3 of these provisions required that “[i]nsofar as the merger affects the seniority rights of the carriers’ employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between

⁹See *O’Donnell v. Pan Am. World Airways, Inc.*, 200 F.2d 929 (2d Cir. 1953); *Brink v. Pan Am. World Airways, Inc.*, 193 F.2d 1009 (2d Cir. 1952); *North Atl. Route Transfer Case*, 14 C.A.B. 910, 916–17 (1951).

¹⁰*North Atl. Route Transfer Case*, 12 C.A.B. 422 (1951).

¹¹*Kent v. Civil Aeronautics Bd.*, 204 F.2d 263, 265 (2d Cir. 1953) (holding that the power to impose conditions which will lessen the adverse impact of an airline merger on employees “is implicit as one necessary to the performance of the Board’s duty to condition approval with due regard to terms which are just and reasonable in the interest of the public”).

¹²*American Airlines, Inc. v. Civil Aeronautics Bd.*, 445 F.2d 891, 897 (2d Cir. 1971).

¹³*Id.*

¹⁴33 C.A.B. 307, 341–47 (1961).

¹⁵59 C.A.B. 19, 45 (1972).

the carriers and the representatives of the employees affected.”¹⁶ Failing agreement, the dispute was to be submitted for expedited arbitration under Section 13 of these LPPs.¹⁷ The Board routinely imposed these LPPs as a condition of its approval of airline mergers during the 1960s and 1970s.

After the passage of the Airline Deregulation Act, however, the CAB warned airline unions: “LPPs will no longer be imposed as a matter of course, or because tradition dictates their use. We therefore advise labor to negotiate its own merger protections through the collective bargaining process at the first opportunity.”¹⁸ For a few more years, the CAB nonetheless awarded LPPs in some merger cases on the theory that the unions had not had sufficient time to respond to the Board’s 1979 warning and negotiate new contractual protections to replace the agency’s LPPs.¹⁹ Then, the Board toughened its stance and denied LPPs to employees seeking to transfer to Eastern Air Lines with Braniff’s Latin American routes, ruling that LPPs would be awarded only “where [the Board] felt they were necessary to mitigate possible labor strife that would adversely affect air transportation as a whole.”²⁰ The District of Columbia Circuit affirmed the Board’s action, observing that the CAB’s “warning to labor to resort to the bargaining table and not to rely on the agency was inescapable.”²¹

The Board went out of existence at the end of 1984 and the U.S. Department of Transportation (DOT) assumed its remaining functions. Beginning with its approval of the acquisitions in the *Midway-Air Florida Acquisition Case*²² and the *Southwest Airlines-Muse Air Acquisition Case*,²³ the DOT refused all requests for LPPs in airline merger cases. The DOT declared: “With deregulation, other carriers can move quickly to fill gaps in service, so a strike will not disrupt the transportation system.”²⁴ The courts accepted this line of reasoning as well.²⁵

¹⁶*Id.*

¹⁷The other provisions of the standard LPPs related mainly to monetary compensation, such as dismissal allowances and displacement protection payments, which are beyond the scope of this paper.

¹⁸*Texas International-Pan American-National Acquisition*, C.A.B. Order 79-12-163/164/165, at 67 (Oct. 24, 1979).

¹⁹*See Air Fla. System-Western Acquisition Case*, C.A.B. Order 82-1-148 (Jan. 29, 1982).

²⁰*Braniff-South Am. Route Transfer Case*, C.A.B. Order 83-6-74, at 24 (Apr. 20, 1983).

²¹*Braniff Master Exec. Council v. Civil Aeronautics Bd.*, 693 F.2d 220, 229 (D.C. Cir. 1983).

²²D.O.T. Order 85-6-33 (June 11, 1985).

²³D.O.T. Order 85-6-79 (June 24, 1985).

²⁴*Midway-Air Fla. Acquisition Case*, D.O.T. Order 85-6-33, at 6.

²⁵*See Air Line Pilots Ass’n v. U.S. Dep’t of Transp.*, 791 F.2d 172 (D.C. Cir. 1986).

For more than 20 years, accordingly, airline employees depended on their collective bargaining agreements or the good will of acquiring airlines and their employees for fair seniority integrations. Sometimes that succeeded, often it did not.

Significantly, moreover, ALPA and the Association of Flight Attendants (AFA) maintained merger policies as part of their internal rules. These policies required “fair and equitable” seniority integration procedures, including data collection, negotiation, and arbitration, when both groups involved in a merger were represented by one of these unions.²⁶ Some examples of flight attendant arbitrations are outlined in Part II below.

In 1986 and 2001, there were unsuccessful efforts to enact legislation providing employees with seniority integration procedures in the event of an airline merger. Trans World Airlines (TWA) announced a merger with Ozark Air Lines in 1986 and the Ozark employees sought legislation requiring LPPs in Washington, D.C.²⁷ Their bill was passed by the House of Representatives,²⁸ but failed on a tie vote in the Senate.²⁹ In 2001, when American Airlines insisted that TWA’s unions modify their collective bargaining agreements as a condition of acquiring TWA’s assets, a bill specifically imposing seniority-integration LPPs only for the TWA-American acquisition passed the Senate as a rider to the Defense Appropriations bill, but it was removed in a House-Senate Conference Committee.³⁰

The McCaskill-Bond statute was signed into law in December 2007.³¹ The law was sponsored by the two Senators from Missouri in reaction to the seniority integration experiences of the TWA employees. The statute is primarily designed to ensure a fair and equitable seniority list integration process for airline employees involved in a corporate merger or similar transaction.³² The law applies to “a transaction for the combination of multiple air carriers into a single air carrier” if it “involves” the sale or acquisition of

²⁶Although the procedural steps for merging seniority lists remained the same, AFA modified its Merger Policy in 1987 to require the integration of seniority lists based on the dates of hire of the flight attendants at their respective pre-merger carriers. *See ASS’N OF FLIGHT ATTENDANTS, POLICY MANUAL §X.C.3.c* (1987).

²⁷*See H.R. 4838, 99th Cong.* (1986).

²⁸132 CONG. REC. 23,428–29 (1986).

²⁹132 CONG. REC. 27,595–97 (1986).

³⁰*See S. 1479, 107th Cong.* (2001).

³¹Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, div. K, §117, 121 Stat. 1844, 2382–83 (2007) (codified at 49 U.S.C. §42112, note, §117 (Supp. II 2009)).

³²*See 49 U.S.C. § 42112, note, §117.*

50 percent or more of the value of the stock or assets of a carrier.³³ If these prerequisites are met, the law requires that the seniority lists of the previously separate groups be combined in a fair and equitable manner pursuant to the Allegheny-Mohawk Labor Protective Provisions, Sections 3 and 13, mentioned above.³⁴

A recent district court case applied the McCaskill-Bond law in a suit by the Midwest Airlines flight attendants and AFA for seniority integration rights in connection with the acquisition of the holding company that owned Midwest Airlines (MAG). That company was purchased by Republic Airways Holdings (RAH), a holding company that owned Republic Airlines, Chautauqua, and Shuttle America, whose flight attendants were represented by the International Brotherhood of Teamsters. The court rejected the Teamsters' contention that the law did not apply because the acquisition involved only the holding companies and not the airlines, explaining that the law "does not require that the transaction be *between* two air carriers. Instead, the amendment only requires that the transaction be '*for* the combination of multiple air carriers into a single air carrier."³⁵

The court also rejected the Teamsters' argument that the transaction did not come under the coverage of the law because Midwest ceased operating after the acquisition and the Midwest flight attendants became unemployed. "The logic of the Teamsters' position is flawed because it suggests that an employer could avoid McCaskill-Bond simply by refusing to employ a group of employees from the merging air carrier."³⁶ The court held that the law applied if "the *purpose* of the RAH-MAG transaction was to combine multiple air carriers into a single air carrier."³⁷

In a subsequent decision, however, the court held that McCaskill-Bond did not apply to RAH's purchase of MAG.³⁸ On cross-motions for reconsideration, the court reexamined the applicability of McCaskill-Bond and found "the genesis for McCaskill-Bond was the operational merger of American Airlines and TWA, resulting in the integration of the two airlines' operations and workforce.

³³ *Id.* §117(b)(4).

³⁴ *Id.* §117(a).

³⁵ *Committee of Concerned Midwest Flight Attendants v. International Bhd. of Teamsters*, 2010 WL 3860366, No. 10-C-379, at *5 (E.D. Wis. Sept. 30, 2010) (quoting 49 U.S.C. §42112, note, §117(b)(4)).

³⁶ *Id.* at *6.

³⁷ *Id.* (emphasis added).

³⁸ *Committee of Concerned Midwest Flight Attendants v. International Bhd. of Teamsters*, 2011 WL 94697, No. 10-C-379, at *2 (E.D. Wis. Jan. 10, 2011).

When viewed in this light, it is apparent that RAH did not combine multiple carriers—Republic and Midwest—into a single carrier.³⁹ Principally, the court relied upon the purpose of RAH’s purchase of MAG, stating that RAH was “hoping to capitalize on the goodwill associated with the Midwest brand,” more so than RAH wanted to acquire MAG’s equipment, aircraft, routes, and employees.⁴⁰ In fact, when Republic began servicing Midwest’s former routes, “it did so with Republic aircraft and Republic flight attendants.”⁴¹ The court therefore held that McCaskill-Bond did not apply because the *purpose* of the transaction was something other than “combin[ing] multiple air carriers into a single air carrier.”⁴² Thus, although the district court ultimately held that McCaskill-Bond did not apply in the particular circumstances of that case, the statute has restored the legal foundation for the protection of the seniority of employees in airline mergers to the place it held from 1950 until 1985.

II. Flight Attendant Seniority Integration Arbitrations

The following chart summarizes some flight attendant (F/A) seniority integration arbitration awards that were issued between 1979 and 1990:

| Merger | Arbitrator | Year | No. of Flight Attendants | Outcome of Seniority Integration |
|-------------------|----------------|------|--------------------------------|---|
| Delta & Northeast | Harry H. Platt | 1979 | Delta: 2,830 Northeast: 591 | The original Delta “compromise” list remained in effect. The “compromise” list was constructed using a ratio of 4.72 Delta F/As for each Northeast F/A. However, Delta adjusted the list to move some Northeast F/As up, in order to minimize discrepancies in length of service (LOS). |

³⁹*Id.* (citations omitted).

⁴⁰*Id.*

⁴¹*Id.*

⁴²*See id.* at *1–3 (citing 49 U.S.C. §42112, note, §117(b)(4)).

| Merger | Arbitrator | Year | No. of Flight Attendants | Outcome of Seniority Integration |
|--------------------|-------------------|-------------|----------------------------------|--|
| Pan Am & National | Richard R. Kasher | 1981 | Pan Am: 5,216 National: 1,532 | The merged list was ordered according to date of hire (DOH), but the senior 50% of National F/As were credited with 360 days additional service. |
| Republic & AirWest | Arthur Stark | 1982 | Republic: 1,452 AirWest: 881 | Republic F/As hired between 5/26/54–4/29/74 and AirWest F/As hired between 2/25/55–4/17/74 were integrated according to DOH. Republic F/As hired between 5/27/74–1/2/78 and AirWest F/As hired between 6/12/74–1/24/77 were integrated at a ratio of 1.5924 to 1. Republic F/As hired between 1/30/78–4/21/80 and AirWest F/As hired between 6/1/77–7/1/79 were integrated at a ratio of 2.3623 to 1. The remaining F/As were integrated based on DOH. |

| Merger | Arbitrator | Year | No. of Flight Attendants | Outcome of Seniority Integration |
|-------------------------------|---------------------|-------------|--|--|
| Seaboard World & Flying Tiger | Marcia L. Greenbaum | 1983 | Flying Tiger: 88 Seaboard: 38 | The merged list was compiled using three groups of 42 flight attendants. The most senior group, with 30 Flying Tiger F/As and 12 Seaboard, was ordered on a LOS basis. The next group had 30 Flying Tiger F/As and 12 Seaboard F/As, and was ratioed on a sliding-scale basis. The most junior group included 28 Flying Tiger F/As and 14 Seaboard F/As, and was integrated on a 2:1 ratio. Constructive notice F/As hired after 7/19/79 were placed at the bottom on a DOH basis. |
| Texas Int'l & Continental | Sylvester Garrett | 1984 | Texas Int'l: 530 Continental: 2,280 | Three tiers were created. The first 1,247 F/As were merged by LOS. The second tier was created by merging a ratio of 3 Continental F/As for each TXI F/A. After the last TXI F/A with LOS prior to 10/31/82 was integrated using the 3:1 ratio, the remaining F/As were then slotted based on LOS. |

| Merger | Arbitrator | Year | No. of Flight Attendants | Outcome of Seniority Integration |
|------------------------------|--------------------|-------------|-------------------------------------|--|
| United & Pan Am | Arthur Stark | 1987 | United: 10,421 Pan Am: 1,202 | The senior 1,500 United F/As were placed in a block at the top of the integrated list. The remaining United F/As were integrated with the transferring Pan Am F/As using a ratio of 7.47 to 1. The post-acquisition hires were placed at the bottom of the list in DOH order. |
| Northwest & Republic | Sylvester Garrett | 1988 | Northwest: 3,493 Republic: 2,351 | Integrated on a DOH basis for all purposes other than monthly bidding of schedules. Separate temporary seniority list for 1,000 most senior former Northwest F/As, who were able to bid on schedules only based on this separate list, which expired on 10/1/91. |
| Continental & People Express | Laurence E. Seibel | 1989 | Continental: 3,300 PEX: 1,247 | Continental F/As had the seniority date of their adjusted hire date as shown on the company's system-wide seniority list. PEX F/As who were hired before 2/1/87 had their DOH reduced by 42 days. If their adjusted DOH still fell before 2/1/1987, their DOH was reduced another 75%. |

| Merger | Arbitrator | Year | No. of Flight Attendants | Outcome of Seniority Integration |
|-----------------|-------------------|------|--------------------------------|---|
| Delta & Western | Thomas T. Roberts | 1990 | Delta: 7,843 Western: 2,303 | The integrated Delta seniority list as implemented by management on 9/1/87 remained in effect. This list was ordered by DOH. In the top quarter of the list, however, F/As hired before 11/19/71 were integrated using a ratio. |

The flight attendant seniority integration arbitration awards referenced in this chart demonstrate the variety of methodologies employed by arbitrators to achieve a fair and equitable result in those cases. One of the essential principles recited by these arbitrators in their accompanying opinions is that each case is unique.

III. Conclusion

Arbitration of seniority integration disputes in connection with airline mergers has proved to be an important aspect of federal law and internal union policy since 1950. The McCaskill-Bond law adopted by Congress in 2007 requires negotiation and arbitration under the “fair and equitable” standard whenever there is “a transaction for the combination of multiple air carriers into a single air carrier.” Although this enactment reinstates a practice followed by the CAB in approving airline mergers from 1950 until its “sunset” in 1984, each arbitral determination as to what is “fair and equitable” in a given seniority integration dispute is unique and the result in any particular case therefore remains unpredictable. Nonetheless, the existence of a final and binding mechanism for peacefully resolving difficult and potentially explosive labor relations issues raised by the merger of air carriers makes arbitration a critical component in the success of future consolidation in the airline industry.