2018 CarswellNat 1427
Canada Arbitration

Canadian Flight Attendants Union and Jazz Aviation LP (01-2016), Re

2018 CarswellNat 1427

IN THE MATTER OF A GRIEVANCE ARBITRATION under the Canada Labour Code

CANADIAN FLIGHT ATTENDANTS UNION ("CFAU") (the Union) and JAZZ AVIATION LP (the Company)

Susan D. Kaufman Member

Heard: April 4, 2017; April 5, 2017; April 6, 2017; June 1, 2017; June 5, 2017
Judgment: March 28, 2018
Docket: YM2718-3990

Counsel: Mr. Michael Church, for Union
Mr. Vince Johnston, for Employer

Subject: Public; Labour

Related Abridgment Classifications

Labour and employment law
I Labour law
I.6 Collective agreement
I.6.b Interpretation aids
I.6.b.i Rules of construction and interpretation
Labour and employment law
I Labour law
I.6 Collective agreement
I.6.b Interpretation aids
I.6.b.ii Intent of parties
Labour and employment law
I Labour law
I.6 Collective agreement
I.6.e Hours of work
I.6.e.i Scheduling
I.6.e.i.A Establishment and alteration of hours

Headnote

Labour and employment law --- Labour law — Collective agreement — Interpretation aids — Rules of construction and interpretation
Labour and employment law --- Labour law — Collective agreement — Interpretation aids — Intent of parties
Labour and employment law --- Labour law — Collective agreement — Hours of work — Scheduling — Establishment and alteration of hours

***Susan D. Kaufman Member*:**

1 The parties to this grievance are Jazz Aviation LP, (hereinafter "Jazz" or "the Company") and the Union, Canadian Flight Attendants Union / Syndicat des Agents de Bord du Canada (CFAU/SABC).

2 The Union, in Policy Grievance #01-2016, dated January 26, 2016 (Ex. 1, Tab 2), grieved that on January 12, 2016, the Company violated Article 5, Article 9.03, the Memorandum of Settlement and "any/all other sections/articles of the Collective Agreement which may apply" in having switched pairings in open time to another base prior to bid closure.

3 The Minister of Labour appointed me to hear and decide the policy grievance under Part I of the *Canada Labour Code*, R.S.C. 1985, c.L-2, as am. There was no objection to my authority to hear and decide this grievance.

4 During opening statements on December 15, 2016, Counsel for the Union submitted that the provisions of the Collective Agreement did not permit the Company to switch the pairings prior to bid closure time, and alternatively, that if the Collective Agreement did permit the switch, that in implementing the switch, the Company exercised its discretion arbitrarily and in bad faith and that in the further alternative, the Company was estopped from so acting. In a book titled "Facts Relied Upon by the Union," which was presented on December 15, 2016 and was marked Ex. 1, the Union included an 11-page Opening Statement of its position, in which it alleged at para. 62 that Jazz had exercised its management rights arbitrarily and in bad faith and stated at para. 63, "that Jazz is estopped from removing pairings from the Open Time Pool of one [base] to reassign it to another base, since the CFAU relied on Jazz's representations, whether explicit or through silence, and would now suffer the extreme prejudice of not being able to address this issue for ten years due to the term of the Collective Agreement." The grounds in para. 62 and 63 had not been disclosed to the Employer before December 15, 2016.

5 On December 15, 2016, Counsel for the Employer also provided a written Opening Statement, comprised of 90 paragraphs. The Employer did not argue that the grounds in the Union's para. 62 and 63 were "an impermissible expansion of the grievance." Rather, it sought disclosure of particulars of the Union's last two allegations. The parties were unable to agree regarding further disclosure, presented written submissions in January and February, 2017, and requested a ruling.

6 In a Preliminary Ruling, dated Feb. 13, 2017, the parties were each directed to provide one another further particulars and they have informed me that they have complied with the Preliminary Ruling.

7 I acknowledge and appreciate the efforts of Counsel for each party in providing me at the outset of this proceeding with their written detailed background statements (their Opening Statements) pertaining to this industry and these parties, with which Counsel knew I was then not familiar. While the Statements did not constitute evidence *per se*, to the extent that the contents of the statements were not in dispute, e.g. the description of functions of the Pairing Analysts in the Crew Planning Dept. and their use of the Altitude Solutions Suite software, the functions of the Crew Planning Department and the Crew Scheduling Department, the system called "Flica" which is the "Open Time Manager" and is referred to as the "Trip Trading Tool," and different folders in Flica, e.g. trade folder, reserve first call folder, swap/add folder, partial trade folder, and drop folder, and the use of them by the Flight Attendants, and the functions of the "next day desk," both Opening Statements were very helpful in assisting me to understand the points of agreement and disagreement.

8 The current Collective Agreement of the parties is in force from July 1, 2015 to December 31, 2025. Both parties acknowledge that that is an unusually lengthy duration period.

9 The parties engaged in extensive collective bargaining over several months in 2015 and signed off a lengthy Memorandum of Settlement on August 27, 2015, and thereafter drafted the terms of the current Collective Agreement.

10 The parties are in agreement that although the actions of the Company being grieved took place on January 12, 2016, before the current Collective Agreement was fully drafted and signed, that this Award is to be based on the terms of the Collective Agreement as finalized subsequently.

11 The items detailed in Appendix 3, pages 12 to 22 of the Memorandum of Settlement ("MOS"), titled "Productivity Enhancement," were of particular importance to the parties, as they formed the basis of the current "Article 5 —

Scheduling Rules, Credits and Hours of Service" and other provisions. In the MOS the parties substantially changed the number of hours of work/credits each non-reserve Flight Attendant (FA) (and other FAs) could work each month at both regular rates and overtime rates. Under the previous Collective Agreement FAs had a maximum of 85 monthly credits or hours, which they could trade. It was not in dispute that under the previous Agreement, FAs could not pick up additional flying. In the August 27, 2015 MOS the parties provided that under the new Collective Agreement, FAs would receive no less than 75 credits monthly, to a maximum of 120 credits monthly, and that credits over 85 would be paid at the overtime rate. They provided that language would be adjusted under "Open Flying" to enable FAs to drop and trade/swap pairings and in addition to pick up pairings. The ability to pick up pairings constituted a new opportunity for FAs to increase credits, flying time, earnings, and to plan their schedules. The new arrangement enabled Jazz Aviation LP to reduce the numbers of reserve FAs and thereby lower its costs, and achieve other efficiencies.

12 It is not is dispute that pursuant to a Capacity Purchase Agreement, Air Canada is the Company's primary client. The Jazz Crew Planning Department, which is located in Halifax, assigns the flights required by Air Canada to five bases across Canada, i.e. Halifax, Montreal, Toronto, Calgary and Vancouver in the month prior to the month in which the flights are to take place. (Jazz assigns flights to arrive and depart from other locations, but this has no bearing on the grievance.) Each pairing is given an initial (e.g. Z or M) which designates the base to which it has been assigned and out of which the flying is to take place. Thereafter, each FA is assigned a monthly schedule and may drop and trade/swap pairings from his/her schedule, and bid on unassigned pairings from Open Time using an automated Trip Trade Tool. The parties also refer to "Open Time" as "Open Flying."

13 After pairings are assigned to a base and unassigned pairings are offered in Open Time, Crew Scheduling may modify them, owing to weather, cancellations, missed flights by crew staff and other issues.

14 Non-reserve FAs can bid on unassigned or open pairings from the time the pairings appear in the Open Time pool until 1500 on the day before the flights are to take place (Arts. 5.28.07 and 5.28.11). The bid-upon pairings are to be awarded to the FAs who bid on them, in order of seniority, and subject to legalities (legal requirements pertaining to eligibility to fly certain flights or aircraft and other matters) by the Crew Scheduling Department by 1700 the day before the flights are to take place.

15 There is a FA seniority list for each base. Thus, for the purpose of determining which FA's bid on an unassigned or open pairing is accepted, seniority is base specific.

16 Jennifer Kalmar, current Vice President of CFAU, gave evidence on behalf of the Union. Daryl Joseph, Manager of Crew Scheduling Training and Administration for Jazz Aviation LP, gave evidence on behalf of the Employer.

17 In this case, on January 12, 2016 at 2:40 p.m. Toronto time on the day before the flying was to take place, staff in the Crew Scheduling Department in Halifax removed pairings which had been in Open Flying at the Toronto base and offered them in Open Flying to FAs at the Montreal base with a deadhead flight from Montreal to Toronto and return to enable Montreal FAs to staff the pairing. At least one Toronto base FA had bid upon the pairings and was proposing to swap a Toronto to New Orleans and return flight for a Toronto to JFK and return flight. Mr. Joseph advised that he believed there had been bids on the pairings by 3 Toronto-based FAs before the pairings were moved to Montreal. As a result of the move, Montreal FAs bid on the pairings when they appeared in the Montreal Open Time Pool and were assigned the pairings in accordance with seniority at the Montreal base and other legalities, and Toronto FAs were not assigned them.

18 The initial or primary position of the Company is that removing the pairings from the Toronto base at 2:40 p.m. on the day before the flying was to take place and offering them in Open Flying to FAs at the Montreal base with a deadhead flight from Montreal to Toronto and return, was

a) the company's exercise of its management rights and

b) an exercise of a past practice, which falls under the management rights clause in the Current Agreement, the wording of which is the same as the management rights clause under the previous Agreement and

c) that it had the right to remove the pairings and assign them as needed "due to operational requirements" (Ex. 1, added Tab 13) and

d) that it was not required to prove operational *necessity* in order to justify its decision, which decision was a prerogative of management.

19 Ms. Kalmar stated that she has worked as a FA for 33 years, has been on the national bargaining committee a number of times and had been chair of it in 2009. She said that she was unaware of the removal of a pairing from one base to another after it had been assigned to a particular base, in all her years as a FA and Union Officer. She did not dispute the contents of two Memos from S. Georgakakos, Manager, Crew Resources dated Sept. 11 and Oct. 10, 2006 (Ex. 3, Tabs 14 and 15) which alluded to the removal of pairings from the base to which they had been assigned, to another base, with deadhead flights to transport FAs to staff the flights. The frequency of that occurring was not established in the Memos.

20 Daryl Joseph initially stated that removal of a pairing from the base to which it was initially assigned to another base was a common practice. He viewed the removal as a legitimate exercise of the Company's right to generally manage the commercial enterprise. Much later in his evidence Mr. Joseph stated that once a pairing is assigned to a base, removal of a pairing from the base to which it was initially assigned to another base is rare and infrequent.

21 Thus, the only clear and convincing evidence of a practice of removal of pairings from one base to another is reference in a Memo of this having occurred in September and/or October, 2006.

22 For an activity to be considered a past practice, the evidence should establish, clearly and convincingly, that it was repeated and/or habitual. The evidence in this proceeding did not establish that.

23 I therefore conclude, from Mr. Joseph's and Ms. Kalmar's evidence, that removal of a pairing from the base to which it was initially assigned and assigning it to another base is indeed rare and infrequent, such that it does not constitute a past practice, but simply a past occurrence.

24 It was not in dispute that during contract negotiations and the writing of the current Agreement neither party had spoken to one another of the removal of a pairing from one base to another after Crew Planning had assigned it to a particular base before a Deadline, as a practice or as a past occurrence, whether for a drop, swap or trade (the only permitted activities in Open Flying by FAs under the previous Agreement). It had simply not come up during contract negotiations or the writing of the current Agreement. There is no evidence to suggest that this omission in their discussions or writing was intentional on the part of either party.

25 Consequently, it falls to this process to determine the parties' intention as to whether under the terms of the current Agreement the Company was permitted to remove pairings from one base to another before the stated Deadline for bids.

26 The immediately relevant provisions of the MOS and the current Collective Agreement at this point in the Award are as follows:

MOS — APPENDIX 3

Productivity Enhancements

2. Article 5.28.03 (OPEN FLYING), language will be adjusted to add flexibility to, drop, pick-up, trade with open pairings from company open time such that the monthly credit level is not less than SEVENTY-FIVE (75) credits or up to a maximum of one hundred twenty (120) credits. Drops are not intended to be used to obtain time off

for calendar events that are common to all flight attendants without Crew Scheduling approval. Dates common to the group shall include statutory holidays and the corresponding weekend, the last 10 days of December, mothers/father's day, Valentine's Day and Halloween.

(a) Drops must be submitted for processing no later than 72 hours prior to the effective date of the drop. Drops are guaranteed as long as not requested on day(s) referenced above.

(b) Any drop requested within 72 hours of the departure time, crew scheduling will have the discretion to action the drop.

(c) Preference deadline to submit request to pick up/swap from open would be by 1500hrs. Award time would be by 1600hrs. (requires change to CA grid on Page 33).

Note: Jazz and the Union agree to a process review of the above within 6 months and 12 months of implementation to evaluate behaviour and operational risks.

. . .

The Current Collective Agreement:

ARTICLE 1 — PREAMBLE

1.01 This Agreement is made and entered into by and between Jazz Aviation LP, herein referred to as "The Company" and the Canadian Flight Attendant Union hereinafter referred to as "The Union".

1.02 The purpose of the Agreement is to promote the mutual interests of the Company and the Flight Attendants by providing services which will further, to the fullest extent possible, the safety of air transportation, the efficiency and economy of the operation, the maintenance of a high degree of quality of cabin services, the continuation of employment, and to establish between the Company and the Union orderly collective bargaining for conditions of reasonable hours, compensation and working conditions. It is recognized, by this Agreement, that it is the duty of the Company and of the Flight Attendants to co-operate fully, both individually and collectively in all ways stated for the purpose of mutual benefit.

1.03 It is mutually agreed that the Collective Agreement is made and entered into by and between Jazz Aviation LP and the Canadian Flight Attendant Union in good faith and that the language entered into and bargained between the parties has been negotiated for the purpose of establishing rules and regulations that apply equally to the Company, Union and its membership. Any known and deliberate violation of this Agreement will be considered a breach of the principles of the preamble and is contrary to the mutual interest of Collective Bargaining and will be addressed in accordance with Article 25 Grievance Procedure.

ARTICLE 3 — MANAGEMENT RIGHTS

3.01 The Union recognizes the exclusive right of the Company to manage and direct the Company's business in all respects and in accordance with its commitments and to alter from time to time rules and regulations to be observed by Flight Attendants which rules and regulations shall not be inconsistent with this Agreement.

3.02 Without restricting the generality of the foregoing, it is the exclusive function of the Company to manage generally the commercial enterprise in which the Company is engaged and without restricting the generality of the foregoing to determine the number and location of bases, location of aircraft, and route patterns and tariffs. The Company agrees that these functions shall be exercised in such a manner as to maintain good working conditions and promote harmonious relations with the Union.

3.03 . . .

3.04 . . .

5.28.07 OPEN FLYING

(a) A Flight Attendant may drop, trade or pick-up from Company open time such that the monthly credit level is not less than seventy-five (75) credits or up to a maximum of one hundred and twenty (120) credits;

(b) Drops are not intended to be used to obtain time off for calendar events that are common to all Flight Attendants without Crew Scheduling approval. Dates common to all Flight Attendants shall include statutory holidays and the associated weekend (e.g. statutory holiday is on Monday or Friday), the last ten (10) days of December, Mother's/Father's Day, Valentine's Day and Halloween;

(c) Drops must be submitted via Company Trip Trade system for processing no later than seventy-two (72) hours prior to the effective date of the drop. Drops are guaranteed as long as they are not requested on the day(s) referenced above;

(i) Any drop requested within seventy-two (72) hours of the departure time, Crew Scheduling will have the discretion to action the drop;

(ii) The preference deadline to submit the request to pick up or swap from Open time will be 1500 hours (local time) day prior. The award time will be by 1700 hours (local time) the day prior.

Note: Jazz and the Union agree to a process review of 5.28.07 (a) within six (6) months and again at twelve (12) months of implementation to evaluate behavior and operational risks.

(d) Pairings that touch the last day of the month will be restricted from being dropped until the final schedule for the following month has been published.

(i) Open flying that remains after the schedule build has been completed, will be available for Flight Attendants to bid on in accordance with Article 5.28.07;

(ii) Flying will be awarded in seniority to Flight Attendants who have submitted a bid each day by 1500 (not 'day of');

(iii) Flight Attendants are able to place a bid for 'Open' flying that takes place at any time during the month and it will be awarded, in seniority, daily.

Example: A pairing is showing as available on the 10th of the month in the open time pool, a Flight Attendant can submit their bid for this flying as soon as it appears in the open time pool up until 1500 the day prior to when the flying is scheduled to operate. If this flying were available in the open pool on the 3 rd of the month, it would be awarded, in seniority order, to any Flight Attendant bidding on it that day in conjunction with the parameters above.

5.28.08 Approval for open trades that occur on or over a statutory holiday is subject to Crew Scheduling discretion.

. . .

5.28.10 Flight Attendants may review the open time website to query open pairings(s). To place their bid for open pairings(s), the Flight Attendant must submit their bid using the automated Trip Trade Tool. Trades will be processed on the day of the request in order of seniority to those Flight Attendants bidding on open flights. Flight Attendants shall be eligible to bid for open pairing(s) subject to the following:

(a) A legal rest period has been observed, prior to operating an open pairing(s) and any duty for that day;

(b) The open pairings(s) will not cause them to exceed their monthly flight time limitation or duty limitation;

(c) Flight Attendant will be paid in accordance with actual or scheduled duty of the open pairing(s) operated;

(d) They will be available to cover their next scheduled pairing(s);

(e) Flight Attendants who pick up from Alternate Trip Coverage will be permitted to trade or swap this pairing with Open time as per Article 5.28.07;

(f) Flight Attendants are permitted in accordance with Article 5.28.07(a) to trade single day pairing(s) for a same single day pairing operating on the same calendar day or a continuous duty for another continuous duty provided it operates on the same day. This will be approved regardless of the calendar day. This must be requested and/or actioned at least one (1) day in advance.

5.28.11 Open pairing(s) shall be awarded to Flight Attendants daily as per the times specified below the day prior to scheduled operations.

Article	**Deadline to State Preferences (Base Local)**	**Award Time**
Article 5.26 (Book Back On)	By 1200 (day prior to pairing commencement)	NA
Article 5.26.01 (book back on for CDO)	By 1000 (day of)	NA
Article 5.28.02 (Bid to pick-up from Open)	1701 (day prior to award day) until 15:00 on award day)	By 1700 (on award day)
Article 5.26 (FAs who book on after 1200 until 1500)	1201 - 1500	By 1700
Article 5.20 (Reassignment bid when notified by Crew Scheduling)	Until 1700 Contact Crew Scheduling by phone to state preferences	By 1830
Article 5.23 - Reserve (possible WDO)	By 1800	By 2030
Article 5.14 (WDO)	Ad hoc	NA
Article 5.20.02 (Airport Move Up)	Ad hoc	NA

(a) Unassigned flying shall be awarded on the basis of seniority in the following order:

(i) Flight Attendants are permitted to place a bid for all published 'open' flying starting at 1701 the day prior to the award. Only the 'Open' pairings still in the pool after 1200 (on the day of the award) will be awarded in order of seniority to those Flight Attendants who placed a bid for flying that day;

(ii) Open flying bidding and awarding will be as per Article 5.28.07;

(iii) Flight Attendants who book back on prior to 1200 the day prior to the commencement of their pairing shall be guaranteed their own pairing;

(iv) Flight Attendants who book back on after the 1200 deadline, will be permitted to submit a bid for 'open' flying from 1200-1500 as per the table above. The submission must be done through the Trip Trade tool.

27 It was not in dispute that the Company has the right and obligation to determine flight routes and the bases to which flights/pairings are initially assigned. As previously stated, the Crew Planning Department performs the initial assignment of pairings the month before the month of flying and the Crew Scheduling Department may make modifications to pairings thereafter. Weather conditions, missed flights by staff, cancelled flights, and other issues all

contribute to the challenge of scheduling flights and ensuring the staff to cover them, and this can result in last-minute changes.

28 Whether the terms of the current Collective Agreement enables or authorizes the Crew Scheduling Department on behalf of the Company to remove pairings from one base to another 20 minutes prior to the "Deadline to State Preference (Base Local)" is the matter in issue.

29 In my view, the characterization of the Union's position as a matter of asserting "ownership" of certain work does not assist to determine the issue, which requires interpreting the parties' Collective Agreement.

30 It will be useful at this point to review the principles of contract interpretation.

31 Section 4:200, "Interpretation of Collective Agreements," Brown & Beatty, *Canadian Labour Arbitration, Fourth Edition*, (Canada Law Book, Toronto, Ontario, June 2017) provides some guidance:

> The purpose of construing the terms of the collective agreement is to determine what the parties intended by what the parties wrote. ...
>
> > ...the words must be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object and the intention of the parties.
>
> And, in determining the intention of the parties, the cardinal presumption is that the parties are assumed to have intended what they have said, and that the meaning of the collective agreement is to be sought in its express provisions.
>
> ...arbitrators have been guided by the purpose of the particular provision, the reasonableness of each possible interpretation, administrative feasibility, and whether one of the possible interpretations would give rise to anomalies.

32 At section 4:2110 the authors state:

> In searching for the parties' intention with respect to a particular provision in the agreement, arbitrators have generally assumed that the language before them should be viewed in its normal or ordinary sense unless to do so would lead to some absurdity or inconsistency with the rest of the collective agreement, or unless the context reveals that the words were used in some other sense. ... It has been stated, however, that where there is no ambiguity or lack of clarity in meaning, effect must be given to the words of the agreement, notwithstanding that the result may be unfair or oppressive or that they were deliberately vague to permit continuing consensual adjustments.

At section 4:2120 they state

> ...in construing a collective agreement, it should be presumed that all of the words used were intended to have some meaning. As well, it is to be presumed that they were not intended to be in conflict.

They further cite the following presumptions:

> ...special or specific provisions will prevail over general provisions; ... where the same word is used twice it is presumed to have the same meaning; where two different words are used, they are intended to have different meanings; ...where a variance from a usual practice is intended, it is said that it must be expressed clearly.

They state that although there is authority to the effect that the part of the contract written first overrides the part written later,

> ...effect should be given to that part which best carries out the real intention of the parties.

At section 4:2150 they state

> ...the words under consideration should be read in the context of the sentence, section and agreement as a whole. ...

At section 4:2151 they state:

> Although prima facie "may" is said to be permissive, and "shall" imperative, both can have the opposite meaning depending upon the context in which they are found. There is not the same doubt, however, about the meaning of "must."

At s. 4:2240, they state:

> ...preceding agreements are utilized to assist in determining the nature of and reason for the change so as to reveal more clearly the parties' intentions.

And at section 4:2250 they state that the general proposition that unless that agreement is ambiguous, an arbitrator cannot use extrinsic evidence to assist in construing the agreement, the general proposition must be qualified, particularly

> ...where the context of the agreement or subject-matter referred to is sought to be established, extrinsic evidence may be received for that purpose. ... the clearest and most commonly utilized examples of extrinsic evidence are past practice and negotiating history. ...

At s. 4:2300, "The Collective Bargaining Context," they state:

> In construing collective agreements, arbitrators look to the purpose of the particular provision in the collective agreement as an aid to determine the meaning intended by the parties. In this regard, they have recognized that collective agreements are not negotiated in a vacuum, but rather are settled in the context of general industrial relations practices, within a specific negotiating context and against a vast history of judicial and arbitral jurisprudence which will affect the parties' expectations and understandings. In the result, arbitrators give effect to this general contextual climate by requiring clear statements to alter such general expectations.

At s. 4:2310, "Management Rights," they provide many examples of the unilateral actions of management which arbitrators have determined fall under the umbrella of management rights "in the absence of any express terms in the agreement to the contrary." Unfortunately, the removal of pairings from one base to another before a specified "Deadline to State Preference (Base Local)" was not among the examples.

33 As well, I had reference to Chapter 2, "Interpretation of the Collective Agreement" in Ronald M. Snyder, *Collective Agreement Arbitration in Canada. Fifth Edition*, (Lexis Nexis Canada Inc., Markham, Ontario, 2013) and drew to the attention of counsel for the parties the rule of construction "Specific Provisions Override General Provisions," and the cases cited in support of that rule, and invited their further submissions regarding same, which they kindly provided.

34 I also acknowledge receipt of the following cases from the parties, which I have considered in detail before writing this award:

> *Rothsay, a Member of Maple Leaf Foods Inc., Ontario Region (Moorefield Facility) and Unifor, Local 39-X (Hale)*, [2014] O.L.A.A. No. 89; 2014 CanLII 43783 (Luborsky); *Brookfield Management Services Co. and C.U.O.E.*, 1999 CarswellOnt 7375, [1999] O.L.A.A. No. 481, 56 C.L.A.S. 307 (Davie); *North Central Plywoods v. Pulp and Paper Workers of Canada, Local 25 (Gullacher Grievance)*, [2000] B.C.C.A.A.A. No. 85 (Greyell); *Norampac (Burnaby Division) v. Communications, Energy and Paperworkers' Union of Canada, Local 1129 (Shift Elimination Grievance)*, [2011] B.C.C.A.A.A. No. 109 (Burke); *Re Falconbridge Nickel Mines Ltd. and Sudbury Mine, Mill and Smelter Workers' Union, Local 598* [1981] O.L.A.A. No. 19; 1 L.A.C. (3d) 309 (H.D. Brown); *Cargill Foods v. United Food and Commercial Workers International Union, Local 633 (Overtime Grievance)*, [2006] O.L.A.A. No. 303;

151 L.A.C. (4th) 54; 85 C.L.A.S. 47 (O.B. Shime); *Pepsi-Cola Canada Beverages, a Division of Pepsi-Cola Canada Ltd. and Teamsters, Local 938 (McComb Grievance)* [1999] O.L.A.A. No. 317; 80 L.A.C. (4th) 445 (A. Barrett); *Hallmark Containers Ltd. v. Canadian Paperworkers Union, Local 303 (Portelli Grievance)*, [1983] O.L.A.A. No. 4; 8 L.A.C. (3d) 117 (Burkett); *Durham District School Board v. Ontario Secondary School Teachers' Federation, Local 13*, [2000] O.L.A.A. No. 48 (S.R. Ellis); *Humber College Institute of Technology & Advanced Learning v. Ontario Public Service Employees Union, Local 562 (Collective Agreement Grievance)*, [2014] O.L.A.A. No. 100 (Leighton); *(Re) Cranbrook (City)* [2001] B.C.L.R.B.D. No. 294; *Re Sudbury District Roman Catholic Separate School Board and Ontario English Catholic Teachers' Association* [1984] O.L.A.A. No. 65; 15 L.A.C. (3d) 284 (G.W. Adams, Q.C.); *Pacific Forest Products Ltd. v. International Woodworkers of America, Local 1-80 (Bull Grievance)*, [1982] B.C.C.A.A.A. No. 117 (D. H. Vickers); *Re Hamilton Community Care Access Centre and Ontario Public Service Employees Union, Local 274* (2004) 136 L.A.C. 129 (Brent); *Navistar international Corp. Canada and C.A.W.-Canada, Local 127* [1995] O.L.A.A. No. 120; 52 L.A.C. 94th) 223 (H. Snow); *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633; *Jazz Aviation LP and Canadian Flight Attendants Union (Policy Grievance: Modification of Pairings)* November 24, 2017 unpublished (D.L.Gee); *Metropolitan Toronto (Muncipality) v. C.U.P.E. (C.A.)*, 1990 CanLII 6974 (ON CA); 74 O.R. (2d) 239; [1990] O.J. No. 537; *Medis Health & Pharmaceutical Services Ltd. v. Teamsters, Chemical, Energy & Allied Workers, Local 424*, 2000 CarswellOnt 5889, [2000] O.L.A.A. No. 112, 59 C.L.A.S. 222; 85 L.A.C. (4th) 357;

35 What is in dispute between the parties is an action of the Company which came to the Union's attention for the first time in the context of their current Collective Agreement, which contained many new provisions.

36 I have read the entire MOS and the Collective Agreement. I have carefully considered Ms. Kalmar's and Mr. Joseph's evidence, which provided the history and context of the matter requiring a resolution this grievance.

37 I accept the submission that there were no changes to the Management Rights clause (Art. 3) from the previous Collective Agreement. However, that in and of itself does not necessarily preserve all management rights that were exercised under the previous Agreement. I make that observation because Article 5 of the current Agreement sets out in substantial detail changes to the number of hours non-reserve (or block) FAs can work and credits they can earn each month. (Other provisions of Art. 5 pertain to other FAs; however, non-reserve FAs were affected in this case by the Company's action.) Article 5 of the current Agreement expanded the concept of Open Flying and made it possible for non-reserve FAs (and others) to drop and swap pairings, and to add pairings to their monthly schedule. This enabled the Company to decrease the number of reserve FAs it needed under the previous Agreement in order to ensure that there were sufficient FAs available to staff all flights, and thereby realize financial savings and efficiencies. The parties referred to this as "productivity enhancement" in their contract negotiations as well as the MOS which precedes and forms part of the current Collective Agreement.

38 As well, Article 5 sets out in substantial detail the means by which the Company will construct and award blocks (Art. 5.18), which are clearly constructed by base.

39 Art. 5.17.03 re "Scheduling Rules — Pairing Construction" states:

> Pairings shall be constructed by the Company from the known aircraft route tracks and shall reflect all known scheduled or charter flying. The Company shall endeavour to produce a variety of pairings *for each base*. (emphasis added).

40 Art. 5.18 re "Scheduling Rules — Block Construction" provides

> ...Flying not assigned during block award will be published as open flying provided that the number of hours permitted to be dropped monthly into open flying will be mutually agreed upon between the Company and the Union on a monthly basis.

As I read it, Art. 5.18 indicates that the Company, through Crew Planning, is constructing and awarding the blocks to the bases. The stipulation in Art. 5.18 that flying not assigned during the block award "will be published as open flying" is a statement of the parties' intention month to month. The not assigned flying is, as a matter of common sense and as reflected in these provisions, base specific, and the Collective Agreement contemplates that the Company will publish not assigned flying as Open Flying at the base to which the Company has assigned it, so that the non-reserve FAs (and others) at that base can access the information as to which flights the Company has assigned to their base remain unassigned, and bid on those flights, and be awarded them in accordance with the base specific seniority list, subject to legalities.

41 In drafting the current Collective Agreement, in Article 5.20 "Reassignment / Airport Move-Up / Major IRROP Recovery Process (Operational Blowout), Article 5.20.02 "Airport Move UP (AMU)" and Article 5.20.03 "Major IRROP Recovery Process (MIRP)," the parties specifically, expressly, clearly, unambiguously and unequivocally provided for unusual circumstances which would justify and result in the Company having the right and obligation to make wholesale changes to the already assigned flight times and schedules.

42 In Art. 5.27, "Bidding Procedures," the parties set out 15 detailed subparagraphs which state, among other things, that *changes* to an initial bid package will be effected by the Company and the Union by mutual agreement (Art. 5.27.01 (b)), as will blocking errors (Art. 5.27.06 (a)), and in Art. 5. 27.05, specifically, expressly and clearly reserved to the Company alone the authority to extend the bid publishing and closing dates and schedule award dates by (2) calendar days, by the words "as required by the Company." They provided, in Art. 5.27.07 that the bid package "*shall contain* the list of pairings available for bidding as well as an information package." The parties stipulated, or mandated, by using the words "shall contain," in articles 5.27.07, .08 and .09, the contents of the bid package, the information package and the pairing listings which are required to inform the FAs.

43 The parties used "must" in Art. 5.28.10 to require the FAs to submit bids using the automated Trip Trade Tool. In other places, the parties used the word "will" to convey a mutual intention, but not necessarily to mandate an obligation. For the purposes of this grievance, it is not necessary to interpret "will" where it appears in the Agreement. I conclude, as a matter of common sense, and in view of their lengthy bargaining relationship, that in drafting the current Agreement, both parties understood that the word "shall" imposed a mandatory obligation. I note that in Art. 1.03, the Preamble to the current Agreement, the parties wrote:

> ...the language entered into and bargained between the parties has been negotiated for the purpose of establishing rules and regulations that apply equally to the Company, Union and its membership.

I conclude, therefore, that when using the word "shall," they imposed a mandatory obligation on both parties to honour and fulfil the action they described.

44 I note that in Art. 5.23.16 the parties considered situations where pairings need to be covered "without sufficient reserve FAs with the 'Best Fit' number of days available to cover the pairing," and stated in detail how the Company was to award those pairings in those circumstances.

45 In this case, the Company submitted that it removed the pairings from the Toronto base before the 3 p.m. "deadline," because of insufficient reserve FAs at the Toronto base (i.e. no reserve FAs available at all at the Toronto base) and because there were reserves available at the Montreal base.

46 I accept Mr. Joseph's detailed evidence regarding the construction of the pairings in issue and his understanding of the reason Crew Scheduling staff removed them at 2:40 p.m. and put them in the Montreal Open Flying pool.

47 Unlike Art. 5.23.16, the parties made no express provision in the current Agreement for the circumstances which arose on Jan. 12, 2016 with respect to the level of reserve FAs in Montreal and Toronto.

48 The parties used different language in different Articles in the current Agreement to reserve discretion to the Company, examples of which follow.

"Operational Requirements"

49 The parties used the term "subject to operational requirements" to reserve some discretion to the Company re granting reserve FAs release for personal reasons in Art. 5.23.28. The term "subject to operational requirements" was used expressly in para. 20.08 of Appendix 3 of the MOS, on that same subject, which preceded the writing of Art. 5.23.28.

50 Art. 2 is titled "Union Recognition and Protection." In Art. 2.21.08 the parties used the term "subject to operational requirements" to reserve discretion to the Company as follows:

> ...The Company agrees to grant Union leave with pay as required *subject to operational requirements* and prior approval of the Regional Manager, Inflight Services...
>
> (emphasis added)

51 Art. 16 is titled "Operational Disruptions." Art. 16.05 is titled "Resumption of Operations." Art. 16.05.01 states:

> Recall from off-duty status shall be in order of Flight Attendant seniority by base, *on the basis of operational requirements*
>
> (emphasis added)

52 Art. 18 is titled "Leaves of Absence." Art. 18.13 is titled "Marriage Leave" The parties stated that a FA:

> ...*shall* be granted a leave of absence without pay ... *subject to operational requirements*
>
> (emphasis added)

53 The parties used other terms similar but not identical to "operational requirements" in various articles of the current Agreement to expressly reserve discretion to the Company regarding the implementation of the terms in each of those articles.

"In exceptional operational circumstances only"

54 The parties used the term "In exceptional operational circumstances only" in Art. 5.23.05 to authorize Crew Scheduling/the Company to depart from stipulated contact time periods within which to contact FAs.

"Operational Necessity"

55 In Art. 5.02.02 the parties clearly, unequivocally, unambiguously and expressly reserved to the Company the authority to increase check-in and check-out times "due to operational necessity at Company discretion."

56 In Art. 5.02.07 the parties clearly, unequivocally, unambiguously and expressly reserved to Crew Scheduling/the Company, the extension of the maximum scheduled duty period, within a stipulated limit, "for reasons of operational necessity."

57 Art. 5.07 is titled "Credits — Training." In Art. 5.07.04, the parties clearly, unequivocally, unambiguously and expressly provided:

> The total duty period of a training day on 'day of can be extended to fourteen (14) hours for *reasons of operational necessity i.e. aircraft availability*.

(emphasis added)

In Art. 5.07.04, they stated an example of "operational necessity, i.e. aircraft availability."

"Subject to Crew Scheduling Discretion"

58 In Art 5.28.08 the parties explicitly, clearly, unequivocally and unambiguously reserved unlimited and unfettered discretion to Crew Scheduling/the Company:

> Approval for open trades that occur on or over a statutory holiday is *subject to Crew Scheduling discretion*.
>
> (emphasis added)

"Extenuating Circumstances"

59 By way of contrast, the parties used the term "in extenuating circumstances" regarding a decrease in the numbers of credit hours Trainers are required to fly in a month "if mutually agreed upon between the Company and the Union" in Art. 11.04.05.

60 The term "in extenuating circumstances" appears again in Art. 17 regarding Vacations. Art. 17.06.07 provides:

> Notwithstanding the rules specified in this Article, *in extenuating circumstances* the Company and the Union, by mutual agreement, may make special arrangements to suit the individual....
>
> (emphasis added)

"Requirements"

61 The term "requirements" appears in Art. 17.08, titled "Bid and Award Procedures" at Art. 17.08.02, regarding the commencement date for bidding re vacation dates:

> Should *the requirements* deem these dates not feasible, the Company and the Union will mutually agree on changes of the dates.
>
> (emphasis added)

62 Art. 18 is titled "Leaves of Absence" and 18.01 is titled "Discretionary Leaves of Absence." The parties used the term "requirements of service" in Art. 18.01.01 to describe when the Company would exercise its discretion in granting a FA a requested leave of absence:

> When *the requirements of service* permit, a Flight Attendant, ... be granted a Leave of Absence ...
>
> (emphasis added)

"The proper operation of the business"

63 Art. 2 is titled "Union Recognition and Protection." Art. 2.22 is titled "Union Leave." In Art. 2.22.01 the parties expressly reserved to the Company the discretion to determine whether to permit FAs time off for Union Committee work:

> The Company shall allow time off without pay to any Flight Attendant who is serving on a Union Committee ... providing all requests for time off are reasonable and *do not interfere with the proper operation of the business*.
>
> (emphasis added)

"At its discretion"

64 In Article 5, at Art. 5.18.03, the parties specifically provided:

> The Company may, *at its discretion*, designate low blocking months...
>
> (emphasis added)

At Art. 5.18.04 they specifically provided:

> The Company may, *at its discretion*, designate high blocking months...
>
> (emphasis added)

65 As can be seen from the above examples, the parties wrote in "carve outs" from the Scheduling "rules" in Article 5. Those "carve outs" reserved discretion to the Company in specific circumstances.

66 The parties did not define the terms "operational requirements," "operational necessity" (although they stated an example), "proper operation of the business," "the requirements," "the requirements of service," "in extenuating circumstances," and "at its discretion." They may have left the terms "deliberately vague to permit continuing consensual adjustments."

67 Although the parties did not define "operational requirements," in drafting the current Agreement, both parties were seeking to ensure that all flights were staffed in the most efficient and economical way possible. During negotiations, the parties addressed the issue of ensuring sufficient staff was available to fly at certain holiday periods and on other dates, while at the same time they planned to increase opportunities for FAs to increase their credits and earnings, and for FAs to plan their schedules using Open Flying. Again, the changes were intended to enable the Company to decrease the cost of maintaining reserve FAs by lowering the numbers of reserves, while at the same time enhancing the productivity of non-reserve FAs by enabling them to earn more credits each month by bidding on unassigned flights. At all times, the parties shared an interest in ensuring that all flights were staffed, in order to ensure that Air Canada continued its Capacity Purchase Agreement with Jazz Aviation LP, and to ensure that the Company maintained the employment and job security of the Flight Attendants.

68 The parties are sophisticated and experienced labour and management negotiators and writers of their Agreements. They are experienced at meaning what they say in those Agreements and must be presumed to have intended what they wrote and what they did not write from Article to Article and paragraph to paragraph.

69 Article 5 of the current Agreement, titled "Scheduling Rules, Credits and Hours of Service" is composed of about 207 numbered paragraphs (not including subparagraphs) which appear from page 15 to 49 of the Agreement. It is clear, from the length and detail of Art. 5, that the parties attempted to be as thorough as possible in setting out the new scheduling rules, so as to ensure that the provisions were acted upon, and so that the Company exercised discretion where discretion was specifically provided for, as the writers of the Agreement contemplated.

70 In Article 5.20, titled "Reassignment / Airport Move-Up / Major IRROP Recovery Process (Operational Blowout) the parties specifically reserved to management in specified circumstances the ability to release or reassign FAs in accordance with certain detailed provisions.

71 Art. 5.20.01 deals in detail with Reassignment in the event of cancellation or change in a pairing.

72 Art. 5.20.02 deals with Airport Move Up (AMU) which permits management to reassign FAs to flight(s) other than their own to prevent cancellation of a flight in specified circumstances, and stipulates at 5.20.02 (d):

> The Company will make every attempt to return the Flight Attendant to their originally scheduled pairing ...Notwithstanding the above the integrity of the Flight Attendants originally scheduled pairing should be preserved *whenever operationally possible*.
>
> (emphasis added)

73 Art. 5.20.03, titled "Major IRROP Recovery Process (MIRP)" is, I am advised, new to the current Collective Agreement. It stipulates that "twenty (20) flight cancellations will be considered a major IRROP recovery" and states

> Example: Weather system affecting YYZ and YUL will be considered one (1) instance. The Company must notify the Union ... prior to the implementation...

This Article specifically authorizes management to amend reassignment rules "In order to protect the coverage of flights in times of severe IRROPS, Flight Attendant reassignment rules can be amended as follows:" and provides certain parameters for both parties in the event of such an occurrence.

74 In Art. 5.27, titled "Bidding Procedures," the parties used the words "shall" and "will" in respect of the rules for both the Company and the FAs re bid publishing and closing dates in Arts. 5.27.01, .02, .03, and 04. While "shall" imposes a mandatory obligation and "will" possibly reflects a statement of intention, nothing turns on it for this case. The parties provided, in Art. 5.27.05

> The bid publishing and closing dates and schedule award dates may be extended by two (2) calendar days *as required by the Company*.
>
> (emphasis added)

75 The above is an example of the parties having frequently used words that clearly, unequivocally and unambiguously carved out and reserved to management some discretion in the application of the rules or protocols re Scheduling of pairings and FAs in Article 5.

76 Where carve out words do not appear in any paragraph in Art. 5, it is reasonable to conclude that the writers of the current Agreement, on behalf of both parties, intended the Company to follow the protocol set out, to the letter. It is reasonable to conclude that the parties both intended that once flights/pairings were assigned to a base and appeared in Open Flying, unless the flights/pairings were cancelled (e.g. Art. 5.20.01 or 5.20.03), the Company via Crew Scheduling was required to permit them to remain there for FAs to bid upon until 3 p.m. (1500 base local) the day before the flying.

77 Art. 5.28.11 provides, above the chart:

> Open pairing(s) *shall* be awarded to Flight Attendant daily as per the times specified below the day prior to scheduled operations.
>
> (emphasis added)

At the top of the chart in Art. 5.28.11, the parties headed the middle column:

> Deadline to State Preference:
>
> (Base Local)

Thereafter, in the chart, they stated that for "Art. 5.28.02 (Bid to pick-up from Open)," the deadline was "1701 (day prior to award day) until 15:00 award day) and for Art. 5.26 (FAs who book on after 1200 until 1500) that the deadline was "1201 - 1500." In both cases, the chart specified the award time would be "by 1700."

78 In view of the provision of the parties in Art. 1.03:

> ...that the language entered into and bargained between the parties has been negotiated for the purpose of establishing rules and regulations that apply equally to the Company, Union and its membership.

I conclude that the parties intended that the "Deadline to State Preference" was to be maintained equally by the Company, the Union and its membership. I conclude that by the parties' use of the word "shall" both above and below the chart in Art. 5.28.11, the parties intended that the Deadline applied equally to the Company, the Union and its membership, and that the "Deadline to State Preference (Base Local)" was not to be changed by the moving of pairings from one base to another before the Deadline of the original base, and that the award of Open pairings assigned to the original base would occur at or after 1500 and by 1700.

79 I conclude that for the Company to move pairings from one base to another prior to the "Deadline to State Preference (Base Local)" except in circumstances such as specifically contemplated by the parties in Art. 5.20.02 and 5.20.03, or other emergencies, constitutes a deviation from the intended protocol which the parties set out in Art. 5 of the current Agreement.

80 I conclude that the Crew Scheduler who removed the pairings in question from the Toronto base to the Montreal base sincerely believed that in doing so s/he was protecting the Company's interest, and that the management rights clause or the Company authorized him/her to move the pairings at 2:40 p.m. Toronto time to the Montreal base and that the move was viewed as the exercise of a past practice. The Crew Scheduler may have anticipated a weather problem or an IRROPS, as Mr. Joseph suggested. However, the evidence did not establish that Art. 5.20.02 or any other emergency was invoked on either Jan. 12 or 13, 2016 to justify the removal of the pairings to the Montreal base. On the evidence before me, I conclude that the reserve levels in Toronto and Montreal were the primary justification for moving the pairings from Toronto to Montreal at 2:40 p.m.

81 I acknowledge and respect the very sensible comments in *Brookfield Management*, *supra*, at ¶62.

> It is now well established that, in the absence of specific language in the collective agreement limiting the right, management has the right to organize the workforce, schedule shifts, and assign employs to shifts. The rationale for this is that it is simply not practical to assume that the parties intended to codify in their collective agreement all of the managerial prerogatives or tools which may be required by the employer, from time to time, to ensure that the enterprise continues to be viable and productive.

However, I conclude that the many and detailed paragraphs that the parties wrote in Art. 5 of the current Agreement reflect a shared intention of the parties to completely codify the rules regarding Open Flying and Scheduling. I conclude that they reflect, with the specific wording in various sub-articles which reserved discretion to management regarding certain rules in Art. 5 and elsewhere, set out above, and the absence of wording reserving discretion to management in Art. 5.28.11, that the parties intended to create a protocol which required the Company to leave unassigned flying in the open time pool of the base to which it had been assigned until the expiry of the Deadline to State Preference. The detailed provisions in Article 5 reflect the shared intention of the parties that after the Deadline to State Preference had expired, the FAs' opportunity to bid had been maximized, and the Company was then in a position to assess whether the bids of the Toronto FAs covered the unassigned flying or whether other measures were required to staff those pairings, which were to be flown the next day. To conclude otherwise would, in my view, render the provisions "Deadline to State Preference (Base Local)" and "Open pairing(s) shall be awarded to Flight Attendants daily as per the times specified below the day prior to scheduled operations" and the provisions regarding "unassigned flying" below the Art. 5.28.11 chart meaningless.

82 I conclude that the language of Article 5, and particularly Article 5.28.11 was specific, clear, unequivocal and unambiguous. I conclude that it limited the more general rights of management in Art. 3. This view is also supported by the rule of construction that "Specific Provisions Override General Provisions."

83 The evidence did not establish that moving the pairings before the Deadline was required to ensure the viability or productiveness of the enterprise. I am not certain that evidence that that had been the case would have authorized a departure from the shared intention reflected in the language of the Agreement, particularly Art. 5.28.11. Be that as it may, that issue has not been determinative of the interpretation I have given to Art. 5.28.11.

84 Furthermore, although the credibility of each of the witnesses was submitted as a basis for determining the weight to be given to the evidence, it may be helpful for the witnesses to know, in the interest of maintaining cordial labour relations between the parties, that credibility was not a factor in reaching my conclusions. I found that both witnesses gave their evidence candidly, sincerely and with integrity, based on their clearly extensive experience. Although I have not set out the evidence in detail, it was very helpful in establishing the context in which the language in the current Agreement was developed.

85 The intention of the parties as manifested in the language of the current Agreement has determined the outcome of this policy grievance. Consequently, it is not necessary for a decision to be made regarding the allegation of "bad faith" or "arbitrariness" or on the issue of estoppel.

86 For all the above reasons, the grievance is allowed.

87 The Company is directed to cease and desist from removing pairings from Open Flying before the Stated Preference Deadlines in Art. 5.28.11.

88 I will remain seised with respect to remedy for the individual grievors and to deal with any other issues arising from this Award.

89 In drafting Art. 5.28.07 titled "Open Flying" in the current Agreement, the parties provided:

> Note: Jazz and the Union agree to a process review of 5.28.07 (a) within six (6) months and again at twelve (12) months of implementation to evaluate behaviour and operational risks.

I gather from the evidence that the relative level of reserves in Toronto and Montreal on Jan. 12 and 13, 2016 may have been viewed as a possible operational risk.

90 I am advised that the parties have a mature and respectful relationship. I encourage them to undertake a process review to discuss the circumstances, if any, as to which they may agree that Crew Scheduling may be authorized to depart from the protocol in Art. 5.28.11 and remove pairings from one base to another before the Deadline to State Preference has expired.

91 I would also like to thank Counsel for both parties for their very thorough and professional presentations of the evidence, argument and written submissions in this proceeding.

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