OPINION AND AWARD

BEFORE THE AMERICAN AIRLINES, INC. / TRANSPORT WORKERS UNION MAINTENANCE SYSTEM BOARD OF ADJUSTMENT

IN THE MATTER OF ARBITRATION
BETWEEN:

AMERICAN AIRLINES, INC.

and

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

Case No. 29 (d) – ATD 02-14
Grievance concerning
flexible vacation benefits
Date of Hearing: 9/9/14
Briefs Received: 10 /18/14
Date of Decision: 11/10/14

SYSTEM BOARD OF ADJUSTMENT

Union Board Member
Gary Shults

Company Board Member
Taylor M. Vaughn

Neutral Chairperson
Stanley H. Sergent

APPEARANCES:

For The Company:

Mark W. Robertson, Esq.
O'Melveny & Myers, LLP
Times Square Tower, 7 Times Sq.
New York, NY 10036

For the Union:

David J. Virella
International Representative
Transport Workers Union of
America – AFL-CIO
1791 Hurstview Drive
Hurst, TX 76054

IN THE MATTER OF ARBITRATION BEFORE AMERICAN AIRLINES SYSTEM BOARD OF ADJUSTMENT

AMERICAN AIRLINES, INC. (Flexible Vacation Benefits)

and

TRANSPORT WORKERS
UNION OF AMERICA, AFL-CIO
LOCAL UNION 514

I. STATEMENT OF THE CASE

American Airlines, Inc. (Company or American) and the Transport Workers Union of America, AFL-CIO (Union or TWU), are parties to two separate collective bargaining agreements, both of which became effective September 12, 2012. The Agreements govern the wages, hours and other terms and conditions of employment of the members of two separate bargaining units. One such bargaining unit is composed of Aviation Maintenance Technicians and Plant Maintenance Employees (M&R) and the other is composed of the Material Logistics Specialists (Stores). Both agreements provide for a grievance procedure culminating in final and binding arbitration as the mechanism to be used to resolve any disputes concerning the interpretation or application of their terms.

The grievance that is at issue in the present case was filed by the Union on June 5, 2014, under Section 29 (d) of the CBA. It alleges that the Company has violated Article 8(C)(1) and 8(D)(1) of the CBA by discontinuing the flex vacation policy. It reads as follows:

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ATTORNEY • ARBITRATOR

Grievance:

In accordance with Article 29 (d) of the AA/TWU Agreement, please accept this communication as official notice of the violation listed below:

- Violation of Article 8 (C) 1 of the M&R Collective Bargaining Agreement and 8 (d) 1 of the MLS Collective Bargaining Agreement between American Airlines and the Transport Workers Union. This communication would also include all of the other TWU Represented Bargaining Agreements that exist on the LAA property with regard to the issue of Flex Vacation.

On June 5, 2014, the company informed the TWU of planned changes via a letter titled "Re: Flexible Vacations – 2015". The basic context of that letter stated that the proposed changes were due in part to the ongoing merger related activities at the company and that management had reviewed the Flex Vacation Policy and decided to eliminate that policy effective January 1, 2015. Pursuant to the specific bargaining agreement violations captioned above, it is the position of the TWU that this letter constitutes a unilateral change to the bargaining agreements outside of negotiations. Furthermore, it is also the position of the Transport Workers Union that the appropriate venue to have had these discussions was during the most recent 1113 Bankruptcy negotiations.

- Lastly, Flex Vacation has been a long standing benefit to the TWU membership that is wholly self-funded by those who utilize the requested vacation time. The TWU disputes the decision made by the company with regard to Flex Vacation and we hereby grieve and appeal this matter under the terms of Article 29d. Due to the high profile nature and importance of this issue, we request American Airlines to reconsider its decision. Failure to reach a satisfactory solution will result in the TWU taking this dispute to expedited 29(d) arbitration."

* * *

Company's Response:

"This letter will serve as the Company's response to the TWU International 29(d) grievance filed on June 5, 2014. The grievance

STANLEY H. SERGENT
ATTORNEY • ARBITRATOR

alleges that the Company's elimination of its Flex Vacation Policy, effective January 1, 2015, violates Article 8(c)(1) of the M&R agreement and 8(d)(1) of the MLS agreement.

After a thorough review of the grievance, I find no violation of the contract. The option of flex vacation has been offered through a Company policy which was applied to a broad group of employees, both contract and non-contract. TWU represented employees were offered this option in the past as a result of this Company-wide policy, not because the Company is contractually obligated to provide flex vacation. Article 8(a) reflects the parties' agreement as to the vacation allowance; it does not provide for flex vacation. In fact, no where does the contract provide that flex vacation is contractually required. Articles 8 (c)(1) and 8 (d)(1) of the agreements referenced in the grievance do not provide otherwise; these sections merely reflect the parties' agreement that the selection and timing of flex vacation, if offered, shall be distinguished from the selection and timing of contractually required vacation.

Based on the above, the grievance is respectfully denied."

* * *

The grievance was processed through the steps of the grievance procedure and when no agreement could be reached, the Union invoked arbitration. A hearing was conducted by the System Board at Hurst, Texas on September 9, 2014. In the course of the hearing both parties were afforded ample opportunity to present evidence and to cross-examine witnesses called by the opposing party. The hearing was recorded by a stenographer and a copy of the transcript was provided to the parties and the System Board. Upon receipt of post-hearing briefs the record was closed pending the issuance of this opinion and award.

II. THE ISSUE

At hearing the parties stipulated to the following formulation of the issue:

> Did the Company violate Article 8 (C)(1) of the M&R Collective Bargaining Agreement and Article 8 (D)(1) of the MLS Collective Bargaining Agreement by discontinuing the Flex Vacation Benefit effective January 1, 2015? If so, what is the appropriate remedy?

III. RELEVANT CONTRACT PROVISIONS

M&R CBA

ARTICLE 8 - VACATIONS

> **(b)** The pay for vacation will be at the employee's base hourly rate at the time the vacation is taken.
>
> **(c)** Preference for the period in which an employee will be permitted to take his vacation will be granted within each station, building, dock/shop, or other vacation work unit in the order of Company seniority provided, however, that vacation schedules may be so arranged within each work group or section as will not interfere with the requirements of the service. The Company will post requests for vacation preference for the following year on Company bulletin boards not later than October 15th of each year; and an eligible employee will list his preference not later than November 15th. The vacation periods will be assigned and posted on Company bulletin boards by December 1st, whenever possible. Any employee not expressing a preference will be assigned a vacation, if eligible. Except in an emergency, an employee's vacation will commence immediately following his regularly scheduled days off.
>
> > (1) The Company will post requests for Flex vacation preference for the following year on Company bulletin boards or other appropriate methods. Flex vacation bidding will commence on November 15th with all bidding completed no later than December 15th.

MLS (Stores) CBA

ARTICLE 8 – VACATIONS

(d) Vacation allowances will not be cumulative and vacation time to which an employee becomes entitled on December 31 of any calendar year will be forfeited unless taken during the following year. However, if an employee is requested by the Company in writing to forego his vacation during the year in which it is to be taken and has not received it by the end of that year, the employee will be entitled to his deferred vacation during the succeeding calendar year or to pay in lieu of same at the option of the employee, subject to the requirements of the service.

(1) The Company will post requests for Flex vacation preference for the following year on Company bulletin boards or other appropriate methods. Flex vacation bidding will commence on November 15th with all bidding completed no later than December 15th.

ARTICLE 29 – REPRESENTATION

(d) An International Representative of the Union or designated Company official who believes that any provision of this Agreement has not been or is not being properly applied or interpreted and which has not yet become the subject of an actual grievance will have the right within ten (10) calendar days after the alleged misapplication or misinterpretation has been ascertained to protest such violation, in writing, to the other party, who will evaluate such protest and render a decision in writing within fifteen (15) calendar days. Disputes in respect to actual grievances will be handled exclusively according to the provisions of Article 31, Grievance Procedure.

This provision will also apply to a Local President with respect to improper application or interpretation of this Agreement affecting a group of employees within the jurisdiction of his Local Union. The protest will be filed with the appropriate Chief Operating Officer of the Company.

IV. SUMMARY OF THE EVIDENCE

The first witness called by the Union was Ed Koziatek, who began his employment with the Company as a Mechanic in 1956. During his employment he was active in Union affairs and held various offices, including that of President of the Local Union from 1976-79, after which he became an International Representative. He became a Vice President of the International Union in 1983 and served as Chairman of the Negotiating Committee for the Union for the next eighteen years until he retired in 2001. During that time he was involved in the negotiation of TWU Contracts for 1989, 1991 and 1995.

Koziatek testified that during the negotiations for the 1989 contract the Company proposed that the members of the bargaining unit share the cost of the benefits that were provided under the various benefit plans. Under that proposal employees could select the benefits they desired and, dependent upon the package selected, could potentially have funds left over for their use. On August 25, 1989, Koziatek sent a letter to all of the Local Union Presidents transmitting a policy that had been devised by the Company regarding Flex Vacations. The last paragraph of that letter reads as follows:

> "One problem I can see is that Flex Vacation solicitation may not be completed until the end of October, while our Contract calls for selection to start by October 15. This will require the estimating of Flex Weeks. As you know, although the Flex Vacation was a feature of the Flex Benefits Plan and we did not seek or negotiate this provision, some members have expressed an interest in it."

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ATTORNEY • ARBITRATOR

Koziatek noted that the Flexible Benefits Program went into effect in January of 1990 and is described in the Employee Handbook as follows:

> "The Flexible Benefits Program, which went into effect January 1, 1990 allows you, as an eligible employee, to tailor a package of benefits to your individual needs, while enjoying the advantages of favorable group coverage rates and of tax-free treatment on many of your selections. This Program recognizes that your situation differs from every other employee's and you have different coverage needs. You choose what's right for you and depending on the options you choose you could end up with more money in your paycheck or you may contribute additional amounts to buy a higher level of coverage."

The 1990 Employee Handbook also contains the following provision pertaining to vacation buying:

> "Vacation buying is an employee benefit effective January 1, 1990, with the Flexible Benefits Program. It allows you, as an eligible employee, to add to your regular earned vacation time by buying up to 5 additional days at your regular rate of pay."

The Handbook goes on to describe how the Vacation Buying Policy works and how the cost thereof is determined.

Koziatek testified that in December, 1991 the Company entered into an agreement with the President of the Local Union at Tulsa to shut down all Base Maintenance Operations at that location for a Christmas Vacation. According to Koziatek, the Company felt that it had the right to enter into such an agreement with the Local Union. In response the International filed a 29 (c) grievance challenging the Company's right to enter into such an agreement. The dispute was ultimately submitted to arbitration before Arbitrator William Eaton, who ruled that the Company

did not have the right under the Agreement to change employees' previously assigned vacations at the Tulsa Maintenance Base to a period specified by the Company. He also held that the Local Union did not have the authority to negotiate the 1992 Christmas Vacation Agreement with the Company. However, he found that under the circumstances of that particular dispute the Company had the right to rely upon the 1992 Christmas Vacation Agreement with the Union. In a subsequent dispute that was decided by the same Arbitrator in November, 1992, the Arbitrator rejected the Company's argument that it had the right to close the Base for vacation purposes. He also held that the Company did not have the right to assign specific vacation periods for the work force at the Tulsa and AFW Maintenance Bases.

Koziatek further testified that in August, 1995, he negotiated an Agreement with the Company which allowed for a base closure during the Christmas Vacation period. He stated that a similar understanding was reached between the parties for the following Christmas Vacation period.

Gary Yingst began his employment with the Company as a Mechanic in 1985. He became involved in Union activities soon thereafter and held a variety of offices, starting with that as a Shop Steward from 1986 to 1994 and progressing to the position of International Vice-President and International Representative in 2001. As such he was directly involved in negotiations pertaining to the 2001 and 2003 CBA's.

Yingst noted that in March, 2001, an Agreement was reached between the Company and the Union regarding the closure of the AFW and TUL Maintenance Bases for one week during the Christmas holiday period. Although employees were required to take vacation during that period, they could not be forced to do so if they had pre-scheduled vacation.

Yingst further testified that he participated in the 2003 restructuring negotiations at which time the Company asked the Union to forego any wage increases for that year. When the Union objected to that proposal it was given access to books and records from which it determined that the Company was on the verge of bankruptcy and was attempting to avoid it. In response the Union agreed to a number of concessions, one of which was to reduce the maximum number of weeks an employee could accrue vacation from 7 to 6. He stated that the total value of concessions given to the Company was in excess of $624 million dollars. In addition, as a cost cutting measure some 1,100 employees were laid off. Yingst also noted that in response to concerns that had been expressed by employees who were being asked to give up a week of vacation in 2003 that they had already earned, an Agreement was reached which provided in pertinent part as follows:

> "For those employees, who as a result of the deferral and adjusted accrual do not have a week of vacation for 2004, can take time off without pay through a CS arrangement. We understand that for employees to work an entire year or more without a scheduled

vacation should have time off and therefore strongly encourage those employees to utilize the Flex Vacation option which will be made available in October, 2003 for 2004 vacation."

John Hewitt began his employment at Tulsa as an Aircraft Mechanic. He became involved in Union activities a few years later and progressed to the position of Chairman of Maintenance, which he held from 2010 to 2013. In connection with Hewitt's testimony a document entitled "2011 Base Closure Questions and Answers" was introduced into evidence. He explained that it is a document that is published on an annual basis for the purpose of answering employees' questions concerning vacations in connection with base closures. He stated that one common question pertained to employees who did not have vacation available for a base closure. The document provides the following answer:

"Answer: Employees that do not have enough vacation available due to transferring into Tulsa from another Station or because of their hire in date will be provided the opportunity to work the base closure, take PV days or utilize POH at their option. All other employees must select it, as a volunteer should be coded as VC, FV, PV or POH."

Hewitt testified that when he was hired in 1980 he was told that one of his benefits would be the right to "purchase vacation time". He stated that although the subject of "vacation buying" is set out in the Employee Handbook he considered it to be a condition of employment and a contractual benefit.

Hewitt noted that during 2012 negotiations the Company's final best offer to the Union was presented to the membership on or about May 5, 2012. It contains the following change regarding vacation:

> "Modify Article 8 to provide Flex Vacation language stating that bidding will be completed no later than December 15. Employees must bid regular vacation first and then bid Flex Vacation weeks.
> - Flex weeks will be available after number of weeks purchased are identified."

Hewitt noted that the savings to the Company resulting from the change in benefits relating to Flex Vacations was substantial.

Tony McCoy was hired by the Company in March, 1990, and became a Shop Steward that same year. He subsequently progressed through various Union offices, including Section Chairman, Executive Board, Recording Secretary and Staff Specialist. He is currently an International Representative.

McCoy testified that he was provided a copy of the Employee Handbook when he was hired in 1990 and understood that one of the benefits that it provided was Flex Vacation and the right to buy vacation time. He stated that he purchased Flex Vacation on a regular basis over a period of fifteen years until he became employed on a full-time basis by the Union. Based on that history he considered the benefits contained in the Employee Handbook to be a term of employment.

McCoy was involved in the 2003 negotiations. He denied that the Company requested the Union to give up Flex Vacations at that time. He

further testified that the Company offer that was presented to the Union membership in May, 2012 contains vacation changes that were proposed by the Company regarding the rescheduling of Flex Vacation and reducing the number of days available for that purpose. He stated that these proposals never reflected any intent by the Company to eliminate Flex Vacations. Moreover, to his knowledge there were no discussions between the parties to that effect.

McCoy testified that the Union first became aware of the Company's intent to eliminate the Flex Vacation Policy when it received a letter dated June 5, 2014, from James Weel, the Company's Managing Director of Labor Relations. It reads as follows:

> "Since the merger close, the Company has been in the process of harmonizing Company policies and procedures so as to eventually have a universal solution that will apply across the combined employee groups at the new American.
>
> As with any merger, consolidating policies is difficult. The Company recently reviewed the Flex Vacation policy and has decided to eliminate the policy as of January 1, 2015. The decision to eliminate the policy was difficult and we understand that it will be disappointing to many employees. Extending this policy to a workforce the size of the new American however, is simply not practical or competitive within the industry. Allowing an additional week of vacation for tens of thousands of employees could put additional stress on the operation and/or coworkers. Thus, the Company has already announced the discontinuation of Flex Vacation for management and support staff, and will announce to other workgroups, including agents, representatives, planners, and contract workgroups later today. This letter is to inform you that Flex Vacation will be eliminated, effective Jan. 1, 2015, for all TWU-represented employees. Again, this was a difficult decision."

Tricia Herschell was the first witness called by the Company. She became employed in 1991 and has been in Human Resources since 1996. She is currently the Managing Director of Human Resources Business Partners.

Herschell testified that the Company Policy pertaining to Flex Vacation applies to all ground personnel, including both labor and management, but does not apply to flight crews. In regard to how the procedure works, she explained that employees are allowed to select on an annual basis the number of days of Flex Vacation they intend to use. If, for example, they select five days the total amount of that vacation benefit will be deducted in equal amounts from the employee's paycheck during the following year. She noted that the Flex Vacation Policy is published in the Employee Handbook and has been published in an electronic form since 2000. It is currently accessible to employees on line at the JetNet Portal.

Herschell noted that under the terms of the Employee Handbook in which the provision for Flex Vacation appears, the Company reserves the right to make unilateral changes in such policies. In that regard, the Employee Handbook Notice provides in pertinent part as follows:

> "American Airlines reserves the right to amend, change, or cancel this Handbook or any other practice, program, plan, administrative guide or any part thereof at its discretion. Such materials, including this Handbook, are statements of the Company's intent. From time to time, you may receive updated information concerning changes in policy. These materials are not contracts or

assurances of compensation, continued employment, or benefits of any kind."

Herschell also noted that the regulations that are published by the Company for the benefit of supervisors reserve the Company's specific right to amend, change, or eliminate such regulations at the Company's discretion. She noted that a similar right specifically appears in a document pertaining to a consolidation of policies, as well as the Log-In Service for the Web Site. She noted that although the Flex Vacation Policy is on the Web Site, it is nonetheless subject to the disclaimer language under which the Company reserves the right to change or eliminate it.

Mark Nelson began his employment with American in 1983 and worked as a Fleet Service Clerk for about ten years. During that time he held several Union offices including that of President of the Local Union. He has been in management for several years and currently holds the position of Senior Manager in Labor Relations Technical Operations.

Nelson testified that he was a spokesman for the Company during the 2012 negotiations and participated in all the sessions that led to the Contract provision in question. He stated that the language pertaining to Flex Vacations was proposed by the Company. It provides as follows:

"5. Modify Article 8 to provide Flex Vacation language stating that bidding will be completed no later than December 15. Employees must bid regular vacation first and then bid vacation Flex weeks.

Flex weeks will be available after a number of weeks purchased are identified."

Nelson stated there was no discussion regarding this proposal at the time it was presented but the Union subsequently submitted a counter proposal in which it agreed to change the Flex Vacation language. As a result, the parties reached an agreement regarding the timing for bidding for Flex Vacation. In particular, the bidding had to be completed by December 15. Nelson noted that the language that appears in the Agreement pertaining to the posting for the Flex Vacation preference and the completion of bidding no later than December 15 was proposed by the TWU. He stated that although the Company agreed with this proposal it never intended to make bidding a contractual right.

On cross-examination Nelson agreed that the Company would not have an obligation to post for vacation preferences if there had been no agreement concerning Flex Vacation.

Jim Weel began his employment with the Company as a Fleet Service Clerk in Chicago in 1983. He subsequently became a Supervisor in Ramp Services and became involved in negotiations and contract administration at DFW in 1992. He became Managing Director for Labor Relations in 1998 and since that time has been responsible for the administration for eight labor agreements with TWU.

Weel testified that both of the CBAs in this case address base closures during the Christmas holidays. They also provide that employees who are not able to select vacation or Flex Vacation will be allowed to work during such holidays. He stated that it was not the intent of this contractual provision to make Flex Vacation a contractual benefit because that has always been a matter of Company Policy. He added that during discussions with the Union concerning the Flex Vacation benefit the Company focused entirely on how it would work. They engaged in no discussions regarding making it a contractual right. He added that the Union never indicated that it interpreted the provision as being a contractual right.

Weel noted that the provision for PV (Personal Vacation) was recently negotiated out of the CBA. He explained that this issue pertained to a contractual benefit that could not be eliminated unilaterally. He noted, that, in contrast, Flex Vacation represents a Company Policy that can be eliminated by the Company without the need for bargaining or the acquiescence of the Union.

V. DISCUSSION AND DECISION

The parties are in agreement that the issue to be resolved herein is whether the Company violated Article 8 (c)(1) of the M&R CBA, or Article 8 (d)(1) of the Stores CBA, by discontinuing its Flex Vacation Policy

effective January 1, 2015. As the Board has noted on several occasions in the past, whenever a case involves a contract interpretation issue the Union, as the party alleging the contract violation, must bear the burden of proof. To meet this burden it is incumbent upon the Union to convincingly establish that the action on the part of the Company that is being challenged is in conflict with some mandate or limitation, either express or implied, in the CBA. In the present case that translates into a burden on the part of the Union to prove that the Company's decision to discontinue its Flex Vacation Policy is in violation of either a specific provision of the CBA or a binding past practice.

The main thrust of the Union's argument is that since the time of its implementation as an employee benefit in 1990, the Flexible Vacation Policy has been continuously applied as a benefit, and, as a result, has become a condition of employment. According to the Union, notwithstanding the fact that no provisions specifically pertaining to flexible vacation benefits have ever appeared in the CBA, by virtue of its long-standing status as a part of the benefit package that is provided to employees it has become a binding practice which cannot be changed or discontinued unilaterally by the Company.

After due consideration of the evidence concerning the history surrounding the implementation and application of the Flex Vacation Policy, the Board finds no support in either the language of the CBA or in

the evidence pertaining to an alleged past practice for the Union's claim that the Company is obligated to provide Flex Vacation on the grounds that it has become a condition of employment. To begin with, the language of Article 8 (c)(1) of the M&R Contract, and 8(d)(1) of the Stores Contract, which are the only contract provisions alleged in the grievance to have been violated, has clearly not been violated. Rather, the plain and ambiguous language of those provisions confirms that they in fact do not provide a contractual right to Flex Vacation.

Since there is no ambiguity in the language, fundamental principles of contract interpretation require that its plain meaning be applied rather than construed. The wording of the provisions make it unmistakably clear that they only address the timing for posting Flex Vacation benefits for bidding purposes, as contrasted to the timing for posting of contractual vacation requests for bidding purposes.

As the Company aptly noted, if the language of the CBA at issue was intended to provide for or grant Flex Vacation then, at a minimum, they would have to identify the number of flex days that were being provided – as is the case for any similar type of benefit that is provided by the CBA. Accordingly, by application of the plain meaning rule mentioned above, Article 8(c)(1) and 8(d)(1) must be read as only addressing the timing of the bidding for Flex Vacation to the extent that it is provided for

by Company policy and not as actually granting a contractual right to Flex Vacation.

Another well-recognized principle of contract construction that is equally applicable to the contract language at issue herein is the rule that "a document should be read to give effect to all of its provisions and to render them consistent with each other". When this principle is applied to the language of the two Articles as a whole, as opposed to on a piece-meal basis, it is abundantly clear that there was no intent on the part of the negotiators to provide for a right to Flex Vacations.

In regard to that issue it must be noted that in both CBAs the provisions cited by the Union in the grievance (i.e., 8 (c)(1) and 8(d)(1)) only address the time for posting and bidding of Flex Vacation. Notably, Section 8 (a) in Article 8 is the sole provision that actually grants employees a vacation allowance by expressly and directly stating: "Employees will become entitled to and receive vacation allowance in accordance with the following: " That same section in both contracts then proceeds to identify the exact vacation allowance to which each employee will be entitled, which is based on length of service, whereas Flex Vacation is not even mentioned.

The parties did add a counterpart to 8(b) and 8(c) in both CBAs, but as previously explained, it only addresses the timing for posting and bidding for Flex Vacation. It did not add a counterpart to those provisions

STANLEY H. SERGENT
ATTORNEY • ARBITRATOR

making Flex Vacation a contractual right by providing for an actual Flex Vacation allowance. Thus, when Article 8 in both CBAs is read as a whole, the only conclusion that can properly be drawn is that it confirms that if the Union wanted a contractual entitlement to Flex Vacation, it would have needed to negotiate it as an addition to the CBA and as a counterpart to Article 8 (a) regarding Flex Vacation.

In addition, any lingering doubt concerning the meaning and intent of Article 8 (c)(1) and 8(d)(1), can be resolved by referring to the evidence concerning bargaining history. Although the Union presented no testimony concerning the issue, the Company presented two members of management who were directly involved in the contract negotiations and provided specific information on the subject of intent. The first was Evita Rodriguez, who was on the team who developed the idea of adding these provisions, and the other was Mark Nelson, who was one of the lead negotiators for the Company, was present for every session in which the addition of these articles was discussed, and drafted the final contract language. As both witnesses explained, the parties agreed to add Article 8 (c)(1) and 8 (d)(1) solely to address the administrative issues related to the timing of the bidding for Flex Vacation. They further explained that the parties had no intent whatsoever to convert flex vacation into a contractual right guaranteed by the CBA, and consequently, the

discussions during negotiations were focused solely on the fact that the language addition represented an administrative fix.

It is also important to note that the Union was unable to point to anything that took place during those negotiation sessions that suggested in any way that by adding these provisions the Company was somehow surrendering its right to cancel its Vacation Policy as specified in every single document in which it is mentioned, thereby establishing a contractual right to Flex Vacation formembers of the bargaining unit. If that had been the parties' intent, there undoubtedly would have been some discussion to that effect. Thus, the absence of any evidence of such a discussion undermines the legitimacy of any argument that such a change had been intended. It also defies logic that the Union would have negotiated a provision making flex vacation a contractual right for two of the TWU – represented work groups, but excludes members of the other five work groups from entitlement to such a benefit.

The only remaining issue concerns the Union's argument that by virtue of the fact that the Flex Vacation benefit has been continuously provided to employees for the past twenty-five years it has become a binding past practice which cannot be discontinued unilaterally. This argument is found to be without merit for two reasons. First of all, as it is traditionally defined and understood, in order to establish a past practice or condition of employment, there must be evidence of a consistent and

unequivocal response to a set of circumstances over an extended period of time that is accepted by both parties as an implied term of the CBA. As authors Elkouri & Elkouri explain in their authoritative treatise, How Arbitration Works, "mutuality refers to the requirement that a past practice is binding on the parties only when the circumstances ensure that it has been understood and accepted by both parties as an implied term of the Contract." It is also axiomatic that the party claiming the existence of the practice must bear the burden of proving that the practice is the product of a mutuality of obligation and commitment for the future.

The fact that such an understanding has never existed is clearly demonstrated by the evidence showing that in every document distributed by the Company concerning its Flex Vacation Policy, the Company has consistently stated expressly and unequivocally that it reserves the right to amend or discontinue the Policy at will. Moreover, given this reservation, even though Flex Vacation is mentioned in the Employee Handbook and is generally considered to be an employee benefit, it clearly has not achieved the status of a contractually required benefit.

Second, even assuming for the sake of argument that the past practice relied upon by the Union did in fact exist, the dramatic change in circumstances, as reflected by the Company's merger with US Airways, would constitute a change of circumstances of sufficient magnitude to relieve the Company of any past practice obligation related to Flex

Vacation. In that regard it is a well-recognized principle that "once the conditions upon which a past practice has been based are changed or eliminated, the practice may no longer be given affect." In the present case the Company had a work force of approximately 70,000 employees and was confronted with the challenge of integrating and harmonizing its Flex Vacation Policy after adding 45,000 new employees, who had no such policy. The fact that this constituted a significant and dramatic change in circumstances which would justify the elimination of the Policy cannot be legitimately disputed.

In conclusion, based upon the reasoning set out above, the Board finds that the Union has failed to meet its burden of proving that the Company's decision to discontinue the Flex Vacation Policy is in violation of the CBA. The evidence reflected by the record as a whole clearly shows that the Flex Vacation Policy was not the product of negotiations between the parties, nor did it evolve as a matter of past practice. Instead, it shows that from the outset it has always been included as a benefit that was listed in the Company's Employee Handbook and that the same document also contained a statement which communicated to all employees, in clear and unambiguous language, the fact that the Company could cancel the Flex Vacation Policy at will. Contrary to the Union's assertion, nothing in the language of the two CBAs that has been relied upon by the Union eliminated the Company's right to discontinue

the Policy or to transfer Flex Vacation into a contractual right for members of the bargaining unit. Accordingly, the grievance is without merit and must be denied.

AWARD

In accordance with the foregoing opinion and for the reasons set forth therein, the grievance is denied.

12/9/14
Stanley H. Sergent Date
Neutral Chairman

12/16/14
Gary Shults, Date
Union Board Member
Concur/Dissent

12-15-14
Taylor M. Vaughn, Date
Company Board Member
Concur/Dissent