

**ARBITRATION PROCEEDINGS BEFORE THE
NWA - AFA SYSTEM BOARD OF ADJUSTMENT
AFA GRIEVANCE NO. 88-77-02-336-07**

In the Matter of the Arbitration Between

Northwest Airlines, Inc.

- and -

Association of Flight Attendants

Subject: Letter #35 Me-Too Covenant

System Board of Adjustment

David R. Driscoll, NWA Board Member
Scott Goodman, AFA Board Member
Dana Edward Eischen, Impartial Chair

Appearances

For the Company:

Paul Hastings Janofsky & Walker LLP
By John J. Gallagher, Esq.

For the Association:

Guerrieri, Edmond, Clayman & Bartos, P.C.
By Carmen R. Parcelli, Esq.

PROCEEDINGS

On July 7, 2007, the Association of Flight Attendants (“AFA”) became the certified representative of flight attendants employed by Northwest Airlines, Inc. (“Northwest” or “NWA”). The present dispute arises under the terms of the AFA/NWA collective bargaining agreement (“CBA”), effective May 11, 2006, for the duration July 31, 2006-December 11, 2011. Those Parties designated me to chair this System Board of Adjustment to hear and decide AFA Grievance No. 88-77-02-336-07, filed in connection with four side letters (Joint Exhibits 5, 6, 7 and 8), entered into between NWA and the Air Line Pilots Association, International (“ALPA”), in Summer 2007. The matter was heard before the System Board at Eagan, MN on March 31-April 2, 2009, with both parties represented by Counsel. Following receipt of the transcribed stenographic record of the hearings, the record was closed with the submission and exchange of briefs and reply briefs.

PERTINENT CONTRACT PROVISIONS

LETTER 35

Subject: Conditions and Covenants

Reference: Section 32 - Amendment of Agreement

* * *

THIS AGREEMENT is entered into by and between Northwest Airlines, Inc. a Minnesota Corporation (the "Company") and the Flight Attendants in the service of Northwest Airlines, Inc. as represented by the **Association of Flight Attendants - CWA, AFL-CIO** (the "Union").

1. Conditions

Notwithstanding any provision to the contrary in this Agreement, the terms of the new Flight Attendant Agreement ("2007 Flight Attendant Agreement") contemplated by the AFA Restructuring Agreement shall become effective only upon the occurrence of the following:

A. The Company implementing, through binding agreement, or legal unilateral authority, revisions to (i) the labor contracts of the Company's other unionized employees and (ii) the wages, benefits and working conditions of the Company's non-union employees so that the aggregate revisions in (i) and (ii) are reasonably projected to produce \$1,126 million in

average annual savings in labor costs from January 1, 2006 through December 31, 2010 (excluding any implementation, severance, or separation program costs). The aggregate savings shall exclude any net savings attributable to pension plans but shall include the following: savings achieved as a result of the current 1113/1114 restructuring negotiations; savings under the pilot Bridge Agreement dated November 22, 2004; savings, net of outsourcing costs, realized through imposition of terms imposed on AMFA represented employees on August 19, 2005; savings from costs reductions imposed on the Company's non-union employees;

* * *

2. Covenants

A. The Company agrees that it will not provide or agree to, without offering a comparable arrangement to the AFA, (i) any profit sharing program, incentive program, stock option plan, or any other form of financial return for any unionized employees which, in the aggregate, net of any offsetting labor cost savings, materially diminishes the value of the \$1,126 million in average annual savings in labor costs set forth in Paragraph 1 above, or (ii) any pension or retirement plan benefits for any union employees which, in the aggregate, net of any offsetting labor cost savings, materially diminish the value of the \$1,126 million in average annual savings in labor costs set forth in Paragraph I above, and which are materially more favorable than (i) the replacement plan provided to Flight Attendants under this Letter of Agreement, and (ii) other Defined Contribution Plans provided at other network carriers to the equivalent class or craft of employees whose plan is being challenged as providing a materially more favorable benefit, Should the Company's defined benefit plans terminate, any savings in pension contribution costs generated by such termination shall not be used to offset or refund the labor cost reductions causing any union to fall below the required applicable labor cost reductions. Costs related to severance or early separation programs will not be considered to diminish the value of average annual labor costs savings. The Company shall provide sufficient relevant information necessary to perform an audit of the terms referred to herein. Disputes over any violation of this provision shall be resolved pursuant to the Expedited Board of Adjustment Procedures contained in Section I of the AFA Agreement.

B. If in connection with the Company's labor cost restructuring process in Chapter 11, the Company concludes any agreement with the IAM, ALPA or AMFA on matters related to equity compensation (other than the rights regarding administrative or general unsecured claims agreed to by the parties) to be paid to employees represented by any of those unions that is more favorable to those unions than the agreement reached with AFA, those more favorable terms shall be automatically applied (on a proportionate basis) to AFA represented employees subject to AFA's agreement to concessions which are comparable to those agreed to by such other union as part of the Company's labor cost restructuring process in Chapter 11 and which occasioned the Company's grant of equity compensation.

SUBMITTED ISSUES

1. Did ALPA/NWA Letter Agreements 2007-3, 2007-4, 2007-06 and 2007-07 violate Letter of Agreement 35 of the NWA/AFA Collective Bargaining Agreement?
2. If so, what is the appropriate remedy?

BACKGROUND

At least a year before NWA's September 14, 2005 declaration of bankruptcy under Chapter 11, the Carrier was engaged in contract negotiations seeking collective bargaining agreement concessions from its unions, including ALPA, the International Association of Machinists ("IAM") and the Professional Flight Attendant Association ("PFAA"), AFA's predecessor as the certified bargaining representative of NWA flight attendants. In 2004, NWA and ALPA reached the "Bridge Agreement," which provided the Company with \$250 million in annual labor cost saving, but no such pre-bankruptcy agreement was reached with PFAA or the IAM.

After filing for Chapter 11 bankruptcy, NWA commenced the concessionary bargaining process with each of its unions, in accordance with 11 U. S. C §1113. Under §1113 of the Bankruptcy Code, the debtor may ask the bankruptcy court for authority to reject labor contracts and through that process management can seek to modify any provision in a labor contract. However, the statutory process requires the debtor employer first to attempt negotiations for modification of existing collective bargaining agreements, "as necessary" for the successful reorganization of the employer, "based on the most complete and reliable information available at the time" and treating all affected parties "fairly and equitably". *Id.* Only if the debtor and a union representing employees exhaust that negotiating process without achieving consensual modifications may the employer in bankruptcy petition the court for authorization to reject a collectively bargained agreement.

In March 2006, NWA and PFAA reached a tentative agreement on consensual modifications to the existing flight attendant CBA, but that restructuring agreement subsequently failed when 80% of the covered employees voted against ratification. On July 7, 2006, AFA became the certified representative of NWA flight attendants and ten days later NWA and AFA reached a tentative restructuring agreement which also was rejected in a ratification vote by the flight attendants. At that point, NWA invoked permission previously granted to it by the Bankruptcy Court to impose

modifications to the existing flight attendant CBA, effective August 1, 2006. In response, AFA announced its intent to strike, but was ultimately enjoined from doing so.

Eventually, on the eve of NWA's May 31, 2007 exit from bankruptcy, NWA and AFA achieved a ratified CBA covering the period July 31, 2006-December 31, 2011. Among other things, that AFA/NWA CBA provides Northwest with its targeted \$195 million in annual labor cost savings from flight attendants, subject to several conditions and covenants, including Letter 35, *supra*. In the meantime, ALPA and NWA had agreed to Restructuring LOAs 2006-01 and 2006-02, which became effective August 1, 2006 after ratification by the pilot group. For the 2007-2010 term of those LOAs, ALPA agreed to provide NWA with average annual pilot labor cost savings of \$358 million, over and above the \$250 million in cost savings provided in ALPA's earlier Bridge Agreement.

During the Fall and Winter of 2006, ALPA representative repeatedly warned NWA management that the Carrier had misjudged the operational impact of the pilot contract changes in bankruptcy and had set the stage for an impending manpower crisis due to pilot understaffing. During preliminary discussions in December 2006 about heading off this problem, ALPA negotiator Patrick Brennamen ("Brennamen") pointed out to NWA negotiator Robert Brodine ("Brodine") that Northwest was "operating [at the] red line" with pilot staffing and predicted that unless work rule changes were made those staffing problems would produce a crisis during the looming peak travel Summer months. Brodine acknowledged the staffing problems and indicated interest in negotiating a solution with ALPA on a "cost-neutral basis". Bilateral talks between ALPA and NWA for that purpose foundered in January 2007 when disagreement over differing valuations of various proposed *quid pro quo* "give" and "takes" under discussion could not be reconciled.

Those discussions resumed with new intensity in late April 2007, shortly after NWA closed a transaction to purchase Mesaba Aviation, Inc. (“MSA”) and announced plans to operate MSA as a wholly-owned subsidiary under the terms of a separate ALPA/MSA collective bargaining agreement; including transferring CRJ-200 aircraft from Pinnacle to Mesaba and placing at MSA CRJ-900s that NWA previously had committed to purchase. A critical component of the context in which that Spring/Summer 2007 bargaining occurred was ALPA’s active appeals to arbitration of several contract grievances alleging violations by NWA of the ALPA/NWA CBA Scope clause. Prominent among those pending grievances was a February 2007 Scope clause grievance filed by ALPA to block NWA’s announced intent to purchase MSA and operate it as a wholly-owned affiliate using transferred CRJ 200s CRJ-900s but without using Northwest pilots and Northwest pay rates. As originally filed, ALPA’s “Mesaba Grievance” was anticipatory in alleging that a Scope violation would occur if Northwest went ahead with its announced intent to purchase and operate MSA using aircraft with a capacity of more than 50 seats.

The “Mesaba Grievance” took on added significance when those contingencies became realities after NWA purchased MSA in late April 2007. Northwest began delivering the CRJ-900s to Mesaba in April 2007 and Mesaba began to train its pilots for future deliveries of the remaining CRJ aircraft which Northwest had now committed to it. Also in Spring 2007, Northwest further aggravated the mainline pilot staffing issues already simmering under the restructured ALPA/NWA CBA by increasing the amount of flying in its schedules for the peak Summer season. As predicted, NWA experienced a very large volume of flight cancellations in June and July 2007. Compared to 116 such cancellations in June 2006 and 225 in June 2008 , the Company had 1571 “carrier-caused” cancellations June 2007. NWA also saw 944 carrier-caused cancellations in July 2007, in contrast to 110 cancellations in July 2006 and 80 in July 2008. Moreover, the bulk of these June-July 2007

cancellations occurred at the end of the months, with the result that NWA was cancelling between 10% to 14% of its flights in the final week of each month, far above the normal rate of 2%. The traumatic impact of those mass cancellations in early Summer 2007 was exacerbated by inflammatory media coverage of irate passengers and by a significant increase in pilot absenteeism.

All of these factors undoubtedly contributed to NWA and ALPA eventually reaching agreement on the Summer 2007 Letters of Agreement (“LOAs”) which constitute the *gravamen* of the present grievance. On June 15, 2007, NWA and ALPA entered into LOAs 2007-3 and 2007-4, which: 1) restored open time in the bidding process, 2) defined hours flown as scheduled or actual time, whichever was greater, for each *segment* flown rather than each *trip* flown and 3) restored deadhead pay from 50% back to 100%. In the aggregate, those three restored concessions had been valued by NWA and ALPA during the § 1113 process at \$15.2 million in payroll savings annually, net of interaction, which was the same valuation these Parties attributed to NWA’s “gives” in the June 15, 2007 LOAs. The *quid pro quo* cost-offset “takes” for NWA in these June 15, 2007 LOAs were: 1) withdrawal with prejudice by ALPA of the pending “Mesaba Grievance” it had filed in opposition to NWA’s intended and actualized operation of the newly-acquired MSA as a Feeder Carrier Affiliate, including the placement of 51-76 seat aircraft at MSA and 2) a non-precedent waiver of the ALPA/NWA CBA Scope clause to expressly permit MSA to operate without using Northwest pilots and Northwest wage rates. [While in bankruptcy, MSA had also reached §1113 agreements with its unions, including ALPA, to materially reduce its own labor cost expenses, which were already less costly than the pay and rules provisions of the ALPA/NWA CBA].

For “cost-neutral valuation” purposes, NWA valued the Mesaba Grievance withdrawal and the MSA Scope clause waiver in the June 15, 2007 LOAs at \$17.2 million dollars annually, which is precisely the 8% markup (or profit margin) on the annual costs of a Fall 2006 proposal MSA management had made to NWA for cost-plus independent operation using 36 CRJ-900 aircraft that Northwest had on order for use by a commuter airline as a Northwest Airlink partner. After conducting her own independent analysis, ALPA economist Marcia Eubanks accepted that \$17.2 million annual valuation as reasonable and further advised the ALPA negotiators that the value to NWA of the Scope clause waiver might have been as much as \$ 2 million more. [The LOAs gave ALPA credit for the margin on Mesaba flying of the 36 CRJ-900 aircraft, but did not give ALPA any credit for the increasing “enterprise value” of Mesaba or for the margin which Northwest would effectively retain on an ongoing basis for Mesaba’s operation of 49 Saab aircraft and 17 CRJ 200 aircraft as Northwest Airlink flights]. On that basis, the original set of LOAs was signed on June 15, 2007, subsequently ratified by the pilot group and remains in effect under the ALPA/NWA CBA.

On August 1, 2007, NWA and ALPA entered into two additional Letters of Agreement, denominated LOAs 2007-6 and 2007-7, which reversed two additional §1113 concessions by ALPA relating to premium pay pilot compensation: 1) premium pay for instructors was reinstated in the August 1, 2007 LOAs, at an agreed valuation of \$1,718,700 annually (which is not contested by AFA in these proceedings) and 2) premium pay for pilot hours flown in excess of 80 per month-- which had been reduced from 50% to 42.5% in the 2004 “Bridge Agreement” and then eliminated entirely in the bankruptcy negotiations-- was restored to pre-concession levels [except for conditioning eligibility for the premium pay on no sick pay during the given month], at an agreed valuation in the August 1, 2007 LOAs of \$4,150,600 per year (which AFA challenges in these proceedings as “ a

60% discount from the value of \$10 million annually attributed to those premium pay concessions in the §1113 process”.

Thus, the cost to NWA of the two §1113 pay concessions restored to ALPA was valued by the Parties to the August 1, 2007 LOAs at a total of \$5,869,300, for which ALPA agreed to give NWA two offsets: 1) elimination of the ALPA/NWA CBA’s requirement for a crew bunk on flights between nine and ten hours in duration (valued by NWA and ALPA in the August 1, 2007 LOAs at \$5,569,300 per year) and 2) withdrawal by ALPA with prejudice of another Scope clause grievance concerning certain CRJ-200 flying that NWA admittedly had performed for a period of six months in 2006 in violation of §1.C.9(c)(1) of the 2004-2006 ALPA/NWA CBA (valued by NWA and ALPA in the August 1, 2007 LOAs at \$300,000 “as a 5 year average.” According to NWA, the LOAs signed by those Parties on August 1, 2007 and subsequently ratified by the pilot group were also “cost-neutral” for purposes of any other union’s “Me-Too” provisions, since the cost offset “gives” by ALPA total \$5,869,300 per year, precisely the value of the premium pay concessions restored by Northwest.

AFA subsequently filed the present grievance, alleging that the Summer 2007 LOAs between Northwest and ALPA did not contain reciprocal benefits for NWA even close in real economic value to the value of restored ALPA bankruptcy concessions, but rather constituted coerced, unilateral and unrequited “give-backs” by NWA to ALPA of prior pilot labor cost reductions. On that basis, AFA asserted a violation of the “Me-Too” provision of Letter 35 in the AFA/NWA CBA, for which it now claims contractual entitlement from NWA of \$31.1 million in unilateral give-backs of AFA’s §1113 concessions. When the matter remained unresolved through all levels of grievance handling, it was appealed to this System Board of Adjustment for final and binding determination in arbitration.

POSITIONS OF THE PARTIES

The following statements of position have been extrapolated and edited from the respective post-hearing briefs and reply briefs filed by Counsel:

The Association

In an attempt to avoid consideration of this matter on the merits, NWA urges this Board to adopt a narrow reading of AFA's Me Too provision. This reading would hold that the provision simply gives no protection to flight attendants against NWA restoring the Section 1113 contract concessions for other employee groups. However, the argument's frivolity is revealed by the fact that it is contradicted by NWA's position in this proceeding and elsewhere and its interpretation also renders the Me Too provision virtually meaningless. Such a reading is impossible to credit given the high-stakes bankruptcy context out of which the Me-Too provision arose.

In June 2007 ("LOA 1") and again in August 2007 ("LOA 2") NWA breached this provision when it agreed to a 4.5% rebate on the pilots' bankruptcy concessions relating to pilot compensation, without offering a comparable arrangement to AFA. AFA should receive an equivalent rebate on its bankruptcy concessions. NWA claims that it obtained offsetting labor cost savings from ALPA in exchange for the restored concessions but the asserted cost-neutrality of the ALPA deals is a sham. Heading into 2007, NWA was thinly staffed in terms of pilots and ALPA linked the restoration of its concessions with addressing NWA's pilot staffing problem. NWA engaged in a phony attempt to make the ALPA LOAs appear cost-neutral in order to placate its pilot group and prevent devastating flight cancellations without having to offer a comparable restoration of bankruptcy concessions to AFA.

AFA's Me Too provision required NWA to obtain \$608 million in annual concessions from ALPA through 2010, including both the \$358 million in annual Section 1113 labor cost savings and the \$250 million per year in cost savings obtained through ALPA's Bridge Agreement. The Me Too provision required that ALPA's concessions remain in place through December 31, 2010. As a result of LOA 1, however, ALPA's total concessions were reduced for a period of 42 months, from July 2007 through December 2010. LOA 2 resulted in a reduction of ALPA's concessions for a period of 40 months, from September 2007 through December 2010.

Through LOA 1, NWA restored \$15.2 million in annual concessions to ALPA without a valid offset. This restoration reduced ALPA's 608 million annual total by 2.5%. Then, in LOA 2, NWA restored \$11.7 million annually (which is equal to the original \$10 million value for premium pay over 80 hours and the \$1.7 million value of the premium pay for instructors), again without valid offsets. This further reduced

ALPA's \$608 million annual total by 2%. As a remedy, AFA is entitled to monetary relief equivalent to commensurate reductions in its annual concessions of \$195 million.

The 2.5% reduction attributable to LOA 1 is equivalent to a reduction in AFA's annual concessions of \$4.9 million per year or \$400,000 per month. The 2% reduction attributable to LOA 2 is equivalent to a reduction in AFA's annual concessions of \$4 million per year or \$333,333 per month. Accordingly, AFA is entitled to compensation as follows:

	<u>Monthly Reduction</u>	<u>Duration</u>	<u>Total</u>
LOA 1	\$400,000	42 months	\$16.8 million
LOA 2	\$333,333	40 months	\$13.3 million

Alternatively, NWA could offer to make changes to the AFA agreement comparable to those provided to ALPA. AFA would then be entitled to a monetary award based on the monthly rates set forth above for the time elapsed between the effective dates of ALPA's LOAs and the effective date of comparable changes to the AFA agreement.

The Company

The language of the AFA Letter 35 covenant limits the prohibition on Northwest – and AFA's protection – to not giving increased "financial returns" (such as profit sharing, incentive programs and stock options) to other unions. This limited and limiting language barring certain transactions clearly does not extend to Scope Rule waivers, work rule changes or grievance settlements.

AFA asks this Board to second guess and reject the valuations of four items agreed upon in collective bargaining by Northwest and ALPA in their 2007 agreements. AFA's entire case, however, is based upon one witness whose testimony was often conclusory, inconsistent and inaccurate on key points. In contrast, Northwest presented the sworn testimony of three Company witnesses who actually did the valuations for Northwest, two witnesses from ALPA who reviewed and concurred in the valuations, and one outside expert who confirmed that the valuation methods used by Northwest were consistent with industry practice. On this record, AFA falls far short of its burden to show that the collective bargaining agreements reached between Northwest and ALPA were not fairly valued through good-faith collective bargaining.

AFA goes out of its way to assign improper motives to ALPA's repeated warnings to Northwest that Northwest had misjudged the operational impact of the pilot contract changes in bankruptcy, and was therefore understaffed with pilots. When that proved to be true in late June and late July 2007, Northwest had a genuine

business problem which it needed to solve. These facts do not undermine the legitimacy of the agreements reached between Northwest and ALPA in the Summer of 2007 but rather confirm that Northwest and ALPA responded to the situation in the way that responsible labor and management should respond – by working out solutions consistent with required constraints that satisfied the needs of both parties while avoiding possible actions that did not satisfy those criteria.

AFA now tries to cast these facts in a nefarious light, suggesting that ALPA “held up” Northwest at gunpoint and that in the process Northwest surrendered its principles and its obligations to AFA. AFA’s evidence on these points falls far short of its innuendo and, despite its rhetoric, AFA has proffered no real evidence at all that the Northwest-ALPA negotiations were anything other than arm’s length, good-faith collective bargaining.

AFA would have this Board conclude that ALPA’s \$17.2 million agreement with Northwest regarding the Messaba grievance and Scope Rule flexibility was not a value-for-value exchange and was somehow the equivalent of a gift to the pilots. Yet, there is no basis in the record upon which this Board could properly conclude that ALPA’s Mesaba grievance did not have merit or that the settlement agreed to between Northwest and ALPA was other than arm’s length. AFA offered absolutely no evidence to that effect. Indeed, AFA had the opportunity to cross-examine the principal negotiators for both ALPA and Northwest, but did not even attempt to show that the Mesaba scope clause grievance was without merit. Indeed, each of those witnesses testified that the ALPA-Northwest negotiations were “good-faith,” “arm’s-length” and “difficult.” In the face of such testimony, AFA again offers only argument and innuendo.

AFA’s broad-scale attack on the NWA/ALPA valuation of their LOAs valuation is based entirely upon the testimony of a single outside expert witness, economist Dan Akins. In response, Northwest offered the testimony of three witnesses from Northwest who were directly involved in negotiating and valuing the LOAs: Bob Brodine, Ryan Gilman and Terry Mackenthun; plus two witnesses from ALPA who likewise were directly involved: Patrick Brennaman and Marcia Eubanks, as well as one outside expert, economist Daniel Kasper. Northwest’s evidence showed that the data upon which it relied for valuations was generated in the ordinary course of business and was the type of data on which Northwest regularly based its business decisions. ALPA did not blindly accept Northwest’s valuation data, but conducted its own review to determine whether it would accept Northwest’s estimates. The record made by these witnesses now confirms that AFA’s rhetoric concerning collusion and conspiracy to violate AFA Letter 35 simply is not supported by the facts. On this record, AFA falls far short of its burden to show that the collective bargaining agreements reached between Northwest and ALPA were not fairly valued through good-faith collective bargaining.

For all of the foregoing reasons, Northwest respectfully submits that the grievance should be denied.

DISCUSSION

Before slugging it out during three days of hearings over the myriad of disputed details in this complex grievance, the contenders each threw opening bell roundhouse punches intended to knock the opposing party out of the ring. NWA asked the Board to dismiss the AFA grievance for lack of substantive arbitrability without reaching its merits, on grounds that the Me-Too provision in Letter 35 was never intended to apply to Scope clause grievances, work rule and pay rule changes, such as those effectuated by the Summer 2007 ALPA/NWA LOAs. We are not persuaded to that view of this case. The convoluted language of the Me-Too covenant is hardly a model of clarity, but nothing in this record supports a ruling that the subject of the present AFA grievance was excluded specifically from arbitration nor is there other “forceful evidence” that the parties intended that the subject in question should not be arbitrated. *See* United Steelworkers of America v. Warrior & Gulf Navigation Co., 353 U.S. 574 (1960) and AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643 (1986).

For its part, AFA urged the Board to make generic dispositive rulings that, 1) the bartered valuation of ALPA’s transaction-specific waivers of Scope clause application and withdrawal with prejudice of related Scope clause grievances awaiting arbitration as commensurate return for NWA’s restoration to ALPA of §1113 work rule/pay concessions is, *per se*, a sham transaction violative of the meaning and intent of Letter 35; on asserted grounds that “the Me-Too provision precludes an unequal exchange, whereby purely speculative value is traded for pay increases” and 2) any bartered valuation for NWA’s restoration to ALPA of §1113 premium pay concessions in Summer 2007 less than the “steady state” March 2005 value attributed to those same concession by ALPA and NWA during the §1113 bankruptcy bargaining process is a sham transaction violative of the meaning and intent of Letter 35; on asserted grounds that, *per se*, “NWA permitted ALPA to ‘buy back’ its

premium pay concession at a reduced rate. . . leaving a hole of \$5.9 million per year in ALPA's overall concessions”.

AFA's assertions that Letter 35, *per se*, prevents NWA's assignment of significant monetary value to ALPA's non-prejudicial waivers of Scope clause application to certain transactions by Northwest and withdrawal of pending Scope clause grievances challenging those transactions prior to arbitration find no support in contract language or statute and are contrary to common practice in the labor-management relations of these Parties. In that regard, the record shows ALPA has a long history of advantageously exchanging limited Scope clause relief for work/pay rules at NWA and the contractual validity and proven efficacy of such prospective waivers of Scope clause provisions for the Carrier's operations is patent. It is noted that during the bankruptcy labor negotiations ALPA received more than \$19 million per year (more than \$95 million over the five year term) in credit for similar Scope clause changes, including changes whose value was premised on revenue enhancements and that Northwest also has offered contract enhancements to AFA in exchange for targeted Scope clause relief.

AFA also contends it was a *per se* breach of Letter Agreement 35 for NWA to agree to restore premium pay (even in modified form, excluding pilots with sick calls) to ALPA at any value less than the value which had been used for the concession of this item for all pilots years ago during bankruptcy labor negotiations. The present dispute is about ¶2 Covenants, *i.e.*, whether NWA agreed to new terms with ALPA in the Summer 2007 LOAs “which, in the aggregate, net of any offsetting labor cost savings, materially diminishes the value” of the presumed ¶1 labor cost savings. [There appears to be no dispute that the ¶1 Conditions were satisfied irrespective of whether projected premium pay cost savings to NWA actually were achieved]. Nothing in this record persuades us to adopt AFA's theory that “steady state” values of items exchanged in §1113 concessionary bargaining and summarized in Letter 35 ¶1 Conditions are “freeze-framed” and immutably fixed by

contract and/or statute to the valuation of subsequent reciprocal exchanges for purposes of interpreting and applying ¶2 Covenants. We find nothing in the language of the Covenants paragraph which plainly precludes the use of actual then-current valuations in the analysis of changes to labor contract terms many years in the future and AFA offered no evidence that the intent of this language was to so restrict the valuations attached to future collective bargaining.

Since we find none of the preemptive arguments by NWA or AFA persuasive or dispositive, the Board turns to the merits of AFA Grievance No. 88-77-02-336-07. At the outset, we find not a jot of persuasive objective evidence to support the opinion testimony of AFA's witnesses that valuation of the items exchanged between ALPA and NWA in the Summer 2007 LOAs was achieved through sham negotiations, collusion or coercion rather than through good faith arm's-length collective bargaining. Rather, we credit the sworn testimony of the respective chief negotiator's for ALPA and NWA, respected professionals and veteran adversaries in dozens of hard fought and momentous bargaining battles between ALPA and Northwest spanning several decades. Mr. Brodin testified under oath: ". . .[T]here were some other items that were ultimately rejected by both sides, didn't end up being part of the package. But it was not an easy bargain." (Tr. 300). Mr. Brennaman testified under oath that the valuations agreed upon by ALPA and NWA were the "result of good-faith bargaining between the Company and ALPA" (Tr. 340:15-21) and "that's why we were willing to negotiate the settlement. . .because the only way we were going to get contract improvements was by giving an offsetting dollar amount to the Company." (Tr. 370:11-14). ALPA representative Eubanks buttressed this evidence with sworn testimony that she had independently reviewed and found within reasonable ranges NWA's valuations of the Mesaba Scope clause waiver (Tr. 449:2-450:23), Premium Pay restoration (Tr. 450:24-452:30) and 757 Crew Bunk modification (Tr. 453:1-19).

We find no reason to find other than that the monetary valuations agreed upon by the Parties to the LOAs of Summer 2007 were determined at arm's-length in legitimate bargaining, conscientiously vetted by costing experts on each side, and determined in good faith by ALPA and NWA to be "cost neutral" in terms of "gives" and "takes". Thus, our inquiry comes down to whether AFA persuasively established the claimed palpable unreasonableness of the value of what NWA gave up, in current actual terms, compared to the value that Northwest received from ALPA in return, also valued in current actual terms.

Having found unpersuasive AFA's generic valuation theories, *supra*, the Board now addresses AFA's challenge that the negotiated valuations of "gives" and "takes" exchanged between in the ALPA/NWA Summer 2007 LOAs were palpably and unreasonably slanted in favor of ALPA. There appears to be no disagreement that the work rule changes which ALPA sought and obtained in June 15, 2007 LOAs increased Northwest's pilot labor costs by approximately \$15.2 million per year. However, AFA claims that the \$5.87 million per year declared value of NWA's "give" to the pilot group of fully restored premium pay in the August 1, 2007 LOAs was understated by some \$2 million. On the other side of the equation, AFA urges this Board to reject the values agreed to by Northwest and ALPA for most of the "takes" obtained by Northwest in both sets of Summer 2007 ALPA/NWA LOAs and instead value at or near *zero* the 757 crew bunk waiver, the non-precedential waiver by ALPA of Scope clause enforcement to block NWA's operation of MSA with 51-76 seat aircraft and the related withdrawal with prejudice of the "Messaba Grievance" and the "CRJ-200 Count Grievance". As the grieving party, AFA had the burden of persuasion in this arbitration proceeding on each of those claims, but we find adequate evidentiary support in the record before us for none of those assertions and propositions.

Valuation of Over-80 Premium Pay

Premium pay for instructors was reinstated in the August 1, 2007 LOAs, at an agreed valuation of \$1,718,700 annually, which is not contested by AFA in these proceedings. In addition NWA agreed with ALPA to reinstate to pre-concession levels premium pay for credit hours earned by Northwest pilots over 80 in one month, with a new proviso that such premium pay would not be available to any pilot who had a sick call during that month. NWA initially sought to use the annual valuation agreed to during the §1113 concession bargaining process but eventually agreed with ALPA to a reduced current valuation for restoration at an agreed valuation in the August 1, 2007 LOAs of \$4,150,600 per year. AFA's principal objection to the valuation of that premium pay item is Northwest's deduction of approximately \$2.099 million attributable to reserve headcount payroll guarantee for the equivalent of seventeen reserve pilot positions, described by the bargainers as "17 equivalent heads", which equated to a 3% reduction in the number of reserves needed (0.48% of active pilots).

The record shows that in revaluing the qualified restoration of the premium pay provision, Northwest and ALPA agreed the updated current valuation of \$4,150,600 per year was appropriate because of the new sick call exclusion, because actual pilot utilization experience was now known to be significantly different from that projected in 2005 and because the airline's size was smaller in 2007 compared to March 2005. As we found, *supra*, this was not a *per se* violation of Letter 35 ¶2 simply because it was less than ¶1113 value/cost projections. Nor do we find it patently unreasonable or incriminating that one of NWA's reasons for agreement to ALPA's proposal for premium pay restoration undoubtedly was expectation that pilots would voluntarily fly additional hours each month and thereby address the Summer 2007 pilot staffing shortage.

Calculations by NWA and ALPA demonstrated that the anticipated reduction of unassigned monthly flight hours each month would save Northwest unproductive reserve guarantee pay costs in an amount *equivalent* to one less reserve head in each category of the approximately 550 active reserve pilots. Each such reserve pilot is entitled to a 75-hour monthly pay guarantee whether or not they actually flew any hours but, because reserve pilots also accrue vacation entitlement each month in addition to their pay guarantee hours, the cost savings value for each of the 17 equivalent head reserves was calculated using 81 hours. [We note this evaluation for the premium pay over-80 restoration was calculated by NWA and ALPA on the same reserve count equivalent guarantee recovery basis as the cost/value of the restoration of Open Time, to which AFA took no exception]. On the basis of the foregoing, we find nothing palpably unreasonable about the anticipated cost/value attributed to premium pay restoration in the ALPA/NWA LOAs, as of the time those agreements were made in Summer 2007.

Nor are we persuaded to AFA's view that we should find a retroactive violation of the Letter 35 Me-Too covenants simply because 20/20 arbitral hindsight might show that the annual cost/value actually realized in 2008-2009 fell short of projections which were reasonable when made by NWA and ALPA in 2007. Even in an industry somewhat inured to uncertainty, the last few years have been marked by unusual turbulence caused primarily by extreme volatility in fuel prices followed by a dramatic and persistent economic downturn. Among other consequences unanticipated in 2007, these changed circumstances accelerated the retirement of NWA's DC-9 fleet and caused shrinkage of recently expanded flight schedules. One of the negative effects was a waterfall of pilot seat and position changes which generated massive re-training and an attendant "training bubble", all of which negatively impacted projected utilization of reserve pilots and opportunities for line pilots to earn premium pay.

Valuation of 757 Crew Bunks Waiver

The record shows that ALPA agreed in the ¶1113 negotiations to waive crew bunk requirement for flights scheduled for more than eight but less than nine hours, for which it received a credit of \$5.2 million (\$1 million for the initial group of aircraft and a credit of \$4.2 million for additional aircraft). The August 1, 2007 LOAs between Northwest and ALPA included another such waiver permitting to NWA to operate narrow-body 757 aircraft up to ten (10) hours of scheduled flight time without a crew bunk, which the Parties agreed to value at \$5.56 million. That figure was calculated by NWA analysts based upon incremental network and route profitability projections generated and used by Northwest's marketing department in the ordinary course of business. The figure of \$5.6 million was arrived at by comparing the projected profitability to Northwest of the best alternative use of the same 757 aircraft on Transatlantic routes that Northwest's marketing department planned to fly with these aircraft: (a) if the crew bunk exception was successfully negotiated, *i.e.*, the three (3) routes over nine (9) but less than ten (10) hours; or (b) if the nine (9) hour maximum remained in place, *i.e.*, the three (3) routes less than nine (9) hours. ALPA economics expert Eubanks reviewed the Carrier's incremental network contribution calculations and declared the methodology and the projected valuation reasonable and acceptable.

The preponderance of record evidence shows that this incremental network contribution approach is routinely used by airlines to model network or flight profitability. As with the projection regarding premium pay, we find the 757 crew bunk waiver reasonable when agreed to in 2007 but not actually achieved because of *ex post facto* scheduling changes resulting largely from unanticipated independent variables, primarily run ups in the price of fuel and a lingering recession.

Aside from *post-hoc* or 20/20 hindsight criticism that circumstances and events which could not be anticipated in Summer 2007 did not vindicate projected valuation which was reasonable when made, an argument we have already rejected in discussing premium pay valuation, *supra*, AFA did

not persuasively establish its claims that the Summer 2007 valuation of the crew bunk concession was palpably unreasonable or a sham transaction.

Valuation of MSA-CJ 900 Scope Clause Waiver/Mesaba Grievance Withdrawal

Regarding the Mesaba issues, in December 2006 and January 2007 ALPA initially proposed a credit value of \$30 million per year in exchange for carving out Mesaba from the provisions of the ALPA/NWA Scope clause applicable to “wholly-owned affiliates.” That initial valuation, which was rejected by NWA, included the “enterprise value” of Mesaba, because ALPA anticipated NWA would turn around and simply sell off Mesaba, as it had done with another of its regional carrier partners, Pinnacle Airlines. After those discussions broke off, ALPA filed an anticipatory grievance in early February 2007, protesting as violative of the Scope clause NWA’s announced plans to purchase Mesaba and then place aircraft at Mesaba with a capacity of more than 50 seats--which did in fact occur in late April 2007. ALPA chief negotiator Brennaman testified that ALPA was confident that it had a meritorious grievance: “...[T]he Mesaba transaction and the Company’s desire to place the CRJ-900s at Mesaba was a very valuable transaction, and that if it went forward, it would violate provisions of the Scope clause that we had negotiated during the bankruptcy negotiations. And, by the way, the negotiations which led to the provisions ... which would be violated by the Mesaba transaction were ... probably the most hard fought provisions ... from ALPA’s standpoint, and with a lynch pin to the successful conclusion of those negotiations”. NWA chief negotiator Brodine testified that if ALPA prevailed in its invocation of the Scope clause against the Mesaba transaction in arbitration, relevant provisions of subsections 1, 2 and 4 of Section 1.B.7.c.(7)(d)8 would have barred NWA’s planned usage of its newly purchased MSA affiliate to fly the CRJ-900 aircraft without NWA rates and pilots and also likely would have required elimination of the Saab turboprop fleet at Mesaba.

AFA correctly reminded this Board that winning in arbitration is never a sure thing. But the record also shows that NWA Labor Counsel advised management superiors that an outcome favorable to the Carrier in the “Mesaba Grievance” was far from likely given the contract language and bargaining history. Another important part of the context for the resumed valuation discussions which led to the consummation of the June 15, 2007 LOAs, including the barter for the “Mesaba Grievance”, was ALPA’s then-recent successful arbitral judgement of another Scope clause grievance against NWA that resulted in a \$2.2 million damage award for a liability period of only five (5) months. (The so-called “Wallin Award”).

Against this contextual background, resumed bargaining concerning NWA’s commitment to going forward with the MSA transaction produced eventual mutual agreement to value at \$17.2 million ALPA’s withdrawal with prejudice of its blocking grievance and the non-precedential prospective waiver of Scope clause application to NWA’s operation of MSA as a wholly-owned affiliate, without using NWA pilots or pay rates, to fly some 36 CRJ-900 aircraft NWA had acquired or had on firm order. [MSA already had in place its own separate ALPA bargaining unit of pilot employees with a brand new separate and lower-cost collective bargaining agreement with ALPA]. While that agreement gave ALPA credit for the margin on Mesaba flying of the 36 CRJ-900 aircraft, it did not give ALPA any credit for the increasing “enterprise value” of Mesaba or for the margin which Northwest would effectively retain on an ongoing basis for Mesaba’s operation of 49 Saab aircraft and 17 CRJ 200 aircraft as Northwest Airlink flights.

In the opinion of AFA’s primary witness, ALPA’s MSA Scope waivers and grievance withdrawal had no economic value at all to the pilot group; but that begs the question at issue which is whether that “give” by ALPA had real economic value for Northwest. On that point, AFA offered no evidence at all except for additional opinion testimony that the \$17.2 million valuation was unreasonably inflated and so speculative as to be meaningless. The record plainly shows, however,

that this \$17.2 million agreed upon valuation is precisely the out-of-pocket cost NWA saved by operating MSA as a wholly-owned affiliate to fly its own fleet and the NWA-owned CRJ-900s, without retroactive or prospective application of the ALPA/NWA CBA Scope clause; as opposed to paying MSA to do that same feeder airline flying for NWA as an independent contractor at the standard 8% profit margin. In sworn testimony, ALPA economics expert Eubanks confirmed that she had independently analyzed the proposed valuation of the Scope clause waiver/grievance withdrawal relating to Mesaba and advised the ALPA bargaining team that NWA's projected value to was reasonably calculated at the \$17.2 million figure and perhaps worth as much as 10% more. AFA did not persuasively establish in this record the opinion testimony of its expert witness to the contrary that the methodology and conclusions leading to the value given by NWA in the June 2007 LOAs for ALPA's withdrawal of the pending "Mesaba Grievance" and the waiver of Scope clause application to NWA's operation of MSA, including the CRJ-900s and the Saab and CRJ-200 aircraft, was highly speculative, unsubstantiated and unreasonably inflated, if not worthless.

Valuation of the RJ Count Grievance Settlement

In the August 1, 2007 LOAs, after all the other valuations discussed, *supra*, had been agreed upon, ALPA and NWA settled upon an agreed valuation of \$1.5 million over five (5) years to settle ALPA's pending post-petition grievance claiming violation by NWA of Scope clause limitations on the numbers of Regional Jets operated by commuter or feeder carriers under the NWA Airlink name. It is a matter of record that NWA conceded liability under that grievance for the three-month period immediately preceding August 1, 2006. The Parties arrived at a compromise remedy value of \$1.5 million annually for the "RJ Count Grievance" by application of essentially the same remedy formula which had been used by the SBA in the then-recent Wallin Award of \$2.2 million for a similar Scope clause violation. The fact that the agreed valuation of \$1.5 million annually was the "plug number" which evenly balanced the books on the August 2007 LOAs on a "cost-neutral" basis arguably

avored NWA by some \$300,000, rather than the “\$1.6 million plus” value originally calculated by NWA and the \$2.2 million originally sought by ALPA, is not alone sufficient to carry AFA’s burden of proving its claim that this Summer 2007 LOA valuation was a sham transaction unreasonably weighted in ALPA’s favor triggering the Me-Too provision of Letter 35.

OPINION OF THE IMPARTIAL ARBITRATOR

In this grievance, AFA contends that the ALPA/NWA Letter Agreements of Summer 2007 were sham deals and “cost-neutral” assertions by the negotiators only a disingenuous artifice intended to mask unilateral “give-backs” by NWA to ALPA of pilot labor cost reductions, with little or no reciprocal contributions from ALPA to NWA. On that basis, AFA alleges a violation by Northwest of the “Me-Too” provision in Letter 35, for which it seeks an arbitral award directing revision of the NWA/AFA CBA by unilateral monetary concessions from NWA to AFA totaling \$30.1 million. Northwest and ALPA jointly maintain that their Summer 2007 LOAs were hard-bargained in good faith negotiations and “cost-neutral” – *i.e.*, that NWA obtained *quid pro quo* benefits from those LOAs at least equal in monetary value to the benefits provided therein to ALPA.

It is well settled that the party alleging a contract violation has the burden of proving every essential aspect of its claim by a preponderance of relevant, material and probative record evidence. *See Certainteed Corp.*, 88 L.A. 995, 998 (Nicholas, Arb. 1987); *Entex, Inc.*, 73 L.A. 330, 333 (Fox, Arb. 1979); *Portec, Inc.*, 73 L.A. 56, 58 (Jason, Arb. 1979); *City of Cincinnati*, 69 L.A. 682, 685 (Bell, Arb. 1977). In such cases, “the burden [is] on the union to prove the employer’s violation by a preponderance of the proof. This obligation has been explained as follows: “The party having the burden of proof is said to have the 'affirmative of the issue,' meaning that it is the party that would be defeated if the bare question were put to the Arbitrator and no evidence were given on either side”. *See also* Elkouri & Elkouri, *How Arbitration Works*, Sixth Edition (2008 Supplement), at Ch. 8.9.E, citing *City of Oregon*, 117 LA 236 (Klein, 2002); *Summit County Children’s Servs.*, 116

LA 1745 (VanDagens, 2002); Archer Daniels Midland Co., 111 LA 518 (Pratte, 1998) (“the burden is on the Union to prove a violation of the Agreement.”). When the record evidence is inconclusive, the presumption necessarily is against the party asserting that a violation has occurred

Fervidly expressed but not uncontradicted opinions of AFA’s expert witness that NWA and ALPA consummated collusive and coerced Summer LOAs which were not “cost-neutral”, and thus violative of the Letter 35 Me-Too provisions, simply are not substantiated by a preponderance of probative record evidence. Skepticism about circumstantial evidence and suspicions of conspiracy, even when presented through opinion testimony of an eminently well-qualified expert, are not alone sufficient to meet that requisite burden of proof. In the final analysis, AFA’s onion-peeling of the ALPA/NWA Summer 2007 LOAs revealed no rotten core and no failure of an exchange of reciprocal offsetting valuations which were reasonably projected when made. As the consummate analyst of ulterior motives and prober of concealed meanings is reputed to have observed: “Sometimes a cigar is just a cigar.” (attributed to Sigmund Freud).

A majority of this Board simply is not persuaded that Article 35 of the AFA/NWA CBA was violated in the facts and circumstances presented in this record. Accordingly, we render the Scotch verdict “not proven” and deny AFA Grievance No. 88-77-02-336-07 for failure of proof.

AWARD OF THE NWA/AFA SYSTEM BOARD OF ADJUSTMENT

AFA Grievance No. 88-77-02-336-07

1. AFA failed to prove that ALPA/NWA Letter Agreements 2007-3, 2007-4, 2007-06 and 2007-07 violate Letter of Agreement 35 of the AFA/NWA CBA.
2. Accordingly, AFA Grievance No. 88-77-02-336-07 is denied.

Dana Edward Eischen

Dana Edward Eischen, Impartial Chairperson

David R. Driscoll, NWA Board Member
Concur/Dissent

Scott Goodman, AFA Board Member
Concur/Dissent