In the Matter of:	)	
	)	
Allied Pilots Association	)	
	)	
and	)	**Darrah Presidential Grievance 02-145**
	)	
	)	**Remedy: Second Expedited Scope Grievance**
	)	**Concerning ASM/Block Hour Freeze**
	)	
American Airlines, Inc.	)	**(ASM/Block Hour Freeze III)**

System Board of Adjustment

Paul R. Barry, Company Member
Denise Lynn, Company Member
J. Bennett Boggess, Association Member
Captain Bill Slikkerveer, Association Member
Stephen B. Goldberg, Neutral Chair

Appearances

Allied Pilots Association

Edgar N. James
Marie Chopra

American Airlines

Thomas E. Reinert, Jr.
John S.F. Gross

I. BACKGROUND

This grievance grows out of those provisions of the 1997 collective bargaining agreement (Sections D.1.(4)(b)(i) and (ii)) that froze the ASMs and block hours of commuter airlines any time that American Airlines (hereafter "AA", "American", or "the Company") pilots were on furlough. The Company furloughed pilots on October 1, 2001, and in January 2002, the Allied Pilots Association (hereafter "APA") filed a grievance alleging that the Company had violated the ASM and block hour freeze provisions.

In ASM-Block Hour Freeze I, the System Board held, insofar as relevant to the instant proceedings, that:

- The appropriate period for determining whether the Company is in compliance with the Section 1.D. (4)(b) freeze on ASMs and block hours during the period of a pilot furlough is 12 months from the date of the furlough. Inasmuch as the furlough took place on October 1, 2001, that portion of the January 2002 APA grievance alleging that the Company was in violation of Section 1.D. (4)(b) was premature.

- The Company is obliged by Section 1.D (4)(b) to schedule furlough day flying in good faith, that is, in accordance with operational needs and passenger demand. Accordingly, the Company was required to provide APA with ASM and block hour information relevant to APA's contention that October 1, 2001, flying may have been artificially inflated. [1]

On receipt of the ASM and block hour information provided by the Company pursuant to the System Board's order in ASM-Block Hour Freeze I, APA filed a second grievance (ASM-Block Hour Freeze II), alleging that the Company had not operated its October 1, 2001, flights in accordance with operational needs and passenger demand. Rather, APA asserted, the Company had artificially inflated flying on October 1 so that it would be free to increase commuter flying during the furlough to a level in excess of what it would have been if furlough day flying had been based on operational needs and passenger demand.

[1] ASM-Block Hour Freeze I, pp. 40-42,44-46 (September 3, 2002)

The Board sustained APA's second grievance, holding that that the number of ASMs flown by Eagle on October 1 had been artificially increased so as to reduce the effect of the Section 1.D. (4)(b) furlough freeze. Accordingly, the Board concluded, the number of ASMs which could permissibly be flown by commuter air carriers during the Section 1.D. (4)(b) freeze could not be determined on the basis of Eagle's October 1 actual ASMs. Instead, the Board held, the figure that should be substituted for Eagle's actual October 1 ASMs (18.9 million) was 17,288,828 ASMs, the average of Eagle's actual ASMs on September 24 and October 8. Inasmuch as the furlough freeze cap is based not solely on Eagle data, but upon the ASMs flown by all commuter air carriers, the Board added the 1,914,364 actual ASMs flown by TWE Express on October 1 to the Eagle figure of 17,288,828. Doing so resulted in a total of 19,203,192 actual ASMs. Hence, the Board concluded, the daily average actual ASMs flown by all commuter carriers during any 12-month period subsequent to October 1, 2001, could not permissibly exceed 19, 203,192, rather than the 20,800,000 cap established by the Company. [2]

The Board also concluded, contrary to the Company's assertion, that flying by American Connection commuter air carriers subsequent to August 1, 2002, on the AX designator code was covered by the Section 1.D. (4)(b) freeze, as was charter flying by American Eagle. Accordingly, the Board ordered the Company to provide APA with statistical data concerning the actual ASMs and scheduled block hours associated with commuter flying under the AX code and with Eagle charter flights.[3]

The data provided to APA by the Company showed that the Company had exceeded the ASM limitation of Section 1.D.(4)(b)(i) in all three compliance periods. In the first compliance period, October 1, 2001 through September 30, 2002, the Company exceeded the ASM freeze number by 1,009,667 daily average ASMs. In the second compliance period, January 1, 2002 through December 31, 2002, the Company exceeded the ASM freeze number by 1,920,541 daily average ASMs. In the third compliance period, April 1, 2002 through March 31, 2003, the Company exceeded the ASM freeze number by 2,621,753 daily average ASMs. The total ASM overage was 1,040,191,692. [4] The Company did not exceed the block hour limitation of Section 1.D.(4)(b)(ii).

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[2] ASM-Block Hour Freeze II, pp. 34-43, 54. The Board found no persuasive evidence that Eagle's scheduled block hours for October 1, 2001, had been artificially inflated, hence concluded that the 2,484 commuter air carrier scheduled block hours for that date should serve as the baseline for commuter air carrier scheduled block hours during the furlough freeze.

[3] Id at 54.

[4] The Company's obligation to freeze commuter ASMs at the October 1, 2001, level was terminated in April 2003 with the signing of a new collective bargaining agreement that did not contain a furlough freeze on commuter ASMs or block hours.

The Board directed the parties to attempt to agree on a remedy for the Company's violation of the ASM freeze provisions of the Agreement. They were unable to do so, and this proceeding followed.

II. ISSUES

The stipulated issues are:

(1) Whether the System Board should award a damages remedy for the Company's non-compliance with the ASM cap during the relevant compliance periods?

(2) If so, what is the appropriate amount of such damages?

III. RELEVANT CONTRACT PROVISIONS[5]

Section 1. C. Scope

(1) General. All flying performed by or on behalf of the Company or an Affiliate shall be performed by pilots on the American Airlines Seniority List in accordance with the terms and conditions of this Agreement . . .

Section 1. D. Scope Exception: Commuter Air Carriers

(4) Limitations on Commuter Air Carriers

(b) Effect of Furlough. In the event of a furlough of pilots on the American Airlines Pilots Seniority List, the impact shall be as follows:

(i) Impact on ASMs. The total size of all Commuter Air Carriers operated under this Section D. as measured by ASMs shall be frozen at the actual levels in effect at the time of the furlough.

[5] All references in this Section are to the 1997 Agreement, which was in effect at the time of the events herein discussed.

(ii) Impact on Block Hours. The total block hours for all Commuter Air Carriers as of the date of the furlough cannot be increased, and further, the total number of block hours that may be scheduled by such Commuter Air Carriers may not exceed 40% of the total block hours scheduled by the Company.

Section 1. L. Remedies

(1) The Company and the Association agree to arbitrate any grievance filed by the other party alleging a violation of this Section 1 on an expedited basis directly before the System Board of Adjustment sitting with a neutral arbitrator. The arbitrator shall be a member of the National Academy of Arbitrators and experienced in airline industry disputes. The burden of proof will be determined by the arbitrator. The provisions of the Railway Labor Act shall apply to the resolution of any dispute regarding this Section 1.

(2) The parties agree that, in addition to any other rights and remedies available under law and this Agreement, an arbitration award under this Section 1 shall be enforceable by equitable remedies, including injunctions and specific performance against the Company, AMR Corp., and / or an Affiliate of the Company. The Company and Association agree that in a court proceeding to enforce an arbitration award under this Section 1, the rights and obligations are equitable in nature, that there are no adequate remedies at law for the enforcement of such rights and obligations, and that the Association and the Company's pilots are irre-reparably injured by the violation of this Section 1.

Section 6. C. 2 Supervisory Flying

> When a supervisory or engineering pilot flies a flight producing revenue for which no pilot at a base can be considered available, the pay for such flight time will be apportioned among pilots on incentive pay at the base in order of system seniority. Apportionment will be made by adding pay for such flight time to each eligible pilot's pay projection (PPROJ) up to the monthly maximum, provided that a pilot who has been apportioned pay under this provision shall not be eligible for a similar application of this provision until all pilots on incentive pay junior at the base have been similarly treated. Apportionment shall be made, up to a maximum of ten (10) hours per pilot, provided such apportionment shall not be made, when such apportionment, when added to the pilot's pay projection (PPROJ), produces a total which does not exceed the guaranteed hours for the month.

IV. DISCUSSION

APA requests the System Board to award a damages remedy in the amount of $25,146,802, the equivalent of the cost to the Company of having had the ASM overage flown by AA F-100 pilots. This remedy, APA asserts, is consistent with the parties' practice by which the Company, whenever it violates the Scope clause of the Agreement by allowing the aircraft of another carrier to transport Company passengers or freight, provides apportionment pay as a remedy for that contractual violation.

The core of the Company's argument against the apportionment pay remedy sought by APA is that American pilots lost no work, hence sustained no economic loss as a result of the Company's violation of Scope. Absent economic loss, the Company asserts, the Board should not award a monetary remedy, since to do so would be punitive, and arbitrators may not award punitive damages. The Company concedes that an arbitrator may award punitive damages if explicit authorization to do so is contained in the collective bargaining agreement, but, the Company points out, no such explicit authorization appears in the Green Book.

It is difficult to know with certainty how much work was lost by American pilots as a result of the Company's exceeding the ASM cap. The Company asserts that

American pilots lost no work at all for two reasons. First, if the excess ASMs had not been flown by the commuter airlines, they would not in any event have been flown by American. Thus, Walter Aue, Vice President, Capacity Planning, testified that "We were losing a considerable amount of money throughout this period, and we did not think that flying - incremental flying - would have improved the situation. In fact, it would have made it worse."

Secondly, the Company asserts, American pilots were underutilized during the periods when the ASM and block hour freeze was in effect. The Company was building low lines of flying of 65-68 hours for lineholders, rather than the permissible 75 hours. Lineholders were picking up open time and working an average of 76.3 hours per month (during 2002), rather than the 80 hours they could work under the Agreement. According to Roy Everett, Managing Director, Crew Resources and Crew Scheduling, the lineholders were getting all the time they wanted.

During the same period, according to the Company, reserve pilots were underutilized. During 2002, the domestic average for reserves was 40.47 hours per month, compared to their pay guarantee of 70 hours per month. According to Mr. Everett, 55 hours per month is an attainable figure for reserves. Mr. Everett testified that if the Company had utilized reserves at the 55 hours per month level, it could have flown an additional 8 billion ASMs with the existing workforce, and with no additional pilot compensation.

APA takes issue with both of these assertions. First, APA argues that American pilots did lose work as a result of the Company's violation of the ASM cap. APA points out that during the period during which the ASM cap was in effect, the Company cancelled or reduced flying on many American routes, and transferred that flying to American Eagle.[6] If the Company had complied with the cap, APA asserts, it would likely have retained at least some of that flying, rather than lose feed. Thus, by not complying with the ASM cap, the Company took flying away from American pilots to their economic harm.

Furthermore, APA asserts, if the Company had complied with the cap, retaining the 1 billion excess ASMs rather than having those ASMs flown by commuter airlines, there is a real likelihood that the extra flying would not have reached the reserves, but would have been picked up by lineholders, who would have increased their wages as a result. For, according to APA, lineholder flying during the

[6] The Company's objection to the admission of APA evidence bearing on route transfers is hereby denied. That evidence is relevant to the remedy issue, hence admissible. While the route transfers from American to American Eagle were, as the Company points out, permissible under Section 1. D. (2)(c) (Markets in Which the Company Cannot Earn WACC)), that does not mean that the route transfers could not violate the ASM cap or that they may not be taken into consideration for remedy purposes

freeze was substantially below what pilots could achieve through fly through, underfly, trip trade with open time, and make up. Lineholder flying during the freeze was also substantially below the monthly average of the months prior to the institution of the freeze.

APA also takes issue with the Company's argument that the excess ASMs flown by the commuter airlines could have been flown by reserves at no additional cost to the Company. According to the Association:

> Nor do the Company's exhibits show that the ASMs could have been scheduled such that the reserves could have flown them at no extra cost to the Company. The Company has developed an unworkable and totally unrealistic construct that could only be developed with the advantage of hindsight and the consequent ability to see what reserve utilization actually was in a given month – not planned in advance. The Company's argument requires accepting the idea that in some months the extra ASMs could have been flown by reserves on one aircraft type, in other months by reserves on two or even three different aircraft types. By the end of the freeze period, the Company would even have had to resort to flying some commuter routes with aircraft in the widebody status that only fly the longer routes: B-757s and B-767s! Reserves for the F-100 aircraft – the aircraft most likely to have flown the same routes as the commuters – could only have covered the extra flying in a single month during the freeze when there was an ASM overage: May 2002. The arrangement proposed by the Company would have created havoc with the scheduling of crews and of aircraft and would have made it impossible to market the flights. It is simply not a feasible scenario.[7]

The arguments raised by both the Company and the Union regarding the amount of work lost by AA pilots are entirely speculative, dealing as they do with a question based on a condition contrary to fact - *the effect on AA pilots if the Company had not exceeded the ASM cap*. It is in order to avoid the time, money, energy, and generation of ill will in attempting to resolve such speculative arguments that parties enter into liquidated damages agreements providing specified damages for recurring situations in which damages are unclear.[8] That is precisely what the parties did in

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[7] APA brief, pp. 41-42.

[8] Hill and Sinicroppi, Remedies in Arbitration 57 (2d ed., BNA Books, 1991). See also 24 Williston on Contracts §65.1, 65.14 (4th ed. 2002)

developing the apportionment pay formula of Section 6. C. 2., and it is also what they have done in applying the apportionment pay formula of Section 6. C. 2. to remedy Scope violations.

Indeed, as APA points out, the Company has never argued, in providing apportionment pay to remedy Scope violations relating to the chartering or contracting out of Company flying, that no pilots lost work or that underutilized reserve pilots could have done the disputed work so that the line holders sustained no economic harm. Instead, the Company has simply provided apportionment pay based on the amount of flying improperly assigned to another carrier.

Conceding that apportionment pay under Section 6.C.2. is a form of liquidated damages, and that it has agreed to pay those liquidated damages whenever a supervisor flies a revenue producing flight, whether or not American pilots are economically harmed by such flying, the Company nonetheless argues that a Board finding in this case that it has agreed, through past practice, to provide apportionment pay as a form of liquidated damages for Scope violations would, absent a showing of economic harm to American pilots, be punitive not compensatory – and that this Board may not award punitive damages without express authorization in the collective bargaining contract.

We have considerable difficulty in grasping the distinction between the Company's Section 6.C.2. commitment to provide apportionment pay for allowing a supervisor to perform Company flying, which we presumably could enforce as liquidated damages, and the Company's commitment through past practice to provide apportionment pay for allowing other companies to perform flying, which we cannot enforce as liquidated damages because to do so would be punitive. Still, we prefer not to rest our decision on that point, but instead to grapple directly with the Company's central argument – that we cannot award apportionment pay, despite the Company's past practice of doing so, because apportionment pay does not require proof of economic loss as a prerequisite to compensation, and "only compensatory damages are available in arbitration, unless the collective bargaining agreement specifically authorizes punitive damages."[9]

In the first place, it is important to recognize that the term "punitive" damages can refer to two quite different types of award. As pointed out in Hill and Sinicroppi, Remedies in Arbitration, the leading text on the subject:

> Both arbitrators and courts use the term punitive in two ways. First it is used to describe a monetary award where there is no

[9] Company brief, pp. 5-6.

> provable financial loss. The party has suffered some type of injury, but proof of calculable loss is uncertain or nonexistent. When a monetary award is made under these circumstances, it may have overtones of punitive damages. Second, a punitive award may refer to situations in which the nonbreaching party is fully compensated, but the arbitrator issues an additional award intended solely to punish and deter the breaching party. . . An arbitrator should not. . .reject as punitive a monetary award simply because of a party's inability to prove damages precisely.[10]

It should be clear that we view the instant case as falling into the first category – proof of calculable loss to the pilots is uncertain – not the second category. Our analysis focuses solely on enforcing the Agreement as interpreted and applied by the parties, not on punishing the Company for its violation of the ASM cap.[11]

There is, to be sure, nothing in Section 1. L., the Remedies section of the Scope Clause, or elsewhere in the Agreement, that provides explicitly that pilots are entitled to monetary damages for a violation of Scope, absent a showing of financial loss. Nor, however, is there anything in Section 1. L. or elsewhere to the contrary - that a showing of financial loss is necessary for the pilots to receive monetary damages.[12]

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[10] Remedies in Arbitration, n. 11 at 439, 449.

[11] Most of the cases on which the Company relies to demonstrate that courts disfavor punitive damage awards fall into Hill and Sinicroppi's second category - awards intended primarily to punish and deter the breaching party. For, whether such an award is issued by an arbitrator or a court, it is not based on objective criteria, but solely on the judgment of the arbitrator or the court concerning the magnitude of the sanction necessary to punish or deter the breaching party, a judgment which some courts view as more appropriately exercised by the legislature, rather than by an arbitrator or a judge. See, e.g. Garrity v.Lyle Stuart, Inc., 40 N.Y. 2d 354, 353 N.E. 2d 793 (N.Y. Ct. of Appeals, 1976). A further concern in labor arbitration cases is that a category two remedy designed to punish the breaching party may have a harmful effect on the ongoing labor-management relationship. In a category one case, however, in which the arbitrator or the court does no more than enforce a liquidated damages provision where proof of loss is uncertain or nonexistent, courts are more receptive, since in such cases the award of the arbitrator or trial judge is circumscribed by the liquidated damages formula agreed upon by the parties. Furthermore, there is little risk that enforcement of an agreed-upon remedy will harmfully affect the parties' relationship. Because we conclude in this case that an award of monetary damages is warranted by the parties' past practice of paying liquidated damages for Scope violations, we need not and do not address the question whether the Company's lack of good faith in determining the amount of furlough day flying (See ASM-Block Hour Freeze II, pp. 34-43, 54) would warrant a category two punitive damages award.

[12] The Company argues that the reference to the Railway Labor Act and the provision for equitable relief in Section 1.L. should be interpreted as precluding monetary damages absent proof of financial loss. We disagree; the provisions in question hardly support the far-reaching implication asserted by the Company. In the first place, the Railway Labor Act cases cited by the Company hold only that category two punitive damages - those intended to punish or deter - are not available in a suit to enforce

In view of the parties' failure to deal explicitly in Section 1.L. with the question of whether a showing of financial loss is a prerequisite to pilots receiving monetary damages for a violation of Scope, past practice in dealing with this issue is of particular importance.[13]

The practice on which APA relies begins with a January 1985 settlement of an APA complaint relating to an incident in December 1984, when the Company arranged with Braniff and Southern Air Transport (SAT) to carry passengers and freight from DFW to relieve operational problems. APA and the Company disagreed whether the Company's actions violated the Scope clause, but the Company agreed to compensate the AA pilots for the time flown by Braniff and SAT. The parties also agreed that in the future the Scope clause would be considered to apply to all subcontracting or chartering of Company airline operations.

In July 1992, the Company chartered two aircraft to transport passengers from Santa Cruz, Bolivia, to La Paz, Bolivia. While the Company believed that it had acted in good faith and in the best interests of all concerned (90 passengers were stranded in Santa Cruz with no AA aircraft or hotel accommodations), the Company agreed that it had violated the Scope clause. It stated:

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the Railway Labor Act. None of those cases assert that category one punitive damages - those intended to compensate an injured party where the proof of loss is uncertain or nonexistent - are unavailable in a proceeding to enforce a contract entered into by parties subject to the Railway Labor Act. Furthermore, the provision for equitable relief in Section 1.L. hardly bars an arbitral award of damages, since it explicitly states that equitable remedies are available "in addition to any other rights and remedies available under law and this Agreement".

The Company also relies on the testimony of Captain Sovich that APA has never sought to include in Section 1 the apportionment pay formula of Section 6.C.2. as undermining the argument that apportionment pay can be implied in Section 1.L. as a remedy for Scope violations. What Captain Sovich testified, however, was that apportionment pay was not in Section 1.L. "because it's an invitation to violate Section 1. What we've always said is that Section 1 is sacred. You don't violate it. Well, if you're going to put a remedy in Section 1 that says well, if you do violate it, here's the way we want it settled, I think it would be philosophically the antithesis of everything that we wanted so far." Examining Captain Sovich's testimony as a whole, we interpret it not as stating that APA rejected apportionment pay as a remedy for Scope violations, which past practice shows not to have been the case, but that APA did not want a remedy for Scope violations set out in Section 1 for fear that it would trivialize the importance of Scope and the gravity of violating Scope.

[13] "In cases where the contract is completely silent with respect to a given activity, the presence of a well-established practice, accepted or condoned by both parties, may constitute, in effect, an unwritten principle on how a certain situation should be treated." Texas Util. Generating Div., 92 LA 1308, 1312 (McDermott, 1989).

> [A]lthough we had no spare aircraft available, we are apportioning pay at the MIA base for the hours which would have been involved if an aircraft and crew had been dispatched from MIA to VVI to transport the stranded passengers to LPB, and then return to MIA.

In November and December 1992, the Company chartered DC-8 aircraft to fly freight from New York to the Caribbean. The Company acknowledged that in doing so, it had violated Scope, and agreed as follows:

> [A]lthough American did not have aircraft available to operate additional extra sections, the Company will apportion pay at the LGA base as if the flights. . . had been operated with American aircraft and crews. The apportionment pay will be based on DC-10-30 international 12th year rates.[14]

In March 1995, the Company chartered a Lear jet to transport seven passengers from an oversold flight to Barbados. The Company acknowledged a "technical" violation of Scope and agreed to apportion time at the Miami base as if an international crew had operated a B-727 from Miami to Barbados and return. [15]

In July 2003, the Company chartered an F-100 to fly two trips scheduled to have been flown in South America by an AA 767. As a remedy for this violation of Scope, the Company agreed to provide apportionment pay to 767 pilots.

Finally, in May 2003, the parties agreed that during two specified 2-week periods the Company would be permitted to charter aircraft from U.S. gateways to Caribbean destinations to the extent necessary to accommodate passenger baggage that cannot be accommodated on the same flight as the passenger. The parties further agreed that this charter activity would not be deemed a violation of Scope, but that:

> The provisions of Section 6.C.2. will apply to such charter activity. To establish the correct apportionment pay required by

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[14] American did not have DC-8 aircraft in its fleet; the next largest aircraft to the DC-8 in the American fleet was the DC-10-30. According to the uncontradicted testimony of former APA president Captain James Sovich, the agreed-upon practice in remedying Scope violations based on chartering or contracting out Company flying that was performed by an aircraft not in the Company's fleet was to base apportionment pay on the rate applicable to the next higher gross weight aircraft that was in the Company's fleet.

[15] The next higher gross weight aircraft to the Lear jet was the F-100, but since neither the F-100 nor the MD-80 was licensed to fly over international waters, apportionment pay was based upon the next higher gross weight aircraft that could do so, the B-727.

> Section 6.C.2. and Q & A #s 14 – 21, the Company shall include the type of aircraft used, origination and destination and any intermediate stops. If the aircraft type used is equivalent to the types specified in the pay charts of the Basic Agreement, those pay rates shall be used. If the aircraft is not specified in the pay charts, the pay weight for the next higher gross weight aircraft shall be used. In no case shall the pay rate be less than specified for the B-7371 twelve (12) year captain.

APA points out that although the Company frequently conditions the settlement of a grievance on the non-precedential nature of the settlement, none of these settlements were non-precedential. Thus, APA argues, the Company is bound by the practice agreed to by the parties pursuant to which if the Company allows the aircraft of another carrier to transport Company passengers or freight in violation of Scope, the Company will provide a remedy modeled on the apportionment pay provisions of Section 6.C.2.

The Company asserts that these settlements are inapposite to this case because each of them dealt with block hours, not with noncompliance with an ASM cap. While that much is true, it is equally true that all the settlements - just as this case - dealt with a situation in which the Company allowed the aircraft of another carrier to transport Company goods or passengers in violation of Scope. It is of little consequence whether the Scope violation relates to block hours or ASMs. The core factor is that there is a practice of providing apportionment pay for allowing another Company to perform the flying of AA pilots, and that practice is as relevant here as in the other situations in which it has been applied.

The Company would also distinguish the prior settlements on the grounds that in each of those settlements, AA pilots would have done the flying if non-AA pilots had not done so. That distinction does not, however, bear scrutiny since two of the settlements - Santa Cruz (1992) and New York (1992) - explicitly stated that the Company had no aircraft available to fly the contracted-out work. Hence, no American pilot could have done the work and no American pilot lost wages. Nonetheless, apportionment pay was provided.

Finally, the Company would distinguish the prior settlements on the grounds that the payment in none of those cases comes close to the amount of damages that APA seeks here. "They were modest payments of block hours for a single flight or limited series of flights."[16] That is certainly true, but it is equally true that in none of those cases did the Company engage in as massive a violation of Scope as it did in this

[16] Company brief, p. 21.

case, in which it exceeded the ASM cap by over 1 billion ASMs during an 18-month period. The practice of providing apportionment pay for Scope violations does not become inapposite as the magnitude of the Scope violation increases.

According to Elkouri and Elkouri:

> . . .[P]ast practice, to be binding on both parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.[17]

We are persuaded that the evidence presented in this case satisfies every element of the requirements for a binding past practice. For 20 years the parties have followed a practice pursuant to which, whenever the Company is shown to have violated Scope by allowing other companies to transport Company passengers or freight, pilots at the affected bases are awarded apportionment pay without the necessity of those pilots proving economic harm. This apportionment pay is modeled on that found in Section 6.C.2., and, as far as the record shows, it has never been deviated from. In short, APA and the Company, as a result of years of consistent behavior, have reached an understanding that apportionment pay will be paid whenever the Company uses another carrier to transport Company passengers or freight.[18]

Under well-established arbitration law, a clear and consistent practice of long duration may be enforced in arbitration as constituting, by implicit agreement, a part of the collective bargaining contract.[19] Most notably, the U.S. Supreme Court stated in Warrior & Gulf:

> The labor arbitrator's source of law is not limited to the express provisions of the contract, as the industrial common law - the practices of the industry and the shop - is equally a part of the collective bargaining agreement although not expressed in it.[20]

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[17] Elkouri & Elkouri, How Arbitration Works 608 and cases there cited (6th ed., BNA Books, 2003)

[18] Further evidence of this understanding can be found in the parties' May 2003 side agreement allowing the Company to charter aircraft during specified periods to accommodate passenger baggage on condition that apportionment pay would be paid, but without any requirement of a showing of economic harm to the pilots. The payment of apportionment pay whenever the Company allows another carrier to transport Company passengers or freight is thus shown to be not merely a means of dealing with this situation, but the way of doing so.

[19] See Elkouri & Elkouri, supra note 17 at p. 606.

[20] Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

It is thus clear that this Board can enforce the parties' long-standing practice pursuant to which the remedy for a Scope violation is the payment of apportionment pay, even though that agreement is implicit in the Agreement, rather than explicit.[21]

The Company, however, relies upon judicial decisions holding that an arbitrator may not imply the existence of an agreement authorizing the award of punitive damages. It quotes from International Union of Operating Engineers v. Mid-Valley, Inc.:

> Because contracting parties do not normally agree to assess exemplary damages for a breach of contract. . . contractual consent to so drastic a 'remedy' for simple breach cannot be implied. Therefore, an arbitrator's assessment of punitive damages must be grounded in express language.[22]

A number of comments are in order. In the first place, the approach of the U.S. District Court for the Southern District of Texas in the above-quoted case is by no means universally accepted.[23] Second, agreements to assess damages of the type that Hill and Sinicroppi would categorize as falling in the "first" category - the party has suffered some type of injury, but proof of calculable loss is uncertain or nonexistent - are not at all uncommon, even though the court in Mid-Valley would characterize such damages as "exemplary". Indeed, the apportionment pay provision of Section 6. C. 2. is just such a provision - a contractual commitment to pay damages when proof of loss is non-existent. Finally, and most important, a judicial approach that would preclude an arbitrator from finding the existence of an implied term of the agreement based upon the past practice of the parties, and enforcing that implied term, would be inconsistent with Warrior and Gulf, in which the Supreme Court held that an arbitrator was free to find that the practices of the parties constitute part of the agreement, even though not expressed in it.

The most that can be said in defense of the decision in Mid-Valley and similar cases is that the court would have been on sound ground if its holding had been narrower - that contracting parties do not normally agree to category two exemplary

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[21] See Bhd. of R.R. Trainmen v. Cent. of Ga.Ry., 415 F. 2d. 403, 416 (5th Cir. 1969)("Custom and practice, the parties agree, are valid bases for fashioning remedies where the contract does not explicitly exclude them.")

[22] 347 F. Supp. 1104, 1109 (S.D. Tex. 1972).

[23] See Edward Electrical Company v. Automation, Inc. and Emery Air Freight, Inc., 229 Ill. App. 3d 89, 103-104, 593 N.E. 2d 833, 843 (Ill. App. Ct., 1992) (federal courts espouse the view that arbitrators are empowered to award punitive damages unless the arbitration agreement states otherwise); Island Creek Coal Company v. District 28, UMWA, 29 F. 3d 126, 131-132 (4th Cir., 1994)(some circuits allow punitive damages absent express provision in the collective bargaining agreement; others do not).

damages (those intended solely to punish and deter the breaching party) - hence that an arbitrator ought not lightly imply the existence of such an agreement. In the instant case, however, in which past practice clearly establishes the existence of an implied agreement between the parties to provide apportionment pay for violations of Scope, regardless of a showing of economic harm, this Board is unquestionably free to issue an award that enforces that agreement.

The Company also relies on a number of arbitration decisions holding that in the absence of a showing of economic harm resulting from improper contracting out, the appropriate remedy is not an award of monetary damages, but an order directing the employer to "cease and desist" from the improper contracting out. In none of the cases cited by the Company, however, was there a contractual provision or a practice of awarding liquidated damages for improper contracting out without the necessity of demonstrating economic harm.

Furthermore, the facts of the instant case demonstrate that it is wholly unlikely that the parties contemplated that a cease and desist order would be the remedy for a violation of the ASM or block hour caps. As the Board held in ASM-Block Hour I, the period for measuring compliance with the ASM and block hour caps was 12months in duration. Hence, there could be no review of the Company's compliance with those caps until 12 months from the date the ASM and block hour freeze went into effect. If, when that review took place, the only remedy for a violation of the caps were an order directing the Company to cease and desist from further violations, the Company would have had at least a one-year free pass to exceed the caps - and probably longer than that in view of the time necessary to proceed through the grievance process to an arbitration award.[24] It is wholly unlikely that APA would have accepted a provision allowing the Company a one-year (or more) free pass to exceed the ASM and block hour caps, or that the Company could reasonably believe that APA had done so. Rather, the parties must have contemplated that a violation of the ASM or block hour caps would subject the Company to the same apportionment pay remedy that had been used to remedy all previous Scope violations.

According to APA, an application of the apportionment pay approach in this case results in an award of $23,248,364. APA explained its calculations as follows:

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[24] In this case, the ASM-block hour cap took effect on October 1, 2001, and the System Board's award was issued in April 2004, approximately 30 months from the effective date of the freeze. According to the Company, if the parties had not agreed in April 2003 to terminate the freeze, the Board could issue no award at this time other than to direct the Company to cease and desist from further violating the ASM cap, the practical effect of which would be to give the Company a 30-month free pass to violate the freeze provisions. Even with the April 2003 termination of the freeze, acceptance of the Company's argument would allow it an 18-month free pass.

> Consistent with the past practice of using the next higher aircraft for remedying subcontracting disputes, the APA initially developed this scenario based on the Fokker 100 aircraft.[25] It calculates a pilot cost per ASM by calculating the total pilot costs, based on the actual pilots' pay, benefits, pensions, and payroll taxes for a particular aircraft or fleet type for the entire freeze period and dividing that number by the total ASMs for the same equipment during the same time. The resulting number, the pilot cost per ASM on particular aircraft type or fleet, is then multiplied by the ASM overage. Using this methodology, the parties calculated the value of the ASM overage based on pilot costs per ASM for the entire American Airlines fleet for the MD-80, for the F-100, for the B-737, and for the Narrow Body Fleet.[26]

The damages calculations pursuant to this methodology are:

Compliance Period	4Q01-3Q02	4Q02	1Q03	Total 4Q01 - 1Q03 Cost
Total ASM Overage	368,528,361	303,117,749	368,545,582	1,040,191,692
F100 Status 15 Pay	$ 107,535,642	$ 27,897,463	$ 25,932,921	$ 161,366,026
F100 Status 15 Benefits & Pensions	$ 19,356,416	$ 5,021,543	$ 4,667,926	$ 29,045,885
F100 Status 15 Taxes[27]	$ 5,559,593	$ 1,442,299	$ 1,340,732	$ 8,342,624
Form 41 F100 ASMs	5,838,992,000	1,632,210,000	1,383,723,000	8,854,925,000
Form 41 F100 Pilot Costs Per ASM	$ 0.02268	$ 0.02105	$ 0.02308	$ 0.02245
Cost of Overage	$ 8,359,695	$ 6,381,239	$ 8,507,431	$ 23,248,364

The Company points out that the APA calculation of pilot cost per ASM is based upon the number of ASMs produced by an F-100 per block hour and F-100 pilot pay per block hour. Inasmuch, however, as the Company did not violate the block

[25] The F-100 is the next higher gross weight aircraft in the AA fleet to the RJs flown by the commuter airlines. (Footnote added.)
[26] APA brief, p. 24.
[27] The taxes referred to here are Social Security (FICA) tax payments. (Footnote added.)

hour cap, the Company argues that a damages calculation predicated on block hours is flawed. It states:

> [T]o base a compensatory remedy on paying pilots for block hours is to render the block hour cap of Section 1.D.(4)(b)(ii) a dead letter. Stated otherwise, under Section 1.D.(4)(b)(ii), the Company had a contractual right to transfer a substantial additional number of block hours to Eagle. . . some 120,000 additional hours over an 18 month period. But the Association is seeking compensation for a group of pilots based on more than 38,000 paid pilot hours for the same period. The Board cannot base a monetary award on paying American pilots for 38,000 block hours when the Company was contractually permitted under the Agreement to have commuter pilots fly an additional 120,000 block hours.[28]

The Company's argument is without merit. Section 1.D.(4)(b) of the Agreement imposes two separate limitations on the Company during any period when AA pilots are on furlough. Pursuant to subparagraph (i), actual ASMs are frozen at the level in effect at the time of the furlough; pursuant to subparagraph (ii), scheduled block hours are frozen as of the same date. The fact that the Company did not violate subparagraph (ii), the block hour limit, hardly immunizes it from an appropriate remedy for its violation of subparagraph (i), the ASM limit.

In our judgment, the most satisfactory means of determining an appropriate remedy in this case, applying the apportionment pay approach of calculating the amount of flying that was improperly assigned to another carrier, and the amount that AA pilots would have been paid to perform that flying is, as APA has proposed, to calculate how much AA pilots would have been paid had they flown those ASMs which the Company improperly allowed commuter air carriers to fly. The fact that a step in those calculations is to determine the number of block hours necessary to fly those ASMs is, under these circumstances, of no consequence.

The Company next argues that it is inappropriate to use the F-100 as the basis of damage calculations because the F-100 is based in only two locations, Chicago and Dallas, and not all the excess ASMs involved those two locations. "Where American has substituted commuter RJ service for American service, it has been a range of American aircraft that was replaced."[29]

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[28] Company brief, pp. 30-31.
[29] Company brief, pp. 39-40.

If we had evidence concerning the ASM overage by base and the weight of the AA aircraft in service at each base during the period of the furlough freeze, we might well accept the Company's argument. In the absence of such evidence, however, and the consequent uncertainty about the mix of aircraft that might have flown the excess ASMs, we accept the argument that since, on a fleet-wide basis the F-100 is the closest AA aircraft to the commuter RJ, it is appropriately used, under the apportionment pay practice, as the basis for determining a monetary remedy.

The Company also challenges the inclusion of benefits and taxes in the APA apportionment pay calculation, asserting that apportionment pay includes neither of these. However, First Officer Larry Rosselot, Chair of the APA Technical Analysis and Steering Committee, testified that while the Company does not provide benefits directly to a pilot who receives apportionment pay:

> He receives the benefit of the benefits and taxes. The Company has to pay the benefits to the B fund and the A fund and taxes. They only pay the pilot the salary. They pay the B fund and the A fund the benefits, and they pay the government for the taxes. So they end up paying for them eventually.

Inasmuch as a pilot who receives apportionment pay obtains the benefit of the Company's payment of benefits and Social Security taxes, albeit the pilot does not receive them directly, it is appropriate to include those amounts in the damages calculations in this case.

The Company next asserts that the APA damages calculation is flawed because "even apportionment pay methodology gives some weight to pilot utilization: lineholder pilots over 75 hours and reserves more than 10 hours under guarantee do not receive apportionment pay".[30] While the Company's assertion is accurate as to apportionment pay under Section 6. C. 2., there is no evidence that the limitation referred to by the Company has ever been applied in the payment of apportionment pay for Scope violations. Hence that limitation is inapplicable here.

For all these reasons, we conclude that the Board should award a damages remedy which follows the past practice of the parties in providing apportionment pay as a remedy for violations of Scope in which Company flying is improperly chartered or contracted out. The amount of the apportionment pay award, based upon the calculations set out on page 17, is $23,248,364.

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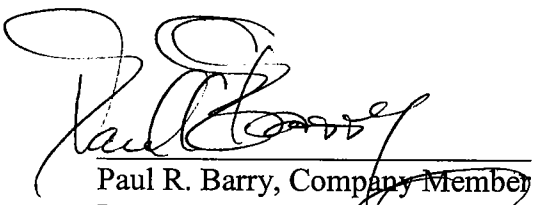
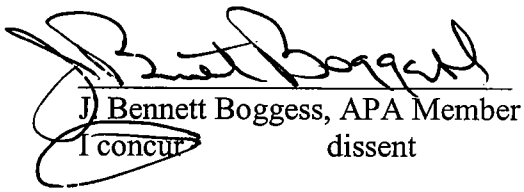
[30] Company brief, p. 22.

V. AWARD

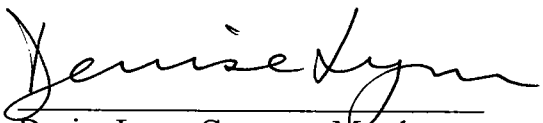
The Company shall pay the sum of $23,248,364 to the Allied Pilots Association.



Paul R. Barry, Company Member
I concur dissent

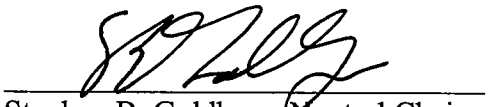


J. Bennett Boggess, APA Member
I concur dissent



Denise Lynn, Company Member
I concur dissent

Bill Slikkerveer, APA Member
I concur dissent



Stephen B. Goldberg, Neutral Chair

Chicago, Illinois
April 14, 2004