Abernethy #4

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

HEARING DATE: October 6, 1993

BACKGROUND

The Employer and the Union are parties to a labor agreement, commonly known as the "Mechanics Agreement," which became effective on December 23, 1991 and runs through November 30, 1994. The Mechanics Agreement sets forth a procedure for filing grievances and appealing unresolved grievances to a System Board of Adjustment (hereafter System Board or The Board) for final and binding resolution. The Union grieved the seniority date specified for the Employee and appealed the grievance to the System Board. Pursuant to Article XVIII Section H of the Mechanics Agreement, John H. Abernathy was selected as Neutral Chairman of the Board.

Prior to hearing before the System Board and pursuant to the provisions of the collective bargaining agreement, Article XVIII Section H.4, the Union prepared a submission dated May 14, 1993, setting forth the questions at issues, the contract provisions that the Union claimed had been violated, the facts on which the Union intended to rely to support its position and a statement of its position (Joint Exhibit 2).

Thereafter the Employer prepared a "Statement of Position," pursuant to Section H.5, dated September 1, 1993, setting forth the questions at issue, the facts on which the Employer intended to relay in support of its position and a full statement of its position (Joint Exhibit 4). In this

document the Employer also presented its response to the Union's statement of facts in Joint Exhibit 2.

The Union then submitted a document entitled "Partial Rebuttal to Statement of Position of the Employer and Notification of Facts on Which Evidence Will Be Presented," dated September 20, 1993 (Joint Exhibit 3). In this document, the Union reiterated its position regarding the proper issue before the Board and presented its response to the Employer's Statement of Facts in Joint Exhibit 4. The Union also stated that it would present evidence and testimony establishing its position as fact.

Thereafter, the Employer prepared a document identifying the facts with which the Union disagreed and asserting that the Employer would present evidence at the hearing before the System Board to establish these facts. (Joint Exhibit 5). The Board received copies of Joint Exhibits 2, 3, 4 and 5 prior to hearing in this matter.

A hearing was held on this matter on October 6, 1993 at Employer headquarters. At the hearing the parties had full opportunity to make opening and closing statements, examine and cross examine sworn witnesses, introduce documents and make arguments in support of their positions. The Neutral Chairman tape recorded the hearing solely as an extension of his personal notes and not as an official record.

The Board's executive session was conducted by conference calls on November 17 and 29, 1993.

The remainder of this opinion, which reflects the opinion of a majority of the Board, is organized as follows. A statement of the undisputed facts is presented, followed by a statement of the disputed facts and the position of each party with respect to each disputed fact. Thereafter, relevant contract language from the 1989-94' contract is presented, followed by the Board's

analysis. The analysis will discuss and determine the issues properly before the Board. The analysis then will address each issue, in the context of the disputed and undisputed facts.

UNDISPUTED FACTS

1. The Employer is an air carrier providing scheduled transportation for passengers, baggage, mail and cargo to over 160 locations in many countries.

2. Employees in the mechanics classification are represented by the Union. At the time this dispute arose, mechanics were covered by the provisions of the 1989-94 Mechanics Agreement.

3. Article X of the Mechanics Agreement addresses provisions governing establishment of job classification seniority on entering the mechanic position.

4. The Employee was employed by Airline 1 on September 1, 1970 at its Country 1 Station in its agent classification. The Employee was a native of the Country 1 Province.

5. Subsequent to his date of hire with Airline 1, and prior to August 1985, the Employee was reclassified to a mechanics position with Airline 1.

6. Subsequent to his reclassification as a mechanic with Airline 1, the Employer purchased the Area 1 route structure, including Country 1, from Airline 1.

7. The transfer of Airline 1's Area 1 Division to the Employer was effective February 11, 1986. The effective date in the acquired region, due to the time difference, was February 12, 1986.

8. As part of this route acquisition, the Employer offered certain Airline 1 employees employment. Those who accepted this offer of employment were credited with their full Airline 1 seniority, as if they had been company employees from the start of their careers with Airline 1.

9. The Employee was part of this Area 1 route acquisition, joining the Employer on February 12, 1986 in Country 1. He was one of approximately 2,000 former Airline 1 employees who, in the

view of the Employer, retained and carried their Airline 1 seniority forward to the new Employer. At the time of the route transfer, the Employee was employed as a mechanic.

10. The Employee subsequently received approval for permanent residence status in Country 2. In 1991 he requested a transfer with the Employer, as provided for in the Employer regulations, to the City 2 Maintenance Base.

11. The Employee was offered and accepted a full-time position in City 2 as a mechanic, in a position in the Union bargaining unit covered by the Employer's collective bargaining agreement with the Union. The Employee was offered the mechanic's position June 6, 1991. He began his probationary period June 23, 1991.

12. In the posting of the Master Seniority List and Juniority List of April 1, 1992, the Employee was listed as having a Employer seniority date of September 1, 1970, the date of his hiring by Airline 1 at its Country 1 station and a mechanics classification seniority date of June 6, 1991.

13. Effective January 29, 1993, several hundred employees in the mechanics classification were placed on layoff status. The most senior mechanic on furlough status from the City 2 station had a classification seniority date of 1989. The Employee was not one of those furloughed.

14. On April 30, 1976, the U.S. District Court entered a Consent Decree, amended in 1977, resulting from a charge filed by the Equal Employment Opportunity Commission (EEOC). That Decree found that the Employer was in violation of Title VII of the federal Civil Rights Act of 1964, as amended. By its terms, the Consent Decree was made a part of the collective bargaining agreement between the Employer and the Union. The Consent Decree contains provisions regarding seniority.

15. The Employer based its determination that the Employee was not subject to layoff on its position that, pursuant to the Mechanics Agreement, Employer Policy and the Consent Decree,

the Employee's seniority date was September 1, 1970. Based on the Employer position that the Employee's classification seniority date was June 6, 1991, the Employer determined that he did not have sufficient seniority to retain his position in the Aircraft Appearance Unit, and reassigned him to the Cabin Equipment Unit.

16. Pursuant to Article X Section E.1.A of the Mechanics' Agreement, the Union filed a grievance at Step 3 on February 10, 1993, protesting the Employee's listings on the Master Seniority and Juniority Lists. The decision at Step 3 of the grievance procedure denied the Union's seniority protest.

17. The grievance thereafter was appealed to the System Board of Adjustment.

DISPUTED FACTS

1. The Employer contends that the Union did not protest the Employee's seniority and juniority dates within the 60-day time limit specified in Article X of the collective bargaining agreement and that, therefore, the matter is not properly before the Board. According to the Employer, under Article X Section E.1.a, if an employee's seniority listing is not protested within 60 days, seniority and juniority dates become frozen and may be adjusted subsequently only by mutual agreement. Where the evidence suggests that such an adjustment is proper, the parties usually agree on a proposed change. According to the Employer, the Employee's seniority and juniority dates were not protested within 60 days. There has been no mutual agreement to change the date because the Employer believes that such an adjustment would not be proper or in accordance with the contract. Therefore the matter is not properly before the Board as to the remedy sought, the Employer contends.

According to the Union, the Employer has mischaracterized the actual mechanics of Article X Section E.1.a. The Union also disputes the Employer claim that an adjustment of the Employee's seniority dates would not be proper and would not be in accordance with the contract. The Union asserts that the matter is properly before the Board.

2. According to the Employer, the 1985 purchase agreement, by which the Employer agreed to purchase Airline 1's Area 1 Division routes, stated in part that many Airline 1 employees would be offered employment with Employer.

The Union objects to this statement because there was no reference to Union type employees in the Country 2 being offered employment with Employer. The Union also stresses that the terms of the purchase agreement do not modify the terms and conditions of the Union's collective bargaining agreement with Employer.

3. The Employer contends that its recognition of the prior service of Airline 1 employees who came to the Employer under the acquisition, crediting those employees with their full Airline 1 seniority as if they had been with Employer since their first hire with Airline 1, was entirely within the sole discretion of the Employer, as Employer seniority never has been the subject of collective bargaining.

The Union disagrees with this statement on the grounds that seniority is not a matter of Employer discretion. Rather, seniority is solely a creature of the contract. The Union has offered proposals regarding Employer seniority in prior negotiations, although they have not been accepted. Further, Employer seniority is part of the Consent Decree, which by its terms is part of the

collective bargaining agreement. The Employer's action regarding Airline 1 employees was arbitrary and in violation of the collective bargaining agreement.

4. The Employer contends allowing former Airline 1 employees to carry forward their Airline 1 seniority to Employer was consistent with the terms of the acquisition, Employer policy and past practice.

The Union disagrees on the grounds that seniority is acquired solely under the terms of a collective bargaining agreement, not Employer policy or past practice. The Union also states that the Employer's action was inconsistent with Article II Section B and Article III Section B of the labor agreement.

5. The Employer maintains that in accordance with Article X. Section A.1.b, the Employee’s classification seniority date was June 4, 1991, the date he was offered the mechanic's position in City 2. This is so because he was an employee at the time the offer was made.

The Union disputes the Employer assertion that the classification seniority date for an employee is established as the date he is notified that he is awarded an open vacancy. The correct classification seniority date for Employee is June 23, 1991, the date he entered the mechanics classification under the Union collective bargaining agreement.

6. According to the Employer, Article X Section B established that seniority plus the ability to perform satisfactorily the work required for the job in question would govern all employees covered by the agreement in instances of layoff. The term "seniority" as used in that section referred to classification seniority.

The Union denies the Employer's statement. The April 1976 Consent Decree established procedures for layoff and recall. By Section XII of the Decree, the Decree is made a part of the collective bargaining agreement.

7. The Employer asserts that the net effect of the Consent Decree for purposes of layoff and recall was to create a blend of Decree and agreement provisions. Future layoffs would be handled as follows:

1) Category I: Classification seniority is to be used for all employees whose classification seniority date for the basic or premium job in question is greater than July 2, 1965.

2) Category II: A seniority date of July 2, 1965 is to be used for all employees who have a seniority date greater than July 2, 1965, but classification seniority in the job in question of July 2, 1965 or later. Ties resulting from this assigned July 2, 1965 seniority date are broken by the employee's relative order on the classification seniority list for the job in question.

3) Category III: Employer seniority is to be used for all employees who have a seniority date of July 2, 1965 or later. Ties in the Employer seniority date are broken by the employee's relative order on the classification seniority list for the job in question.

The Union denies that there is any blend of decree and contract provisions.The Union also disagrees with the categories identified by the Employer. Further, the Union asserts that the Employer's statement is inconsistent with its earlier statement that Article X Section B governs layoff.

Finally, the language of the decree speaks for itself.

8. The Employer asserts that its determination that the Employee would not be subject to layoff in January 1993 was based on the Employer's application of the Consent Decree.

The Union denies that the determination was properly based on application of the Consent Decree.

9. The Employer asserts that the Employee's classification seniority date of June 6, 1991 and his Employer seniority date of September 1, 1970 were reflected on the April 1, 1992 System Mechanic Seniority and Juniority Rosters in accordance with Article X Section E.1.a of the contract.

The Union agrees that these dates appear on the rosters, but denies that the dates were established in accordance with Article X Section E.1.a.

RELEVANT CONTRACT LANGUAGE

> ARTICLE II - SCOPE OF AGREEMENT
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> B. The Employer's General Policy, Operating and Maintenance Regulations shall be available to all employees at all points, and employees covered by this Agreement shall be governed by such Regulations and by all applicable rules, regulations and orders issued by properly designated authorities of the Employer not in conflict with the terms of this Agreement. The Employer shall cause to be compiled and issued on each present and new employee, a convenient sized book containing all applicable rules, regulations and orders and shall furnish each employee with amendments or changes from time to time as amendments or changes are made. This book of rules shall be supplementary to but shall not supersede the aforementioned regulations.
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> ARTICLE III - STATUS OF AGREEMENT
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> B. It is further understood and agreed that all provisions of this Agreement shall be binding upon the successors or assigns of the Employer for the duration of this Agreement. In case of a consolidation or merger, representatives of the Employer and Union will meet without delay and negotiate for proper provisions for the protection of employee seniority and other property rights.

ARTICLE X - SENIORITY

A.1. Seniority shall be by work classification and shall accrue from the date of entering the classification. The work classification to be recognized for seniority purposes shall consist of Lead Mechanic, Aircraft Inspector, Shop Inspector, Mechanic, Mechanic's Helper, Seamer, Apprentice Mechanic, Lead Ground Communications Technician, Lead Flight Simulator Technician, Flight Simulator Technician, Lead Computer Terminal Technician, Computer Terminal Technician, Metrologist, Lead -Utility Employee and Utility Employee. The names of all supervisory employees of the Employer who have been or who are promoted from classifications covered by this Agreement shall be maintained on the seniority list at the point from which promoted.

a. For bulletined jobs, the classification seniority date of the successful bidder or bidders will be the day following the last day for bidding on the job or jobs.

b. In all other instances, the classification seniority date will be the first day actually worked in the classification except that the classification seniority date of an employee shall be established as the date he is notified that he is awarded an open vacancy. The probationary period and pay in the new classification of such employees, however, will begin with the first day actually worked in the new classification.

B. Seniority plus the ability to satisfactorily perform the work required for the job in question shall govern all employees covered by this Agreement in preference of shifts, in case of lay off, reemployment after lay off, and in all promotions, demotions, or transfers within or between classifications covered by this Agreement. Preference of fixed days off scheduled within a shift in work groups which have more than one work schedule, and, for employees entering a work group, preference of rotating days off schedule vacancies within a shift shall be similarly governed.

D. Except as otherwise provided in this Agreement, all newly hired or transferred employees covered under the Mechanics' Agreement shall be regarded as probationary employees for the first one hundred eight (180) days of their employment or transfer. Employees may be discharged at any time during such probationary periods without hearing. If retained in the service of the Employer after the probationary period, the names of such employees shall then be placed on the seniority list for their respective classifications in the order of their classification seniority date. An employee's probationary period may be extended in appropriate cases (such as the employee's extended absence because of accident or illness) by local agreement between the Union and the Employer.

E.1. A Master Seniority list by basic classification for the system showing the name, classification, classification seniority date, and date of entering the Employer's service of each employee covered by this Agreement shall be posted in a convenient place April 1 each year at each point. It shall be the responsibility of the employee to immediately protest if such list is in error. Such claims may be processed by the Union directly to Step

Three of the Grievance Procedure. In the event an employee fails to protest the list within sixty (60) days after his seniority date and position on the seniority list is first established or adjusted there shall be no monetary liability or other retroactive application for subsequent seniority adjustments.

b. Ties in classification seniority date on the master system seniority list will be broken first by Employer seniority date and then by giving preference to the employee with the lower number comprised of the last four digits in his Social Security number. This procedure will not be used to disrupt established relationship of employees already appearing on a seniority list based upon the last point at which the employee worked or is working in that classification.

c. Employees whose adjusted seniority (for example, an employee returning from a leave of absence in excess of ninety (90 days) results in a tie with other employees will be placed ahead of such other tied employees on a seniority list. When two or more employees with adjusted seniority are tied in classification seniority date, their relative position will be determined as provided in subparagraph b. above.

H. When it becomes necessary to lay off employees due to a reduction in force, at least ten (10) calendar days' notice of such layoff or normal pay in lieu of such notice will be given all employees to be laid off except temporary employees.

ARTICLE XI - VACANCIES[1]

ARTICLE XVIII - BARGAINING AND GRIEVANCE PROCEDURE

A. Should a grievance occur, both the Union and the Employer shall make an earnest effort to ascertain the facts and seek a fair and equitable settlement through the following procedure. It is the intent of the parties to settle complaints and grievances at the lowest possible level in the procedure based upon the facts and common sense.

B. Grievance Time Limits
In order to document relevant facts, complaints must be lodged promptly after the cause giving rise to the incident. The Employer shall have no monetary liability for any period beyond thirty (30) days prior to the filing of the complaint in writing. Any answers not appealed in writing within the specified time limits at any step of the procedure shall be considered closed on the basis of such answer, unless such time limits have been extended by mutual agreement. Grievances not answered within the specified time limits may be appealed to the next step of the procedure. Time limits for appeals, decisions, and System Board responses will be exclusive of Saturdays, Sundays, and Holidays.

E. Step Three
If not settled, the grievance shall be reviewed by a representative(s) of the Industrial Relations Staff and the appropriate Assistant General Chairman. The Employer shall

[1] In its May 14, 1993 submission, the Union alleged violation of this article, but has given no specifics.

provide its written answer within fourteen (14) days from the meeting. If the Union decides to appeal the answer to the System Board, it will submit a written appeal perfecting all facts within forty (40) days from the Employer's answer. Copies of the appeal shall be sent to the Industrial Relations Officer, the Corporate Director of Industrial Relations-Ground, and the System General Counsel.

H. Step Tour - System Board
If the grievance remains unsettled after being processed through Step 3 above, the System General Chairman may request the case be heard by the System Board in compliance with Section 204, Title II of the Railway Labor Act as amended.

1. The System Board of Adjustment shall consist of three members, the CHAIRMAN, who will be a neutral member selected in a manner agreeable to the Employer and Union, the EMPLOYER MEMBER, who will be appointed by the Employer, and the UNION MEMBER, who will be appointed by the Union. In matters relating to contract interpretation, all members of the Board will hear and decide the case by majority vote. In disciplinary cases, only the Chairman will sit on the Board and he shall decide the case.

2. The Board shall meet in the city where the General Offices of the Employer are maintained (unless a different place of meeting is agreed upon by the parties.)

3. The Board shall have the power to make sole, final and binding decisions on the Employer, the Union, and the employee(s) insofar as a grievance relates to the meaning and application of this Agreement. The Board shall have no power to modify, add to, or otherwise change the terms of this Agreement, establish or change wages, rules, or working conditions covered by this Agreement.

4. All appeals properly referred to the Board shall include.
   a. The question or questions at issue.
   b. A statement of the specific Agreement provisions which are claimed to have been violated.
   c. All facts relating to the dispute which it intends to cite in support of its position.
   d. The full position of the appealing party.

A copy of the Submission shall be served on the other party.

5. Except in cases involving appeals of disciplinary action, letters in the file, suspension, or discharge, in which the only written procedural step will be the Union's Submission to the Board, the other party to the dispute shall, within forty (40) days after receipt of the appealing party's Submission, file a Statement of Position with the other party which shall include:

a. The question or questions at issue.
b. All facts relating to the dispute which it intends to cite in support of its position.
c. The full position on which it will rely.

Within fifteen (15) days after the date of the Statement of Position is filed with the other party, the parties shall advise the Board the facts, if any, on which they desire to present evidence during the hearing. Each party shall have the opportunity at the hearing to present evidence on the facts on which the other party presents evidence. The Chairman may also advise the parties the facts on which he desires to have evidence.

6. If the parties agree, the following procedure will be used in place of that specified in Paragraph 5 above.
In advance of the Board hearing, the Employer and Union will confer for the purpose of preparing a joint Submission to the Board. The Submission shall include:

a. The issue or issues to be decided.
b. The facts on which the parties agree.
c. The disputed facts.
d. The primary position of each party.

The Submission shall be signed by each representative and presented to the System Board Member(s)

7. Witnesses who are employees of the Employer shall receive free non-revenue positive space (MPS) transportation over the lines of the Employer from the point of duty or assignment to the point at which they must appear as witnesses and return, to the extent permitted by law.

8. Witnesses testifying at the hearing may be required to do so under oath if requested by either party.

9. Evidence presented at the hearing may include sworn depositions, written evidence, or oral testimony.

10. A stenographic record may be requested by either party. If such record is requested the cost will be borne equally by the parties.

11. Each of the parties hereto will assume the compensation, travel expense and other expenses of the witnessed they call or summon. The expenses of the Chairman will be borne equally between the Employer and the Union.

12. The Chairman shall give his written decision within thirty (30) days of the close of the hearing unless extended by mutual agreement.

13. The Chairman's copy of all transcripts and/or all records of cases will be filed in a place to be provided by the Employer, and will be accessible to the parties.

STATEMENT OF THE ISSUE

The parties could not agree on the framing of the issues to be presented to the Board.[2] According to the Union, the appropriate statement of the issue is as follows:

Did the Employer act in accordance with the Mechanics' Agreement when it awarded the Employee an Employer seniority date of September 1, 1970, and a classification seniority date of June 6, 1991? If not, what then should be the remedy?

According to the Employer, the appropriate statement of the issue is as follows:

Whether the subject matter of this grievance has been timely filed as to the remedy sought in accordance with Article X.E.1.a, or is barred thereby; established, when it has never been the subject of collective bargaining except for part-time employees.

If so, what then should be the remedy?

Turning first to the Employer's proposed issue regarding the question of timeliness, the Union asserts that the Board should not consider this issue because the Employer did not raise it in the earlier steps of the grievance procedure. The Board finds nothing in the contract, however, that would require the Employer (or the Union in the case of the Employer grievance under Section G) to raise a procedural objection such as timeliness at an earlier stage of the grievance procedure. In the absence of controlling contract language, it is appropriate to look to general arbitral principles for guidance. The Employer has, in essence, raised an arbitrability issue.

[2] The word "Board" refers to all three members of the System Board; the term "majority of the Board" or "Board majority" refers to two members of the System Board.

Elkouri and Elkouri in How Arbitration Works, Fourth Edition (BNA, 1985) state, as a general principle:

> The right to contest arbitrability before the arbitrator is not waived merely by failing to raise the issue of arbitrability until the arbitration hearing.

Applying that general principle to this case would lead the Board to conclude that consideration of this grievance on its merits is not time barred. The majority of the Board therefore finds this to be a valid issue that will be considered by the Board.

The second issue proposed by the Employer, regarding the question of the Board's jurisdiction to examine the basis for the establishment of Employer seniority is, in our view, too narrow. The facts of the case indicate that the Union raised questions about both the Employee's Employer seniority date and his classification date. The Employer argument that the Board has no jurisdiction over the determination of Employer seniority may be considered as part of the larger question of whether the Employer violated the parties' labor agreement in this matter.

For these reasons, the majority of the Board finds the issues before it to be as follows:

1. Was the subject matter of the grievance timely filed in accordance with Article X Section E.1.a as to the remedy sought or is it barred thereby?

2. If the grievance is not barred by Section E.1.a, did the Employer act in accordance with the parties' collective bargaining agreement when it awarded the Employee an Employer seniority date of September 1, 1970 and a classification seniority date of June 6, 1991?

3. If not, what is the appropriate remedy?

ANALYSIS

1. Was the subject matter of the grievance timely filed in accordance with Article X Section V.1.a, or is it barred thereby?[3]

Article X Section E.1.a requires the Employer to post Master Seniority Lists by April 1 of each year. It then states:

> It shall be the responsibility of the employee to immediately protest if such list is in error. Such claims may be processed by the Union directly to Step 3 of the grievance procedure. In the event an employee fails to protest the list within sixty (60) days after his seniority date and position on a seniority list is first established or adjusted there shall be no monetary liability or other retroapplication for subsequent seniority adjustments.

In the present case, it is an undisputed fact that the first seniority list showing the Employee's assigned Employer and classification seniority dates was posted April 1, 1992. The grievance protesting the Employee's seniority listings was not filed until February 1993, some ten months later. In the Employer's view, because the Union did not file its seniority protest within the sixty day period specified in Section E.1.a, the grievance is untimely as to retroactive remedy. Further, because of this untimely filing, the Board may not consider the merits of this grievance, i.e., it is time barred.

The Union makes several arguments in support of its claim that the grievance should not be barred on grounds of untimeliness. The Union first contends that the Employer did not raise the claim of untimeliness at the lower steps of the grievance procedure and therefore may not raise it before this Board. The Union further contends that it was not aware of Employee's seniority listing until it learned of the Employer's proposed reduction in force in late 1992 or early 1993. Union Representative Person 2 testified that in December 1992 the Union was made aware that the Employer was preparing for a reduction in force. Bumping took place and in late January

[3] See Disputed Fact No. 1

1993 the Employee appeared in the department that Person 2 represents. When a bargaining unit member asked why the Employee was still on the property, Person 2 checked the seniority list and found that the Employer had assigned him a Employer seniority date of September 1, 1970 and a classification seniority of June 6, 1991. According to the Union, Person 2 then filed a timely seniority protest on February 4, 1993.

Person 2 further testified that he has been a shop steward since 1968. He testified that in his experience, the Employer had never taken a position with respect to the timing of a seniority protest that it has taken in this case.

The Union also asserts that it represents more than 20,000 employees of the Employer. It is unreasonable to ask for the personnel records of all Union employees to verify the seniority and juniority lists. Person 2 testified that he had no knowledge that the Employer had assigned the Employer and classification seniority dates listed for the Employee on the seniority roster until the time that this grievance arose. Had he been aware, the grievance might have been filed earlier.

The Union also points out that the language of Section E.1.a requires the employee to protest his seniority listing within sixty days of posting, but does not preclude the Union from challenging a seniority listing at a later date.

In the Board's view, the contract language is quite clear that if a seniority protest is not made within sixty days, "there shall be no monetary liability or other retroactive application for subsequent seniority adjustments." This time limit, however, applies only to the remedy for an incorrect seniority listing. The reference to "subsequent seniority adjustment" clearly indicates that if an error is made in the seniority list, it may be corrected. The language simply means that

if a seniority listing is not protested within sixty days, the employee is not entitled to a monetary remedy or retroactive application of the seniority listing.

The parties made it clear that if an improper seniority listing occurs but is not protested within the sixty day period, it still may be protested and the listing may be corrected. However, for those over-sixty-day protests there is no monetary correction and retroactive application. The language of Section E.1.2 says nothing about the prospective application of an improper seniority listing.

The majority of the Board concluded, therefore, that Section E.1.a does not bar a seniority protest made more than sixty days after posting. It does, however, bar any retroactive remedy for an employee harmed by an incorrect listing. In our view, the approach contemplated by this language is reasonable. It would not be appropriate to continue forever an incorrect seniority listing, simply because the error was not "caught" within sixty days. Conversely, the parties have determined that an employee is not entitled to a retroactive remedy if he or she does not promptly protest his or her seniority listing.

In the present case, this means that the Board may consider the Union's seniority protest on its merits. It is not barred by Section E.1.a. If the Board determines that the Employee's seniority listing is incorrect, however, any employee(s) harmed thereby would not be entitled to any monetary compensation or other retroactive application of a subsequent seniority adjustment.

2. If the grievance is not barred by Section E.1.a. did the Employer act in accordance with the parties' collective bargaining agreement when it awarded the Employee an Employer seniority date of September 1, 1970 and a classification seniority date of June 6. 1991?

Turning first to the question of Employer seniority[4], the Employer position is that Employer seniority is solely a management decision, since it never has been bargained and is not a part of the collective bargaining agreement. For this reason, the matter is beyond the jurisdiction of the Board, the Employer contends.

The Union, on the other hand, argues strenuously that seniority is solely a creature of the contract and that the contract does not create Employer seniority. For the purposes of layoff and recall, the only pertinent type of seniority in this, case is classification seniority (a creature of the contract), not Employer seniority (a creature of management's imagination).

With respect to the Employer contention that Employer seniority is outside the jurisdiction of the Board, the evidence establishes that the Union has offered proposals regarding Employer seniority during bargaining in the past, but the Employer has not agreed to any contract provisions regarding the definition, establishment or application of Employer seniority in the labor agreement. The Board notes that the contract does refer to Employer seniority in Section E.1.b, which states that ties in classification seniority on the Master System Seniority List will be broken first by the Employer seniority date. But the collective bargaining agreement itself does not contain a definition of Employer seniority or criteria for the earning of Employer seniority or the application of Employer seniority. In summary, the contract is largely silent on Employer seniority.

The parties agree, however, the 1976 Consent Decree between the Employer and the EEOC is made a part of the collective bargaining agreement between the parties (see Joint Exhibit 6). Section XII of the Decree states:

[4] See Disputed Facts No. 3 and 4.

> The terms of this Decree shall be fully binding upon the Employer and defendant unions and the arrangements provided herein with respect to practices and procedures which are presently governed by collective bargaining agreements between the Employer and each such defendant union are hereby made part of such collective bargaining agreements as though expressly incorporated therein; the provision of any such collective bargaining agreement, practices or arrangements to the contrary notwithstanding. Provided, however, nothing in this Decree shall operate to neither change the collective bargaining rights of the Employer or any of the defendant unions nor prevent the Employer and unions from pursuing normal collective bargaining related to areas covered by this Decree so long as nothing done therein shall be inconsistent with this Decree.

Section VII of the Decree, entitled "Seniority," states in Section 1:

> 1. All job classifications covered by the Employer-Union Ramp and Stores, Food Services, Mechanic, Dispatchers, Communications employees and Guards Agreements as well as those jobs covered by the Employer's agreements with other unions shall henceforth be governed by the following seniority for purposes of determining priorities in layoffs and recalls:
>
> > a. Classification seniority for all employees who have a classification seniority date in the job classification in question greater than July 2, 1965.
> >
> > b. A seniority date of July 2, 1965 for all employees who were initially hired by the Employer prior to July 2, 1965 but who have a classification seniority date in the job classification in question less than July 2, 1965.
> >
> > c. Employer seniority for all employees who were initially hired by the Employer after July 2, 1965 and did not enter the job classification until after that date.
> >
> > d. Employees in promoted positions holding seniority under the Mechanic, Ramp and Stores, Food Services, Dispatchers or Guards Agreements or who are hereafter promoted to such positions, upon return to a position under one of the Agreements in which they hold seniority, shall have their Employer seniority adjusted (for purpose of layoffs and recalls) in the same manner as their Classification seniority is adjusted pursuant to the seniority provisions of the collective bargaining agreement.

Employer seniority is mentioned in both paragraphs c and d. The majority of the Board notes that these paragraphs do not define Employer seniority, nor do they set forth criteria for how it can be earned or lost or where it would control. The Board finds that no other provision of the Consent

Decree defines Employer seniority or sets forth criteria for the establishment of Employer seniority.

The majority of the Board thus finds that the Employer is correct that neither the labor agreement itself, nor the provisions of the Consent Decree incorporated into the labor agreement contain language governing the definition or establishment of Employer seniority. The establishment of Employer seniority therefore remains a matter for management's decision. The Board majority does not agree with the Employer, however, that application of Employer seniority is beyond the jurisdiction of the Board. Rather, it is within the Board's jurisdiction for several reasons. First, the Consent Decree clearly states the category of employee for whom Employer seniority governs placement on a seniority list; i.e. employees "who were initially hired by Employer after July 2, 1965 and did not enter the job classification until after that date." Since the Consent Decree is part of the contract, the Board majority finds that we have the authority to review the Employer's actions with respect to the Employee to determine whether the Employer acted in accordance with the provisions of the Consent Decree under the facts and circumstances of this case. Second, it is conceivable that the Employer could apply Employer seniority in such a way as to conflict with classification seniority. In addition, the Union has alleged that the Employer's action in this matter was arbitrary and capricious. It is a general arbitral principle that actions within the realm of management rights are subject to arbitral review against the standard of arbitrary, capricious, or unreasonable conduct. For these reasons, the Board majority finds that we have the authority to review the Employer's determination with respect to the Employee's Employer seniority.

Turning next to the Union's contentions with respect to Employer seniority, the Union has argued forcefully that seniority is solely a product of collective bargaining and the resulting collective

bargaining agreement. Since Employer seniority is not part of the labor agreement in this case, it was not proper for the Employer to give the Employee an Employer seniority date of September 1, 1970 and to apply that date for purposes of layoff. Rather, the Employer should have applied the Employee's classification seniority date to determine his order of layoff, the Union contends.

The Employer, on the other hand, argues that it properly exercised its management decision making rights in awarding Employee's Employer seniority date and applying that date to determine his order of layoff.

In the Board's view, the Union is correct that, in general, seniority is a creature of the contract and employees acquire seniority rights through collective bargaining and inclusion of such rights in the resulting labor agreement. Indeed, employers often argue that certain seniority rights sought by employees should not be granted because those rights are not specified in the contract. In the present case, however, unlike the typical case, the Employer and court in the Consent Decree has granted an additional type of seniority, Employer seniority, which does not exist in the contract. Here it is the Union rather than the Employer seeking to restrict employee seniority rights to those specified in the contract; i.e. classification seniority.

While the Union obviously feels strongly that this approach is proper in the present case, it does not account for the fact that both parties have accepted the existence and application of Employer seniority for a period of many years, often to the benefit of the Union and its members. In our view, it is doubtful that the Union really would want the Employer to abandon its long practice of awarding and applying Employer seniority to its employees. For example, if a long term bargaining unit employee of the Employer changed classifications and the Employer refused to apply the employee's Employer seniority for purposes of benefit accrual, and instead treated the

employee as a totally new employee based on the date of entry into the new classification, the Union likely would take issue with the Employer's failure to apply Employer seniority, even though it is not a part of the labor agreement. For these reasons, the majority of the Board finds that it was not improper for the Employer to apply Employer seniority in this case, even though Employer seniority was not a part of the collective bargaining agreement.

Turning next to the particular Employer seniority date established by the Employer for the Employee, the Union contends that the Employer's award of a Employer seniority date of September 1, 1970 is improper, arbitrary and capricious and in violation of the contract. According to the Union, the labor agreement did not apply until the Employee became a U.S. resident and took a position in the bargaining unit covered by the labor agreement. Again, the Union argues that the only relevant date is the date Employee entered the mechanics classification; i.e. June 23, 1991.

The Employer agrees with the Union that the Mechanics' Agreement did not apply to the Employee until 1991 when he acquired Country 2 residency status and took a position covered by the Union contract. According to the Employer, however, this does not mean that he was entitled to no Employer seniority credit until that time. Rather, the Employer contends that it properly exercised its management discretion in 1986 to give the Employee an Employer seniority date of September 1, 1970, the date Employee was hired by Airline 1. According to the Employer, that Employer seniority date properly was carried forward through the succeeding years.

In the Board's view, the important point here is that the Employer's decision in 1986 to give the Employee an Employer seniority date based on his date of hire by Airline 1 was completely

consistent with the Employer's actions with- respect to 2,000 other Airline 1 employees who came to the Employer as a result of the Airline 1 acquisition. That is, they all received an Employer seniority date that was the same as their date of hire with Airline 1. Under these circumstances, it cannot be said that the Employer's action with respect to the Employee's Employer seniority was arbitrary and capricious. Further, the Board can find no basis for changing the Employee's seniority date when he came to the Country 2 and took a position covered by the Union contract. The Union has presented no evidence of other Airline 1 employees, for example, whose Employer seniority date was changed in like circumstances. Thus, the Board majority find that the Employer's assignment of a Employer seniority date of September 1, 1970 to the Employee and the continuation of that date after the Employee entered Country 2 and took a position in the bargaining unit constituted a proper exercise of its decision making rights, was not arbitrary or capricious and did not violate the labor agreement.

The next question is the effect of the 1976 Consent Decree.[5] The parties agree that, like the collective bargaining agreement, the Consent Decree did not apply to the Employee prior to the time that he became a Country 2 resident and accepted a position in the Country 2 under the collective bargaining agreement. The Union position is that the Consent Decree does not apply to the Employee at all. Not only was he not a Country 2 resident when the decree was issued, he also had no discrimination claim pending against the Employer when the Decree was issued, or at any time since. The Employer, on the other hand, asserts that it properly applied the terms of the Consent Decree to the Employee.

[5] See Disputed Facts No. 6, 7 and 8.

According to record evidence, the Consent Decree remains in effect, both in and of itself and as part of .the collective bargaining agreement. The Majority of the Board finds nothing in the Decree to indicate that it applies only to persons with a discrimination claim pending against the Employer at the time the Decree issued and the Union has presented no evidence to substantiate such an assertion. Since the Decree is still viable and remains a part of the labor agreement, it is difficult to see on what basis Employee would be singled out for non-coverage.

As stated earlier, the Decree set forth the types of seniority to be applied for purposes of layoff and recall. Article VII Section 1.0 of the Decree requires "Employer seniority for all employees who were initially hired by the Employer after July 2, 1965 and did not enter the job classification until after that date." (Emphasis added.) The Employee was hired by the Employer and also entered the job classification after July 2, 1965. Thus, by the terms of the Consent Decree, his Employer seniority date was properly determined to be September 1, 1970 and that date governs his layoff and recall. The majority of the Board therefore finds that the Employer properly applied the Employee's Employer seniority date to determine his order of layoff.[6]

Once the Employee's Employer seniority date is properly determined to be September 1, 1970, the majority of the Board finds that the determination of his classification seniority date is governed by Article X Section A.1 of the labor agreement.[7] Section A.1.a states:

For bulletined jobs, the classification seniority date of the successful bidder or bidders will be the day following the last day for bidding on the job or jobs.

It is undisputed that this subsection does not apply to the Employee. Section A.1.b states:

> In all other instances, the classification seniority date will be the first day actually worked in the classification except that the classification seniority date of an employee shall be established as the date he is notified that he is awarded an open vacancy. The

[6] A Board Member dissents from this finding.
[7] See Disputed Fact 5

> probationary period and pay in the new classification of such employees, however, will begin with the first day actually worked in the new classification.

According to the Employer, the Employee's classification seniority date is June 6, 1991, the date he was notified that he was awarded the vacant position in City 2. The Union disagrees. According to the Union, the Employee's classification seniority date is June 23, 1991, the date he actually entered the mechanics classification. By the terms of the contract, the Union's date would be correct only if the Employee were not an employee at the time he was awarded the vacancy. The Union apparently contends that the Employee was not in the Employer's employ until he began to work for the Employer in a bargaining unit position in the Country 2. The term "Employer employee" in Section A.1.b is not limited in this manner, however. The majority of the Board finds no basis for concluding that the Employee was not a Employer employee in the period leading up to his award of the position in City 2. Since he clearly was an Employer employee at that time, the Employer correctly recorded his classification seniority date as the date that he was notified that he was awarded the position; i.e. June 6, 1991. In summary, the majority of the Board finds that the Union has not established that the Employer violated Article X in establishing the Employee's Employer seniority and classification seniority dates.

In its original submission, the Union also charged violation of Article XI, entitled "Vacancies" (Joint Exhibit 2). The Union presented no evidence or argument to establish a violation of this article, however, and the Board finds no such violation.

In its partial rebuttal dated September 20, 1993, the Union alleged violation of Article II Section B and Article III Section B (Joint Exhibit 3). Article II Section B provides:

> The Employer's General Policy, Operating and Maintenance Regulations shall be available to all employees at all points, and employees covered by this Agreement shall be governed by such Regulations and by all applicable rules, regulations and orders issued by properly designated authorities of the Employer not in conflict with the terms

> of this Agreement. The Employer shall cause to be compiled and issued on each present and new employee, a convenient sized book containing all applicable rules, regulations and orders and shall furnish each employee with amendments or changes from time to time as amendments or changes are made. This book of rules shall be supplementary to but shall not supersede the aforementioned regulations.

Article III Section B provides:

> It is further understood and agreed that all provisions of this Agreement shall be binding upon the successors or assigns of the Employer for the duration of this Agreement. In case of a consolidation or merger, representatives of the Employer and Union will meet without delay and negotiate for proper provisions for the protection of employee seniority and other property rights.

Union Vice President Person 3 testified that when the Employer acquired Airline 1's Area 1 routes, the Employer advised the Union that it was not bringing in any Airline 1 mechanics as part of the acquisition. Thus the Union had no knowledge of how the Employee obtained what the Union terms his "super seniority." According to Person 3, had the Union been aware of any mechanics coming in, it would have sought to enforce Article III Section B of the contract, which requires the Employer to meet with the Union and negotiate protection of employee seniority and other property rights in instances of consolidation of merger.

According to the Employer, one of the problems is that at the time of the Airline 1 acquisition in 1986, no one anticipated the circumstance that the parties are in today. At the time of the acquisition, the question was asked whether Union-type employees were coming over from Airline 1. Because the answer was no, there was no need for discussion between the Union and the Employer about how to treat any such employees. No one anticipated an employee such as the Employee later transferring to a position covered by the Union agreement. In any event, the Employer contends that the Union should not be allowed to expand the issue before the Board by alleging violation of other contract provisions such as Articles II and III. The contract requires

the parties to "perfect the facts" before submitting a case to the System Board and requires that the submission contain the "full position of the appealing party." The Union did not offer these other contract provisions early enough in the process to merit consideration, the Employer asserts. In the Board's majority view, whether or not the Union's allegations about these other contract provisions were timely, the Union has presented insufficient evidence to warrant a finding of a contract violation.

In addition to its documentary evidence and testimony, the Union offered several other documents, either arbitration awards or statements of the Employer's position in prior cases, to support its position in this case. The Employer offered no prior arbitration awards or statements of position. The Board briefly will address the Union's documents as follows.

1. Union Exhibit 7 is the Employer's Statement of Position, dated September 22, 1967 (prior to the Consent Decree), a dispute between the Employer and the Union before the System Board. According to the Employer, the issue in the case was whether the Employer violated the parties' Letter of Agreement when it reclassified all employees classified as utilitymen or lead utilitymen in City 1 as ramp serviceman or lead ramp serviceman and credited them for purposes of pay progression and other benefits with all time spent as utilitymen or lead utilitymen, but did not credit the Employee for such purposes for time he spent as a ramp serviceman at City 2. Beginning at page 15 of its Statement, the Employer sets forth its position that "It is a well established principle that seniority does not exist until established by agreement." The Employer cites Elkouri and Elkouri, Now Arbitsation Works, which in turn quotes Arbitrator Brandschain in a 1946 case to the same effect. The Employer relied on this principle to support its position that it did not violate the Letter of Agreement in the case before the System Board. The Union

emphasizes that in this 1967 case, the Employer took the same position that the Union takes in the present case; i.e. that seniority is solely a creature of the contract and does not exist outside it. As discussed earlier, the Union's assertion is generally correct, but it does not account for the fact that in this case both parties have accepted the existence and application of Employer seniority, even though it is not part of the labor agreement, for a period of many years, generally to the benefit of the Union and its members. The other difficulty with the Union position is that in this case, as discussed earlier, the case occurred prior to the Consent Decree and the Consent Decree by its terms is part of the contract. While the Consent Decree does not define Employer seniority, it does make Employer seniority a part of the contract with a meaningful impact on bargaining unit employees' rights to layoff and recall.

2. Union Exhibit 11 is the Employer's Statement of Position in that grievance, a 1993 dispute between the Employer and the Union. According to the Employer, the issues in this case were whether the System Board had jurisdiction over the grievance and whether the Employer violated Section 1 paragraph B of the 1986-89 contract by assigning dispatch duties for intra-European flights to non-Union based employees. In this case, the Employer stated as a fact that: At the time the Union was certified, the Employer did not have non-Country 2 based employees performing the work of airline dispatchers. Under applicable rules, however, any such employees would not have been considered to be encompassed within the certification because only employees based within the Country 2 and/or its possessions are subject to the jurisdiction of the Railway Labor Act, 45 USC Section 151 et seq. (the 'MLA").

The Employer further stated in Facts No. 40, 41 and 42, that:

> 40. The Employer acquired Airline 1’s routes on or about April 3, 1991. In connection with this acquisition, the Employer hired approximately 900 Airline 1-based employees from that route, including approximately six persons who had been employed by Airline 1 as flight dispatchers with respect to its routes.

> 41. The former Airline 1 employees who worked as flight dispatchers were represented by another union. Under that country's law, the Employer was obligated to recognize and negotiate with such union.
>
> 42. As a result of the laws in other countries, the Country 2 based, Country 2 citizen flight dispatchers represented by the Union could not be assigned to work on those new routes.

In its Statement of Position, the Employer asserted that the System Board had no jurisdiction over the grievance because it had no jurisdiction to apply the agreement to work performed outside Country 2 with respect to flights operated entirely outside of Country 2. Because the other dispatch employees at issue and the new route flights they allegedly improperly dispatched were located completely outside the Country 2, the System Board had no jurisdiction over the dispute.

The Union cites this Statement of Position to support its own position in the present case. According to the Employer, however, the case does not apply to the present case. The Director of Arbitration for the Employer, Person 4, testified that the present case revolves around the establishment of Employer seniority. According to Person 4, an employee is an Employer employee, regardless of where that employee works. As an Employer employee, an individual has certain rights, one of which is Employer seniority. According to Person 4, because the Employer stated in Union Exhibit 11 that the labor agreement could not be enforced outside the jurisdiction of the Country 2, the Union in the present case is trying to say that the Employer cannot grant Employer seniority to a foreign national. The Union is mixing apples and oranges, however, because Employer seniority is not a negotiable subject. Person 4 concluded that the extra-territorial arguments in the Union Exhibit 11 case have no application to the present case. For the reasons stated by the Employer, the Board majority agrees that this case does not compel a conclusion different from the one that the Board majority has reached in the present case.

3. Union Exhibit 13 is a 1985 award of Arbitrator Kasher, regarding the seniority integration of stock clerks/cleaners and station agents/ramp agents formerly employed by Airline 3, Inc., following its merger with Airline 1. According to the arbitrator's statement of background facts, the 1979 approval of the merger by the Civil Aeronautics Board (CAB) was conditioned on Airline 1's acceptance of labor protective provisions. These provisions included a provision for integration of seniority lists of the employees of the two carriers "in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and representatives of the employees affected." In the event of a failure to agree the labor protective provisions also provided for final and binding arbitration of the dispute.

Arbitrator Kasher was selected to arbitrate a dispute between Airline 1 and three different employee unions regarding such seniority integration. It is difficult to the see the applicability of this case. Unlike Arbitrator Kasher's case, the present case does not involve a claimed violation of labor protective provisions in a merger agreement, nor does it involve integration of two sets of seniority lists.

4. Union Exhibit 14 is the 1990 award of Arbitrator Rehmus in another seniority integration case, this one between Company 1, Company 1 mechanics and related employees, and former Company 3 mechanics, stock clerks and related employees. The dispute grew out of Company 1's acquisition and merger of Company 3 in 1989. Like Union Exhibit 13, this case involved Company 1’s agreement to provide certain labor protective provisions to employees as part of a process of approval of the acquisition. A primary focus of the dispute was whether the seniority roster of affected employee groups should be integrated through the use of a date-based method or a ratio-based method. The arbitrator identified criteria for determining which method would

be the most "fair and equitable," including the relative lengths of service of the two employee groups involved, the relative economic strengths of the merged airlines, the employment security and seniority improvement prospects of both employee groups had the airlines not merged, and the benefits or losses that each of the employee groups have gained or incurred as the result of the acquisition and merger. The arbitrator based his determinations on an analysis of the evidence in the record with respect to each criterion, concluding that a ratio-based rather than a date-based method would be the most fair and equitable. This conclusion had much to do with his finding that the Company 3 began in 1945 and many of the Company 3 employees had many more years of seniority than did employees of Company 1, a relatively new Employer. Since Company 3 was going out of business, the Company 3 employees had the most to gain through the acquisition, while the Company 1 employees, with relatively less seniority, had the most to lose. Again, the majority of the Board finds it difficult to see how this case aids the Union's position herein. The present case does not involve labor protective provisions under a merger agreement, nor does it involve integration of seniority lists.

5. Union Exhibit 16 is Company 2 case (Arbitrator Brandshain, 1946). The facts of this case were unrelated to those of the present case, but the Union apparently cites the case for Arbitrator Brandshain's statement that seniority rights of employees exist solely by virtue of the labor agreement and do not exist outside it. As discussed earlier, this general principle is generally correct, but for the reasons already stated, does not apply in the same manner in the case before us.

6. Union Exhibit 17 case (Arbitrator Boyer, 1984). In this case the arbitrator held that a private, non-profit corporation that assumed functions of a defunct municipal department was obligated under contract to .pay employees accrued vacation benefits according to a clause defining seniority as length of continuous service with the employer "dating from origin" of the Municipal Department Program, "notwithstanding any changes in the employer's status," rather than a clause providing for vacation rights according to seniority "as of the anniversary date." The arbitrator found that the contract was less than sufficiently ambiguous or unclear to justify a decision negating a provision that establishes seniority dates that predate the formal establishment of the employer. This case has little to do with the issue in the present case, but does contain the often-cited quotation of Arbitrator Brandshain in the Company 2 casee. For the same reasons stated earlier, the majority of the Board finds this case of little value to the present case.

In summary, the majority of the Board finds that the documents submitted by the Union in support of its position do not require us to change the conclusion the Board majority has reached in this case. As the Employer correctly points out, the Union has the burden of proof as the moving party in this case. The majority of the Board finds that the Union has not sustained this burden of proof that the Employer violated the labor agreement, was arbitrary and capricious, or acted improperly in this matter. The majority of the Board will enter an award consistent with the foregoing findings and conclusions.

After careful consideration of all oral and written arguments and evidence and for the reasons set forth in the opinion that accompanies this award, it is awarded that:

1. The subject matter of the grievance is not barred by Article X Section E.1.a.

2. The Employer acted in accordance with the parties' labor agreement when it awarded the Employee a Employer seniority date of September 1, 1970 and a classification seniority date of June 6, 1991.

3. The grievance is denied.