CHAPTER 9

ARBITRATION IN THE AIRLINES

I.

DANA E. EISCHEN*

I will give a brief legal and historical overview of arbitration in the airline industry to set the scene for the presentations of the other panel members. As most of you know, this industry is covered by the Railway Labor Act (RLA) and not by the National Labor Relations Act (NLRA). The reason why the airlines ended up under the RLA rather than under the NLRA is a curious accident of personalities and history. The story, as I understand it, goes this way.

The Airline Pilots Association, formed in 1931, had as its first president David L. Behncke, a United Airlines pilot. From the beginning he was in favor of coverage under the Railway Labor Act. Probably not even thinking about grievance arbitration, he was in favor of compulsory mediation for settlement of interest disputes, which was attractive to a fledgling labor union. The airline industry for the most part was indifferent about the RLA. In fact, experience with the National Labor Board, the precursor of the NLRB, had so disaffected airline management that they too were willing to accept any viable alternative.

In 1936 Title II of the Railway Labor Act was amended to provide for coverage of airlines, including the establishment of the National Air Transportation Adjustment Board (NATAB) similar to the National Railroad Adjustment Board. The amended Railway Labor Act provides for NATAB, a system with two members each from industry and labor, giving the National Mediation Board discretion to create and implement NATAB with the same jurisdiction and authority as the railroad Boards of Adjustment and with the same government subsidy and administration.

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With this statutory structure there is an overlay of judicial gloss imposing compulsory arbitration of minor disputes, i.e., grievances. In 1957 a decision by the U.S. Supreme Court[1] essentially held that in minor disputes there is compulsory arbitration. Under the RLA there is no right to self-help or a strike over grievances, contrary to the interpretation of employee rights under the NLRA. (I apologize to the more sophisticated members of the audience for an oversimplification of this distinction.) This removal of the right to strike has been used by some as an explanation for the federal subsidy, whereby the government pays for arbitration in the railroad industry. This appears to be a latter-day rationalization, however, developed some 20 years after passage of the statute; but it is suggested that this is a quid pro quo for giving up the right to strike.

Parties in the airline industry chose not to follow that model. With the government subsidy, no economic incentive to settle, and no right to self-help, there have been lots of problems in the railroad industry with grievance arbitration. The airlines have never pressured the National Mediation Board to establish the National Airline Transportation Adjustment Board, but instead have established their own system boards of adjustment through negotiation. Arbitration is still a statutory mandate, but the vehicle is through collective bargaining rather than through a statutory NATAB. Because of the pluralism in the airline industry, there is a wide variety of structures and processes.

Two common factors are: (1) tripartitism, which results in sometimes three, sometimes five, or as many as seven members on arbitration boards, with one chair and an equal number of partisan members; and (2) a systemwide jurisdiction, whereby the collective bargaining agreement covers the entire airline nationwide. This also determines the jurisdiction of the boards of arbitration, which are permanent features of the relationship rather than ad hoc structures.

This has been a very brief historical and legal background of arbitration in the airline industry. Now let me review what the other speakers are going to be talking about:

Seth Rosen of the Air Line Pilots Association will discuss the variety of structures and procedures, including the wide range of formality and informality and the historical development of

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[1]*Chicago River & Indiana R.R. v. Railroad Trainmen*, 353 U.S. 30, 39 LRRM 2578 (1957).

these boards, emphasizing the effects of deregulation as well as some of the substantive issues.

John Hedblom of United Airlines will speak generally about the tripartite system, its advantages and disadvantages, and then add his perspective as a management representative in evaluating the arbitration process as it relates to the complex cases with which this industry abounds, especially with reference to integration of seniority lists and mergers.

Mary Clare Haskin of the Association of Flight Attendants is going to bring a unique perspective to this discussion in her role as grievance chairperson at United Airlines. She will cover the administration of tripartite boards with specific reference to cost effectiveness, arbitrator selection, scheduling, and case screening prior to arbitration.

Martin Soll of Eastern Airlines will talk about the arbitrator's role on a tripartite board, what the parties have a right to expect from the neutral, and what conduct is unacceptable. He will also discuss stress and overload in the system, its causes, and how to deal with it.

II.

SETH D. ROSEN*

I have been a practitioner under the Railway Labor Act for many years and came to it from a background under the National Labor Relations Act. While a student taking labor law, I can remember that the Railway Labor Act was merely a footnote and was never covered on any examination during my period at George Washington University where I took all the labor law courses. I came to the Air Line Pilots Association (ALPA) in 1971, and I'm a product of a somewhat mixed career there since we represented both pilots and flight attendants when I first arrived. It was then a heavily regulated industry. I've gone through the ebb and flow of the industry over a long period of time. I ended up in Washington at headquarters. I have had the pleasure of working at every airline that we represent. That now

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consists of 46 carriers, each one with its separate bargaining unit and each one with its separate system board of adjustment.

When I started representing flight attendants at Western Airlines in 1971, we handled five discharge cases in one four-member system board of adjustment quarterly meeting and resolved all the cases. In fact, that was the pattern of most of the boards at that time. We seldom went to a five-member board because we settled most of the cases with the four-member board.

The two four-member system boards I'm going to talk about today are good examples of that approach. United Airlines was first organized by ALPA in 1940. The very first agreement we had with a major carrier was with American Airlines some 50 years ago. Shortly thereafter all the major carriers were organized, the last of which was Eastern Airlines.

Each agreement established a system board of adjustment. In order to maintain stability in the transportation industry, one of the underlying premises of the Railway Labor Act was to provide for the prompt and orderly settlement of all disputes growing out of grievances or involving the interpretation or application of agreements covering rates of pay, rules, or working conditions. When Title II of the Railway Labor Act was added, that language was incorporated into Section 204 to detail how broad the jurisdiction of the system board was in resolving disputes.

Although there is a distinction between major and minor disputes, the courts have determined that disputes arising out of the employment contract are minor disputes subject to the arbitration process under the system board procedures for resolution by the parties. The trend has been changing somewhat and some precedents have been challenged, especially regarding finality of system board awards. I need not talk to the Academy about the importance of the finality of the arbitration process.

When the industry first started, it was a small industry with a small work group. There was a closeness among all the people in the airline, and that attitude spilled over in the conduct of the system boards. United is a good example. They have always had a formalized procedure with rules and transcripts, but a very active four-member board that resolved practically all disputes. Over time things changed so that in 1968 it became more formalized. The collective bargaining agreement permitted either party to request initially that the case go to a five-member board. Since that time every case goes to an arbitrator.

It was similar during those formative years at Eastern Airlines. It wasn't until 1982 that a provision allowing bypassing the board by either party was negotiated into the contract. Previously, they had a marvelous success rate with only the four-member system board without requiring the services of a neutral. Over 75 percent of all cases at Eastern were resolved at the board level. That active process continues even today, up to the time of the strike, except for complex contract interpretation and discharge cases.

We have seen a trend toward more formalized relationships through the arbitration process, following the trend overall in labor relations matters. We are becoming a very litigious people. There has been an increase in formalism rather than the relaxed process that prevailed with four-member boards.

There is one key ingredient that makes the four-member board system work, and that is trust. There also must be a lot of independence and authority entrusted to the people who are presiding as board members. The people on both sides of the table have political considerations to deal with, but it is only when those people are free to exercise their will in a fair and just manner, without being subject to recrimination by either side, that such a structure can work.

That system still does work at some airlines, for example at Delta (although the trend lately has been toward having neutrals enter more and more disputes). Until a few years ago there was never an arbitration at Delta, but now we have two or three arbitrations a year. Most carriers and pilot groups are now moving toward a five-member board with an arbitrator. I think that is a very negative trend. I think people are better off working out their own problems, coming up with their own solutions, and living with those decisions.

When you deal with pilot jobs, you are dealing with a multimillion dollar career with all the legal considerations that go with it. So what we've seen is a much more technical handling of the cases with transcripts, discovery, subpoenas. Even the composition of the board is changing. Now at United, Northwest, and other places, we see lawyers being inserted on the boards instead of only management and union representatives. If the company puts a lawyer on the board, we have to counter by doing the same thing to protect our interests. That tends to break down the process—the informality, the free-flowing dialogue between board members, and the ability to give the arbitrators what they

want in terms of assistance from the board, namely, an understanding of the property and how things work, not a lot of lawyer arguments and relitigation in executive session, but some common sense being brought to the situation.

When you add to this the duty-of-fair-representation problems unions face, with employees bringing in outside counsel and companies bringing in outside counsel instead of internalizing the matter and keeping it in the family, there is bound to be more acrimony and a more confrontational environment. This is part of the changing society—changing labor relations starting with PATCO in 1981 and other significant factors. Once there is instability and a contentious environment, the ability to resolve disputes in a local and friendly fashion is bound to erode. Eastern and United are models of that.

When United Airlines came into deregulation in 1978, the United pilots supported the company in its desire to have Congress enact deregulation, contrary to where ALPA as an organization stood on the matter. The United pilots saw deregulation as being in their best interests because it would allow the company to grow and increase its potential to dominate the industry. They saw that as very desirable. Parenthetically, there were no system board cases during this time. There were such positive relationships that the cases dwindled to practically nothing.

Aside from its impact on labor relations in this country, the PATCO strike in 1981 also contracted the industry at a time when the industry was looking for growth. The results were a cancellation of plane orders, a cutback in scheduling, and ultimately, bankruptcies and an industry recession. The result was a much different environment for everyone. It changed the system board attitudes as well.

Since 1983 the cases at United have gone off the board with over 200 cases now pending at United. We are scheduling into next year, and the relationship has turned sour. At Eastern even during the bad economic time, the parties used the four-member board. The cases have now increased astronomically, to where it is now impossible to get minor disputes resolved in a timely fashion. The backlog is enormous.

There has been a decided change from the sense of stability and trust and the ability to work together; everything has become very formalistic. I do not see the parties sitting down and resolving minor disputes. In fact, I see the parties using the arbitration process as just another part of their overall strategy,

whether it is to aggravate, delay, and prolong the controversies, to buy time, or to protect issues for future negotiations. It is being used as a tactic involved in the overall labor relations strategy. It isn't a good sign, but it won't change until we see some stabilization in the industry, and that doesn't appear to be happening soon.

On a happier note, I can conclude with one last observation: there's a lot of work out there.

III.

JOHN M. HEDBLOM*

I came into labor law in 1985 at United Airlines to fight in arbitration cases. I come from an insurance litigation background where all you do is fight. I don't come in with a labor background. I agree that there is more legalization in labor arbitration. I don't see that as a negative necessarily, but I agree that we could do with a lot less acrimony. That has been a problem.

Yesterday I heard that one of the speakers described arbitrators' opinions as "father knows best" kind of opinions. If I could give my speech here today a title, it would be, considering that we're going into the 1990s, "expanded family knows best," because in the airlines we will continue to have a multiple board to work with. It is rare that we have solo arbitration cases.

Here is a quick overview of the boards I have worked on with United. We have five-member boards with both the flight attendants and the pilots. Since the 1960s, when we had a solo arbitrator, there have been only multiperson boards. On the ground side we do have some single arbitrators in discipline cases only; the board in ground agreements consists of three people, one from each side and the neutral arbitrator, who hear contractual disputes. That is the one limited exception. In the industry generally multiple-person boards are the rule.

I want to discuss first the negatives of the multiple-person board. The biggest negative is that it takes too long. For example, when a motion is made in a solo arbitration, the arbitrator rules on it immediately; but in our process there is argument on

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both sides, the board members contribute to the discussion on both sides, and then they ask for a caucus. Thus, there is a mini-executive session at various times during the hearing. Sometimes this takes 15 to 30 minutes. And if we don't finish the hearing in a day, we have to reschedule it for a later date. It's hard to get everybody together. So the case drags on.

Another area that is difficult from an advocate's standpoint is the presentation of witnesses. You all know with a solo arbitrator there are difficulties there. Testimony is let in "for what it is worth" frequently. Objections are generally overruled. I can't protect the witness in an arbitration hearing the way I would be able to in a court of law. If I object to hearsay, or the like, generally I will be overruled. Those problems with a board sitting are compounded by round-robin questioning. The arbitrator may have one or two questions; the board may have other items they consider important; that complicates matters.

When I bring in witnesses who have never been in such a proceeding, I tell them that testifying before a system board at United will be the most difficult job of testifying they will ever have to do, because of the additional problem of the board members being able to ask questions. I know I can object to board members' questions, but I also know I will not be sustained, and I will generally be looked at askance if I do object.

Another thing adding to the time delay is that transcripts go to all the board members. They have scheduled a later date for getting together in executive session to discuss the case and to fight it out all over again. There are few exceptions to this. This means there will be another round of fighting. Our skillful advocates will bring out all the technical considerations for the neutral's benefit. Then the neutral will draft an opinion and send it out to all the board members. They review that and send all their complaints, suggestions, recommendations back to the neutral, and hopefully it all gets worked out. All that takes a long time. Thus, you can see that anything that delays the process is a negative.

I'll touch briefly on expenses of the board, which I consider a negative. Those people who are employees of the company who sit as members of the board have their salaries paid during the time they spend on the board. With outside counsel, as on the pilots' board, that is an added expense for both sides. The most

expensive item is coffee; with a five-member board, they drink plenty of it.

You might ask why we have multiple-person boards. We are not required by the Railway Labor Act to have multiple-person boards, or we wouldn't have the solo arbitrator sitting on the ground discipline cases. So that leads me to the positives of the multiple-person board.

First, it's a lot more fun for me. I'm convinced that a requirement for membership in the National Academy is that you all have to take a course in noncommital nodding and general inscrutability. If I present a case to a solo arbitrator, I get no reaction. But if I present a case to the opposite board members, I can bait them and get them to express their thoughts. Or if I say something out of line, I can get some facial expression from my own board members. So it's a lot more fun. Seriously, advocates for the airlines agree that we get better opinions from a language standpoint with a multiple-person board than we would get from a solo arbitrator. The board members have input during the process, during the executive session, in the opinions after the fact, and they may even work with their opposites on the board to tighten up the neutral's language. That focuses the award and prevents that part of the case not central to the issue from hurting either party by inadvertently reinterpreting some part of the agreement which has already been decided and which shouldn't be meddled with. I'm not saying we expect to have bad language with a solo arbitrator, but with the board we have more control.

The board also has pulled my feet out of the fire. If I have board members who know something about the case, they can ask the right questions; they can put the right thoughts in the neutral's mind; they can argue the right points in the executive session, whereas I might have missed something. Able counsel on the other side has done the same thing to us. The process adds more advocacy and may be more acrimonious, but it helps refine the board's decisions.

Another one of the big pluses of the multiple-board is that in the airline industry we are dealing with complex technological situations. Of course, sometimes we have very simple cases as well. One case I remember involved a ramp service man who was accused of driving a movable stairway too fast and overturning it on the tarmac. He insisted he was driving it carefully and de-

scribed that he was air-drying it because it had just been washed. The neutral asked: "Wouldn't that leave spots?" We did not need a sophisticated arbitrator for that; we did need a practical one, and that's what we had.

As an extreme example, there is a device in the cockpit known as the INS, the inertial navigational system, which tells you where you are wherever you go. How it does that is far from simple; it seems to be magical. The current coordinates get plugged into the computer and it detects motion. It's in a lot of aircraft. What the machine does is simple, but how it does it is difficult. As an advocate trying to describe it to a single arbitrator, I could be certain that I would not be able to make it clear. But with a multiple board, I could rest assured that during the executive session, if the neutral had any questions, the other board members could answer them better than I could have during the hearing.

The contractual cases that we have are also complex. We have scheduling rules, particularly on our international operations, which are an absolute wasteland of gray areas, interpretations, practices, that no one knows everything about. Having a person on the board who knows about these practices is a real comfort to everyone involved, including the grievant. And the decision is a completely informed one.

In conclusion, the virtues of the multiple board outweigh the less expensive, more expedient, cleaner solo arbitration case. They're here to stay in the industry, and the bottom line is that if you arbitrate in the airline industry, you can expect company.

IV.

MARY CLARE HASKIN*

One of my job responsibilities is to coordinate the scheduling of the United Airlines System Board of Adjustment. United has 13,000 flight attendants who are represented by AFA, and we have 500 grievances presently pending before the system board. Some of our cases go back as far as 1971. This seems to be an incredible backlog, but we have a well-oiled machinery for expediting grievances at the arbitration level. I really don't find the

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multiple board process as time-consuming as the previous speaker seemed to suggest. In scheduling, we try to pull out those cases which are likely to take a longer hearing time and schedule them accordingly. We don't find the board so time-consuming. In addition to arbitration, I also meet with the company several times throughout the year to review the pending cases and work toward settlements, if possible.

On case screening we don't have a formal system. But with the 500 cases, some get screened without being heard. Every grievant wants a day in court. We always give a document to the grievants to let them know that the case has been settled. While this is not as formal as a hearing before the board, we do try to satisfy each grievant.

Today, I'm going to focus on how our panel operates, specifically, where we get our mandate for our panel, how panel members are selected, factors contributing to cost effectiveness, our selection process of cases, and how our arbitrators interface with the system board and the advocates.

Our contract sets forth the establishment of both a five- and a four-person board. However, the four-person board has not been used for the last ten years or more. The contract also establishes that the parties will select at least 11 referees. This panel runs concurrent with the life of the agreement unless the parties mutually agree otherwise. Our contract further establishes that the cases will be heard during one week of each month. We schedule a minimum of 60 cases per year. Even though we may settle some cases, we use the time by scheduling back-up cases. We have had this practice for over 20 years.

For the past several years the company designees had scheduled all our cases with my concurrence. My turn came two years ago. To begin the process I start by assuming that all 11 arbitrators will accept service on our panel. So far that has proved true. Each arbitrator can be assigned five days plus one extra day for five arbitrators. I advise the arbitrators of the mutually selected dates for the year, and they in turn advise me of their availability for those dates. And that's when the fun begins.

It takes many hours to put faces on the schedule. Then the company and I negotiate about the schedule. While our cases are heard in Chicago, our arbitrators are from all over the country. Whereas in the past we may have had a different arbitrator for each of the five days, two factors have altered our scheduling practices when we schedule arbitrators for two to three con-

secutive days. A key reason is cost. Scheduling an arbitrator for consecutive days cuts down on travel expenses. The second reason is that our cases often require more than one day's hearing. It is far more expedient and cost effective to complete the case in one session, particularly since the arbitrator may not be rescheduled for several months. Every effort is made to hold executive sessions in the home town of the arbitrator because in the airline industry, company passes are available to employees for business-related travel whereas the arbitrator bills for expenses.

It is not unusual for arbitrators to find a conflict once the schedule is submitted. In that case we allow them to trade days. We rarely know prior to the month before what cases will be presented to a particular arbitrator. The union usually selects what cases will be heard. Our Master Executive Council policy mandates that we give discharge cases priority, and we rarely see a discharge case that is held in abeyance more than two months. The descending priority list involves the following matters: (1) MEC contract violations that affect the entire membership, (2) local grievances that may affect other domiciles, (3) individual cases of policy matters that may affect other flight attendants in the future, and (4) disciplinary cases.

Our boards know that we have a very technical contract, and hence there are numerous opportunities for contract violations. Also, we have a very educated membership who are quite capable of making their own interpretations. Then we have a practice of grieving every step of the disciplinary procedure involving such things as sick leave, to protect the grievant's rights in the future. It's hard to tell members not to grieve because when they get the oral warning, the written warning, then the suspension and they haven't grieved the previous action, they are bound by the determinations. We sometimes have to advise a grievant at the system board level that their case may be lacking merit, but it's hard to do that at the local level when a member feels it is very important.

The Railway Labor Act requires a system board for arbitration and, while we know that some airlines have a sole arbitrator for some cases, we have chosen a five-member board. Our board is unique in that we have participatory board members representing both the company and the union, who have served in this capacity for over 20 years. That is somewhat of a record. They know the contract as well as the precedents of the system board.

Another unique factor is that the board has established a set of rules regarding procedural and evidentiary matters, and all arbitrators must live with these. Continuity in contracts and consistency in board decisions is preserved by one of the rules, which states that prior contracts and board precedents shall be considered by the board at all times. The parties may direct the board's attention to any prior contract or any prior board decision without formal introduction into evidence.

I have attended all system board hearings in the past five years while I have had this job as grievance chairperson. I have observed continuity and consistency, but also a collegial atmosphere which exists between company and union board members and the neutrals. We feel our modus operandi is unique compared with the operations of other industries. We think that our system gives our membership expedient results on their grievances.

V.

MARTIN SOLL*

I will spend a few minutes on the subject Dana Eischen chose for me, namely, what could disinvite you from the system board panel provided that you should be chosen. I have presented cases for two airlines, on contract and noncontract issues, before three, four, five person boards. What might be acceptable to you and to the attorneys who present cases day in and day out may be totally unacceptable to the grievants who come to the board for the first time or to the management people, such as the manager of flight or the chief pilot, who are there for the first time and who have no knowledge about the arbitration process but may have quite a bit of clout in deciding who is chosen or who should remain on the panel. You have heard in prior discussion things you shouldn't do, but they continue to happen. I talk as a neutral myself, and I suggest that you listen because they happen in real cases.

The system board has many fronts. Here are a few pointers: A case may be political for whatever reason. Don't try to mediate.

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The issue may be insignificant to you, but it is quite important to the grievant.

Another point is what goes on at the hearing, especially what goes on in executive sessions. In some cases we have had four days of hearing, with two hours of actual testimony and the rest executive session. What happens is that the arbitrator tries to appease one party or the other by listening and listening, but both sides get very frustrated when the arbitrator won't make a decision.

Another unacceptable fact is that the arbitrator lets the parties use the technical rule of exclusion. The attorneys can handle it, but the other members of the board have trouble with it. If the arbitrator becomes too legalistic, it does not serve the purpose of arbitration. In one case we even had to prove up the contract. The party who was prevailing in this point was just as angry at the arbitrator for allowing this to happen as the opponent. That person was not invited back.

Another problem involves the pleasantries that go on among the parties and the arbitrator. This may be wonderful at a social event such as this, but at an arbitration hearing the grievant and some of the management people who are there for the first time don't understand the in-jokes and feel that the process is working against neutrality. Be very careful. You are being judged by that grievant. If it is a disciplinary matter and a job is on the line, it is no joking matter.

Another example of this type of conduct occurred when an arbitrator during the course of the hearing made a disparaging remark about another union official. Unfortunately the grievant, hearing the remark, interpreted it as prejudicial to unions generally and to this case in particular. The union attorney was asked to require that arbitrator to recuse himself from the case. There was delay and increased cost, and it should not have happened.

If you want to have a one case tenure, don't bring the contract. Or bring the contract, but don't read the pertinent sections ahead of time, even when the parties let you know what the case is about. In a continuing contract, don't bring the file from the last session. Or bring the wrong file. Or with the system board of adjustment, show up at the right hotel but in the wrong city. Or have the board convene with everybody there except you, the arbitrator, and when you are called, say "I thought it was next week." I assure you that happens only once.

If you want to have only one case, fall asleep during the presentation of the case, or look like you're falling asleep. Tell one of the advocates "You don't have a case" during the hearing, by body language or otherwise. Don't issue the opinion for a number of months. We have one case where we submitted briefs three and a half years ago. The union's brief was seven pages, mine was five. We're going on four years since the case was heard.

If you really want to cause a lot of havoc and contribute to the cost of the board, add some footnotes that have nothing to do with the case but that give your opinion. We have been arguing one footnote now for 10 years. We've had 45 cases as to the meaning of the footnote, and we can't get a decision.

Decide other contract issues that aren't being grieved. Add to the contract and put in your own words. Send a draft copy of your award to the grievant or to the advocates.

With reference to backlogs, there are thousands and thousands of cases. We have been looking for ways to resolve this. We instituted an internship program at several universities with senior law students and permitted them to get the feeling of what the cases were, and they were going to be assigned minor disciplinary cases. Everybody was happy with the idea, but for some reason it didn't work out. We also went into a mediation-type procedure with an advisory opinion. I think it would have worked if we could have managed it.