CHAPTER 5

ARBITRATION WITHOUT NEUTRALS: JOINT COMMITTEES AND BOARDS

I. THE LEGAL BACKGROUND

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The title of today's discussion, the printed program to the contrary notwithstanding, is "Arbitration Without Neutrals: Joint Committees and Boards." My hope is that it will be both descriptive and controversial: descriptive in the sense that the speakers will describe a process in which arbitrators (at least as that term is used by the Academy) do not participate and as to which they are—or at least I am—relatively ignorant; controversial insofar as the speakers have different views as to whether a joint board or committee decision is the equivalent of arbitration.

There are, of course, many industries in which joint board or committees sit in judgment on grievances. The National Railroad Adjustment Board, when sitting without a referee, is perhaps the oldest example.[1] There are also, I am told, similar systems in some of the building trades unions. For today's discussion we have taken as the prime exemplar the joint committee systems under the agreements of the Teamsters Union, with primary emphasis on the committee system as it operates under the National Master Freight Agreement.[2] The principal

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[1]For a description of its procedures *see* Daugherty, *Arbitration by the National Railroad Adjustment Board*, in Arbitration Today, Proceedings of the 8th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1955) 93.

[2]The only descriptions of how the Teamster joint committee procedures actually operate that I have been able to find are Azoff, *Joint Committees as an Alternative Form of Arbitration Under the NLRA*, 47 Tulane L. Rev. 325 (1973) and James and James, Hoffa and the Teamsters: A Study of Union Power (New York: Van Nostrand, 1965) 167–85.

speaker, who I hope will be both descriptive and controversial, will be Gerry Miller of the firm of Goldberg, Previant, Uelman, Gratz, Miller and Brueggerman, the firm which has, over the years, represented the Teamsters in the litigation I am about to describe. Commenting on and responding to him from an arbitrator's viewpoint will be Professor Clyde Summers of the University of Pennsylvania. Then we will switch to a minor variation on the same theme: the airline system adjustment boards dealing with pilot disputes. Discussing their operations without a neutral will be Stuart Bernstein of the firm of Mayer, Brown & Platt, who has spent many years as an employer representative on the United Airlines System Board. Responding to him will be Robert Nichols of the firm of Cotton, Watt, Jones, King & Bowles who has served as the ALPA representative on that Board when it operated with a neutral.

Before they begin, let me try to set the legal background. To many in this audience and certainly to all of the members of the Academy, the title of today's session is either nonsensical or self-contradictory. An arbitrator, as we have become accustomed to using the term, is by definition a neutral. It would therefore certainly appear strange to regard persons who, by definition, by title, and by function, are representatives of management or labor as "arbitrators."[3] Yet it is plain from the decisions which I am about to review that at least the Supreme Court of the United States has treated certain joint decisions by management and labor representatives as "arbitration." How this came to be is the principal burden of my speech. The second, and one which I hope will provoke something more than a historical discussion, is whether it makes any difference that this is so.

Let me begin with a few generalities and limitations. First, what I am talking about is grievance arbitration, what we now call the arbitration of rights. Second, I am talking about those industrial relationships in which the determination as to what action to take or not to take in a given employment relationship is made in the first instance by management: management hires, fires, promotes, demotes, lays off, pays wages, etc. If a question

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[3]Indeed, the by-laws of the Academy have since 1976 deemed it inconsistent with continued membership in the Academy for any member to undertake thereafter to serve partisan interests as advocate or consultant for labor or management in labor-management relations. Similarly, the FMCS Arbitration Regulations exclude from the roster of arbitrators "persons who act as partisans in the labor relations process. . . ." (In both cases, of course, there are exceptions for grandfathers.)

arises as to whether in taking any such actions management has complied with the terms of a collective bargaining agreement, there is a procedure in which, at various steps and levels, the representatives of the parties seek to reach an understanding as to whether the action taken by management does or does not comply with the collective bargaining agreement and, if it is determined that it does not, what the appropriate remedial steps should be. We usually call this the grievance procedure.

If, at any stage of the process, the representatives of the parties agree that there has been a violation of the collective bargaining agreement and upon appropriate remedial steps, that is an agreement between the parties. If, contrariwise, they agree that there has been no violation to the agreement, then that too is an agreement of the parties as to the proper application of the agreement to the particular grievance before them. If they are unable to agree and the union determines that the claim of violation is without merit or that it is unwise or undesirable to proceed further with the dispute, then the management decision stands and there is no further recourse. If, on the other hand, the union decides that management's response to the claim of violation at a particular step in the grievance procedure is unsatisfactory, it can proceed to appeal to the higher steps of the procedure and, if agreement is not there reached, it can proceed to what we call "arbitration."

Within that generalized framework there are, of course, enormous variations. The final "arbitration" step may provide for a single neutral. In many situations, however, there is a provision for a board or committee consisting of equal representatives from the union and employer sides and a neutral. Sometimes, indeed, the employer and union representatives are called arbitrators in the agreement. In such agreements it is often provided that these representatives shall first attempt to resolve the dispute. If they are unsuccessful in doing so then, and then only, is a neutral "arbitrator" called in to resolve it.

Despite the terminology, however, and unlike commercial arbitration, where the party-appointed members are at least supposed to be themselves neutral, in labor arbitration it is generally recognized that the party-appointed members of the joint boards and committees are representatives of labor and management. If they agree, it is an agreement of the parties. If they don't and a neutral is called in, they can, in the confidence of the executive session, not only present a partisan view but also

help to acquaint the neutral with problems which a proposed decision may create for the ongoing relationship of the parties.[4]

The first question that I want to address is whether, in the absence of a neutral, the joint decision of the employer and union representatives without a neutral, either at or before the final step, is, in law, treated as an "arbitration" decision. The second is whether, if it is so treated, it makes a difference.

If we are to believe the decisions of the Supreme Court of the United States, and presumably we must, the answer to the first question seems to be "yes." That court has in the past flatly declared that decisions by a joint board or committee without the participation of neutrals is "arbitration" even if not so labeled by the parties.

The first intimation that a joint committee decision was "arbitration" came in 1963 in *General Drivers v. Riis & Co.*[5] To understand that case one must go back to some law that is no longer law. In 1955, in *Westinghouse Salaried Employees v. Westinghouse Electric Corp.*,[6] a divided Supreme Court held that there was no jurisdiction under Section 301 of the Taft-Hartley Act over suits by individuals or on their behalf claiming that an employer had violated their rights under a collective bargaining agreement. Two years later in *Lincoln Mills*,[7] the Court held that there was Section 301 jurisdiction over a suit to compel arbitration of such claims and then, in the third of the Steelworkers Trilogy, *Enterprise Wheel*,[8] the Court held that it had jurisdiction to enforce an arbitrator's award granting reinstatement and back pay to individual employees.

This was the state of the law when the Sixth Circuit decided the *Riis* case. Six drivers had been discharged for refusal to cross a picket line. Grievances were filed and processed through the Joint State Cartage Committee to the Joint Area Cartage Com-

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[4]The operation of tripartite boards is most recently discussed by Zack and Rehmus in *Tripartite Interest and Grievance Arbitration*, in Arbitration Issues for the 1980s, Proceedings of the 34th Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1981) 273, 284. The discussion always assumes that the party representatives are, in fact, party representatives, not neutrals. In highly sophisticated relationships, such as in United States Steel, the neutral is still termed Chairman of the Board of Arbitration but the parties dispense with the formality of having an "outside" advocate and an "inside" advocate who is called a member of the Board. They simply allow the Chairman of the Board to communicate directly with the representatives of the parties in formulating his decision.

[5]372 U.S. 517, 52 LRRM 2623 (1963).

[6]348 U.S. 437, 35 LRRM 2643 (1955).

[7]*Textile Workers v. Lincoln Mills*, 353 U.S. 448, 40 LRRM 2113 (1957).

[8]*Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

mittee. That committee ordered reinstatement with back pay. The employer refused to comply and suit was brought under Section 301. The Sixth Circuit described the procedure set out in the agreement as "a grievance procedure." "It is not," the Circuit continued, "an agreement for compulsory arbitration, in exchange for a no-strike or work stoppage clause. There is no finality to this grievance procedure."[9] Therefore, it concluded, the case came squarely under *Westinghouse,* not *Lincoln Mills* or the Trilogy and there was no jurisdiction.

The case went to the Supreme Court during the same term as *Smith v. Evening News.*[10] *Smith* overruled *Westinghouse* and held that a suit to enforce individual rights under a collective bargaining agreement could indeed be brought under Section 301. After the decision in *Smith* it no longer made any difference whether the suit was one to enforce an arbitration award or to enforce an agreement which the parties had made in the grievance procedure. The Supreme Court therefore reversed in *Riis*, noting that *Westinghouse* was indeed now dead. But in the course of its brief *per curiam* opinion it volunteered the statement that "it is not enough that the word 'arbitration' does not appear in the collective bargaining agreement, for we have held that the policy of the Labor Act 'can be effectuated only if the means chosen by the parties for the settlement of their differences under a collective bargaining agreement is given full play.' " It followed that if the joint committee was the parties' chosen instrument for the settlement of grievances, and its decision was "final and binding," it was enforceable whether or not it was termed arbitration.[11]

The next case was *Humphrey v. Moore.*[12] *Humphrey* did not involve a grievance claiming a contract violation at all, but rather a question as to how to integrate seniority lists when one carrier took over the routes of another by agreement. Section 5 of the agreement covering both carriers said that if one absorbed the business of another, the seniority of the employees affected should be determined by mutual agreement between the

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[9]298 F.2d 341, 342, 49 LRRM 2550, 2551 (1962).
[10]371 U.S. 1975, 51 LRRM 2646 (1962).
[11]I should pause here to note that David Previant, the senior partner of my co-panelist here, did not in his brief to the Supreme Court attempt to argue that the Sixth Circuit was wrong, and that the decision of the Joint Committee was indeed arbitration. Rather, his argument was the straightforward one that it was a final and binding agreement between the parties and enforceable as such.
[12]375 U.S. 335, 55 LRRM 2031 (1964).

employer and the union, with any controversy with respect to that matter submitted to the Joint Grievance Procedure. The dispute was as to whether the employees of the transferring carrier who lost their jobs should be dovetailed or endtailed on the seniority list of the receiving carrier. The dispute went to a local joint committee, where the parties disagreed, and then to the Automobile Transporters Joint Conference Committee, whose decision was to be "final and conclusive and binding upon the employer and the union, and the employees involved." The Committee decided to dovetail seniority. The displaced employees of the receiving carrier then brought suit claiming a breach of the duty of fair representation. The Supreme Court said that there was no evidence of "fraud, deceitful or dishonest conduct." Therefore, quoting the language of *Ford Motor Company v. Huffman*[13] dealing with the duty of fair representation in the negotiation of a contract, it decided that there was no breach of duty.

If it had stopped there the decision would be irrelevant for present purposes. But Mr. Justice White went on, as is his wont. He said, hypothetically, that *if* the powers of the Joint Committee were limited by Section 5, the Committee's decision came within its authority under that section. That portion of the opinion drew a concurring opinion from Justices Goldberg and Brennan. They agreed with the result, but they said that it was no business of the Court to look into the question of the power of the Joint Conference Committee. It is true, they said, that in decisions dealing with labor arbitration the powers of the arbitrator are defined by the collective bargaining agreement. But the decision here was not the decision of an arbitrator: it was an agreement between the parties to the collective bargaining agreement. Therefore, it made no difference whether the Committee's decision was within the scope of Section 5 or not. The parties were free to resolve the dispute by amending the contract to dovetail seniority lists or to achieve the same result by entering into a grievance settlement.

The next case was *Hines v. Anchor Motor Freight.*[14] The plaintiffs there had been discharged for dishonesty. Their grievances were appealed to the Joint Area Committee established under the National Master Automobile Transporters Agreement.

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[13]345 U.S. 330, 31 LRRM 2548 (1953).
[14]424 U.S. 554, 91 LRRM 2481 (1976).

That agreement provided that disputes unresolved between the employee and the employer could be taken first to a local joint committee, then to an area committee, then to a national committee and, if there not resolved, to a "Board of Arbitration" consisting of three members: a union representative, an employer representative, and "a third disinterested arbitrator" appointed by the two party representatives. The discharges never got to the "Board of Arbitration." They were sustained by the area committee. The discharged employees then brought suit claiming breach of the duty of fair representation. The court of appeals concluded that there was sufficient evidence of breach of duty by the local union to warrant a trial but affirmed summary judgment in favor of the employer.

When the case got to the Supreme Court the only issue was whether the decision of the joint committee relieved the employer of any liability if, in fact, there had been a breach of the duty of fair representation by the local union. It had been reasonably clear since *Vaca v. Sipes* that the employer could be sued under Section 301 for breach of the collective bargaining agreement when a union failed to take a grievance to arbitration in breach of the duty of fair representation. The question of the employer's liability in *Hines* therefore implicitly involved not one but two questions: first, whether the decision of the joint committee should be treated as arbitration and, second, if so, whether an employer was relieved of any potential liability if the plaintiff lost the arbitration because the union breached its duty of fair representation in presenting his case.

Oddly, no party in *Hines* directly addressed the first question. No one seriously pressed a contention that the concurrence of the union members of the joint committee in management's action was the same as a union's refusal to process a case to arbitration. The parties conceded that it was an "arbitration" award. The only argument made by petitioner, and the principal argument made by PROD as *amicus*, was that a joint committee decision should be given less deference than other "arbitration" awards.[15] The employer, of course, relying on the Trilogy and the finality there given to arbitrators' awards, argued that the

[15]There was no issue as to the liability of the international union. It had been dismissed from the suit by the court below. It nevertheless filed a brief urging that *Riss* and *Humphrey v. Moore* precluded any argument that joint committee decisions should not be given the same effect as arbitration decisions.

arbitration decision was not reviewable even if the union had breached its duty of fair representation.

The Court accepted without question the unargued assumption that the joint committee decision was an arbitration decision. It repeatedly referred to the joint committee as a joint arbitration committee despite the absence of a neutral. It held, on the second question, that the employer could nevertheless be found liable if the union's breach of duty "seriously undermines the integrity of the arbitral process."

The identification of the joint committee decisions as "arbitration" was emphasized by the dissent of Mr. Justice Rehnquist in which the Chief Justice joined. Rehnquist said flatly that "Here the case *was* presented to a concededly fair and neutral arbitrator. . . ." (Emphasis in original.) According to Rehnquist, it was permissible to hold the employer responsible where the union breached its duty by failing to take a grievance to arbitration. That "bolstered the consistent policy . . . of encouraging the parties to settle their differences according to the terms of their collective-bargaining agreement." But when settlement failed and the case had been presented to an arbitrator, the policy of giving finality to arbitration decisions dictated the opposite result.

The characteristics of joint committee decisions as "arbitration" decisions reached its apotheosis in 1981 in *United Parcel Service v. Mitchell.*[16] This, again, was a suit for breach of a duty of fair representation in the processing of a discharge case. The discharge was sustained by a joint panel of the "Atlantic Area Parcel Grievance Committee," apparently the step in the procedure below the "Eastern States Area Parcel Grievance Committee" established by the agreement between United Parcel Service and the union.[17] The question was what statute of limitations should be applied to a suit by the discharged employee against the employer claiming that the union breached its duty of fair representation and that the discharge violated the agreement. The Court held that the applicable statute in a suit against

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[16]451 U.S. 56, 107 LRRM 2001 (1981).

[17]The record in the Supreme Court is silent as to the composition of the panel or of the Atlantic Area committee. It does show that the Eastern States committee should be composed of the employer and union representatives who negotiated the agreement and that if that committee did not settle dispute by a majority decision, the grievance could be submitted to a permanent arbitrator. This agreement therefore, like that in *Hines*, did provide for what everyone would describe as "arbitration" but only if no agreement was reached in the committee stages. The committee, however, sustained the discharge.

the employer was the state statute of limitations applicable to suits to vacate arbitration awards.

Mitchell was overruled two years later in *DelCostello v. Teamsters*.[18] The decision actually covered two cases. The other case was *Steelworkers v. Flowers*. *Flowers* involved what everyone would consider an arbitration decision. The plaintiff had been discharged, and his discharge had been upheld by the Impartial Umpire under the Bethlehem Steel-Steelworkers agreement. More than ten months after the decision the employee brought a *Vaca*-type suit against both the company and the union. The Second Circuit, following *Mitchell*, held that the claim against the employer was barred by the New York ninety-day statute of limitations applicable to suits to set aside arbitration awards. The claim against the union, however, was not. The applicable statute for that claim was New York's three-year statute for nonmedical malpractice actions.[19]

DelCostello involved the discharge of an employee, an active member of PROD, by the same Anchor Motor Freight Company that had been involved in *Hines*. The discharge had been sustained by the Eastern Joint Conference Automobile Transporters Joint Committee. The Fourth Circuit held that the claims against both the union and the employer were barred by Maryland's thirty-day limitation period for actions to vacate an arbitration award.[20]

The International Brotherhood of Teamsters was not a party in the Supreme Court case. It had been dismissed as a defendant by the trial court for reasons unrelated to the limitation question. But, as in *Hines*, it filed a brief *amicus*. So did the Teamsters for a Democratic Union (TDU). TDU's brief was the first and only one in the Supreme Court to argue squarely that a joint committee decision was not an arbitration decision.[21] The international union, of course, responded that it was, relying on *Riis*,

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[18]51 USLW 4695, 113 LRRM 2737 (1983).

[19]671 F.2d 87, 109 LRRM 2805 (1982).

[20]679 F.2d 879, 111 LRRM 3062 (1982), *aff'g* 524 F.Supp. 721, 111 LRRM 2761 (D. Md. 1981).

[21]None of the parties in either case disputed the premise that a joint committee decision was an arbitral decision. The plaintiff in *DelCostello* accepted it but argued that the six-month statute for unfair labor practice charges contained in § 10(b) of the National Labor Relations Act should be applied to arbitration decisions. The local union and Anchor Motor Freight also agreed with the premise but argued that the 30-day arbitration statute should be applied to the claims against both the union and the employer. In *Flowers* the union argued, in agreement with the plaintiff in *DelCostello*, for a six-month period and the employee argued for the state nonmedical malpractice period.

Humphrey, and *Hines.* It argued that the committee decision should be distinguished clearly from a union's failure to appeal an adverse decision in the grievance procedure. Where the union acquiesced in management's decision by failing to appeal, the six-month statute was indeed appropriate; but where the joint union-management committee sustained the action, that was an arbitration decision and the thirty-day statute was the appropriate one.

The Supreme Court held that the six-month statute applied in both cases and to the claims against both the union and the employer. Significantly, in light of the sharp conflict between TDU and the IBT, the Court for the first time in this sequence did not refer to the joint committee decision in *DelCostello* as an arbitration decision. To the contrary, the decision was referred to as the decision of a "regional joint union-management committee." It made no difference, of course, because the Court held that the six-month statute applied to all *Vaca*-type actions, whether the union's breach of duty was in failing to take a case *to* arbitration or in presenting the case *in* arbitration.

There the matter now stands, at least insofar as the Supreme Court of the United States is concerned. The Court clearly has treated joint committee decisions as "arbitration," although in no case in which it did so was the question argued and in the only case in which the question was squarely put it did not explicitly confirm its prior language. The question now is whether it makes any difference to other than purists like neutral arbitrators who are jealous of their status.

Since *DelCostello* it clearly no longer makes a difference in determining the appropriate statute of limitations in a fair representation suit. Let me suggest, however, that there are some areas in which it may make a difference whether a joint committee decision is regarded as an arbitration decision or as an agreement between management and union representatives.

First, there remains a statute of limitations question when the employer (or, in the rare case of a bilateral grievance procedure, the union) does not comply with a decision by a joint committee and the other party brings suit. The decision in *DelCostello* was based on the similarity between a suit for breach of the duty of fair representation and a similar charge under the NLRA. If a joint committee decision is an arbitration award, the statutes applicable to suits to enforce such awards or to set them aside are presumably still applicable where that element is missing.

Second, there is the question of the standard to be applied in *Vaca*-type suits in determining whether there has been a breach of duty. I would argue strongly that the plaintiff's burden in such a suit is and should be a much higher one where the grievance has been arbitrated than in cases in which the claimed breach is in failing to process a grievance to arbitration,[22] and there is language, ironically, in *Hines* to support that argument.

Third, there is a question of the extent to which a court will review a decision. That difference is underlined by the difference between Mr. Justice White's opinion for the majority in *Humphrey v. Moore* and Mr. Justice Goldberg's concurrence. White at least seemed to say that the question of whether a joint committee decision could be set aside required that the court determine whether the decision was within the committee's jurisdiction; Goldberg, on the other hand, argued that a decision by a joint committee was an agreement by the parties who had the right not only to interpret the agreement but to change it if they believed it appropriate to do so.

Fourth, there is the question of the extent to which the National Labor Relations Board will defer to decisions of a joint committee in applying the *Spielberg* standards in an 8(a)(3) proceeding. Up to this point the Board has firmly decided, following the Supreme Court, that it will treat joint committee decisions as arbitration decisions for that purpose, at least unless it is shown that the charging party was an active PROD supporter.[23] Given the new Board's recent enlargement of the deferral doctrine this

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[22]*See* Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Cal. L.R. 663, 812 (1973).

[23]*Denver-Chicago Trucking Co.*, 132 NLRB 1416, 48 LRRM 1524 (1961); *Modern Motor Express*, 149 NLRB 1507, 58 LRRM 1005 (1964). During the ups and downs of the Board's deferral doctrine (*compare Electronic Reproduction Serv. Corp.*, 213 NLRB 758, 87 LRRM 1211 (1974) *with Suburban Motor Freight, Inc.*, 247 NLRB 146, 103 LRRM 1113 (1980) *and*, then, *Olin Corp.*, 268 NLRB No. 86, 115 LRRM 1056 (1984)), only Member Jenkins has differentiated between arbitration by a neutral and a joint bipartite committee decision. *See American Freight Sys., Inc.*, 264 NLRB 126, 111 LRRM 1385 (1982) (concurrence), *enf. denied*, 722 F.2d 828, 114 LRRM 3513 (D.C. Cir. 1983); *Terminal Transp., Inc.*, 185 NLRB 672, 75 LRRM 1130 (1970) (dissent). The treatment of joint committee decisions as arbitration for *Spielberg* purposes has received approval by some courts. *See e.g., Bloom v. NLRB*, 603 F.2d 1015, 102 LRRM 2082 (D.C. Cir. 1979) and its failure to defer in such cases has sometimes been reversed. *NLRB v. Motor Convoy, Inc.*, 673 F.2d 734, 109 LRRM 3201 (4th Cir. 1982); *American Freight Sys., Inc. v. NLRB*, 722 F.2d 828, 114 LRRM 3513 (D.C. Cir. 1983). On the other hand, a substantial number of the cases in which the Board's decision to defer in § 8(a)(3) cases has been reversed or its decision not to defer has been sustained have, in fact, involved joint committee decisions. *See, e.g., Banyard v. NLRB*, 505 F.2d 342, 87 LRRM 2001 (D.C. Cir. 1974); *Stephenson v. NLRB*, 550 F.2d 535, 94 LRRM 3225 (9th Cir. 1977); *Klann Moving & Trucking Co. v. NLRB*, 411 F.2d 261, 71 LRRM 2196 (6th Cir. 1969); *Hawkins v. NLRB*, 358 F.2d 281, 61

may be the most important consequence of the labeling of joint committee decision as arbitration.

Finally, there are a host of questions as to procedure and parties. If the joint committee is in fact an arbitration committee, is it proper for the parties to speak with the committee members *ex parte*? Must the members of the committee behave as neutrals or can they be active partisans? Is it proper, as apparently is the practice, for a charging party before the committee to also sit as a member of the committee? Finally, if suit is brought to set aside a committee decision, can the committee or its members be made defendants? The Academy has always urged that arbitrators are not proper defendants in such actions. Are the "arbitrators" on a joint committee entitled to the same immunity?

These are only some of the questions which can be raised. Let me conclude by giving the facts of just one case in a lower court, one which does not involve the Teamster procedures but an airline system board of adjustment. The case is *Del Casal v. Eastern Airlines*.[24]

Del Casal was a pilot employed by Eastern Airlines, who, the court said, was refused membership in the Airline Pilots Association because he was incompetent. Eastern fired him for incompetence and he filed a grievance. A union representative assisted him at the initial stage of the grievance procedure but was told he could not do so on appeal to the System Board of Adjustment because Del Casal was not a member. Under the Railway Labor Act an individual has a right to process his own grievance even if the union refuses. Del Casal did, retaining his own lawyer.

The case was heard on the merits by a four-man System Board consisting of two representatives of Eastern, which had fired him for his incompetence, and two representatives from ALPA, which had refused him membership because of his incompetence. The System Board—surprise—sustained the discharge. Del Casal then brought suit claiming breach of the duty of fair representation and asking for a trial on his claim of wrongful discharge.

The Fifth Circuit held that ALPA had indeed breached its duty of fair representation. It could not, the court said, refuse to represent an employee in the bargaining unit because he was not

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LRRM 2622 (7th Cir. 1966); *Illinois Ruan Transp. v. NLRB*, 404 F.2d 274, 69 LRRM 2761 (8th Cir. 1968); *United Parcel Serv. v. NLRB*, 706 F.2d 972, 113 LRRM 2174 (3d Cir. 1983).

[24]634 F.2d 295, 106 LRRM 2276 (5th Cir. 1981).

a member. Del Casal was therefore entitled to recover against the union the fees which he had paid to his attorney. But he lost his claim for review of the decision upholding his discharge. That was, the court said, a decision by an impartial arbitral tribunal. The members of the System Board were obligated to determine disputes before it in an independent, impartial manner. There being no specific showing of partiality or bias on the part of the individual members of the System Board, the court would not disturb its conclusions.

Del Casal may, indeed, have been incompetent as a pilot. But I will leave to the members of the panel who will discuss airline system boards the question of whether it can really be said that he had a fair hearing on that question before the Board.

II. TEAMSTER JOINT COMMITTEES: THE LEGAL EQUIVALENT OF ARBITRATION

GERRY M. MILLER*

I approach this assignment with trepidation for two reasons: (1) co-panelists include two renowned labor law professors who are already on record as in disagreement with what I am about to say. Worse yet, the one who will rebut, Clyde Summers, taught my classes on the subject over 20 years ago; (2) this is a distinguished assemblage of professional neutrals, so I feel a little like the dissident union member is supposed to feel who is about to have his discharge grievance heard before what he believes is a stacked committee selected from a hostile audience.

Teamster joint committees come in many sizes, shapes, and varieties. Some decide grievances under the multi-employer or industry collective bargaining agreements such as the National Master Freight Agreement; others under companywide contracts such as the United Parcel Service agreement. Some are "open-ended" procedures, meaning that the parties are permitted economic recourse if the joint committee deadlocks at the final stage of the grievance procedure; others provide for arbitration by a neutral in some or all cases if the joint committee cannot reach a majority decision. Some operate in tiers, at local or state, area, and national levels; others decide, if they can, all

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