given a pass it would mean anyone caught drinking in the future could get a pass the first time out.

The Board converted the discharge into a suspension which extended 2½ months beyond the date of its decision, for a total of nine months, a considerable fine for an airline pilot.

The Board concluded its opinion:

> "It has been suggested that any disposition of this case other than support of the discharge would mean that in no instance would discharge for a first discovered offense be appropriate. We, in turn, suggest that no one be lulled into such a misconception of the Board's intent. The action taken by the Company in this case can reasonably be interpreted to mean that the Company intends firm enforcement of the 24-hour rule. This action itself has changed the circumstances and if the Board has not accepted this retroactively it does not mean that the Board intends its decision to stand for the principle that any violator of the 24-hour rule is automatically entitled to a second chance."[10]

No discharge in a drinking case was reversed thereafter.

I do not want to appear overzealous in my defense of bipartite boards and my purpose here is not necessarily to advocate their use. Rather, as I said at the beginning, it is to say a few kind words about a now departed institution which I remember fondly.

V. BIPARTITE AIRLINE SYSTEM BOARDS OF ADJUSTMENT

ROBERT H. NICHOLS*

My role today, as defined by our distinguished Chair, is to react to Stu Bernstein's observations concerning bipartite boards in the airline industry, and not, at least as I choose to define my assignment, to attempt to persuade anybody that Mr. Del Casal received a fair hearing before Eastern's Pilot Board. Parenthetically, as an advocate who from time to time represents the

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[10]I have heard only one criticism from any of the neutrals with whom we dealt. He said that he would have been more comfortable in a discharge case had he had an opportunity to see the witnesses and observe their demeanor. There may be something to the point, but I have yet to have an arbitrator in any case in which I have appeared as an advocate make a credibility determination. It seems to be one of the unstated principles that you do whatever you can to avoid that. Further, I do not believe any of us can tell a skilled liar from a nervous truth teller just by watching. There are sitting judges who are unsighted. Recently, a blind judge in Denver was asked and refused to recuse himself on motion of one of the parties who claimed he was unable to observe the demeanor of a witness whose testimony was videotaped. The Colorado Supreme Court upheld the refusal of the judge to step aside. *Chicago Sun-Times*, May 20, 1984, p. 8.

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Air Line Pilots Association (ALPA), I should add that I am quite confident that such an argument could readily be made. However, even the Lord required six days to make the universe and I have been allotted only ten minutes.

I, like Stu, have had my principal exposure to airline system boards at United. For 14 years I have been an ALPA appointee to the Pilot Board there. In addition to that experience, I also have tried cases to system boards at United, American, TWA, Pan Am, Ozark, North Central and Airwest, the last two of which now, together with Southern, make up Republic.

My experience at United, unlike Stu's, has been almost exclusively with a five-member Board, and in fact, it was in part as a result of the statistics which Stu cited to you earlier that I became a member of the Board and that the United pilots negotiated a direct appeal to a five-member Board. Whether that was an appropriate response to those numbers, or even a fair one, I obviously am not in a position to say. All I can tell you is that it is a fact. And unlike Stu, I have made no effort to determine whether, since the routine introduction of a neutral in pilot System Board proceedings there, those statistics have changed. My reluctance to do this, needless to say, is not promoted by any selfish reason akin to job preservation but merely to spare Stuart the embarrassment which a public disclosure of those numbers might occasion.

Stuart has outlined briefly for you the statutory structure provided by the Railway Labor Act pursuant to which system boards are created and operate.[1] A little more might fairly be said about the nature of the boards in the industry. In general, airline contracts treat the grievance procedure and the system boards of adjustment in separate contractual articles. Grievances by operation of the statute itself, 45 U.S.C. Section 184, may be appealed to the "chief operating officer of the carrier." If the matter is not adjusted to the parties' satisfaction there, it then may be referred to the system board of adjustment for the particular class or craft involved. The jurisdiction of the board is invoked by the filing of what is commonly known as a "submission." Interestingly, most airline contracts, while permitting a grievance to be filed by "any employee or group of employees," require that a submission to the system board be

[1]All statutory references herein are to the Railway Labor Act, 45 U.S.C. §§ 153 *et seq.* (herein "RLA").

filed by either the carrier or the union.[2] Once filed, conventionally they are initially heard by a bipartite board, except in those rare situations, and the United pilot agreement is one such case, where immediate access to a neutral is possible. Interestingly, at least one effort to create a structure more akin to the sort of arbitration routinely negotiated in NLRA agreements was rejected by the local district court precisely because such a structure was *not* provided. In *Panarale v. Air Wisconsin*,[3] an effort by a carrier and independent union to provide that grievances be resolved in final and binding arbitration by a member of the Wisconsin Employment Relations Board was rejected by the court, which instead ordered the parties to create a "statutory board of adjustment."

Turning now to the operation of airline boards, obviously if the matter is referred to a five-member board initially, no real problem exists short of the theoretical possibility that the company and union representatives could outvote the neutral. All the serious issues arise when the case is heard initially by a bipartite board, as is done, I am quite confident in asserting, in the majority of cases in the industry.

Let us turn first to the easier side of the problem. Assume a routine contract case involving a package of flying put together by the company either for assignment to a pilot or flight attendant or for inclusion in a monthly line of flying, which will

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[2]Which brings me to a proposition essentially assumed by both Dave Feller and Stuart Bernstein but which I believe is far from clear, namely, that under the Railway Labor Act an individual has the right to process his own grievance to the system board even if the union refuses. While it is abundantly clear that he may process a grievance, his right to invoke the jurisdiction of the system board is not. The assumption that this is so appears to be based upon a narrow reading of *Elgin, Joliet & Eastern Ry. Co. v. Burley*, 325 U.S. 711, 16 LRRM 749 (1944), where at the urging of a number of individual employees the Court invalidated a settlement of certain claims because no proof existed that the union had specific authority to represent them. Even in that case, however, the Court observed that such authority might be conferred by, for example, a general provision in the union's constitution. Moreover, that case was a railroad case, and did not deal with the distinctions between §§ 153 and 184 of the RLA, the former dealing with railroads and the latter with airlines. Further, § 184, which is the section which requires the air carriers and the employees' representative to establish a board, speaks of a submission to the Board "by petition of the parties or by either party. . . ." The sole reference in the statute to which the term "parties" may grammatically refer is the airline and the union. Thus, there is ample room for argument that the union's status as certified bargaining representative should afford it, as is afforded NLRA unions, the right to control the grievance. *Republic Steel v. Maddox*, 379 U.S. 650, 58 LRRM 2193 (1965); *Vaca v. Sipes*, 386 U.S. 171, 64 LRRM 2369 (1967). On the other hand, in a more recent case, the Court has suggested, although again in a rail case, that particular concern should be afforded individual rights under the RLA. *Electrical Workers (IBEW) v. Foust*, 442 U.S. 42, n.11, 101 LRRM 2365 (1979).

[3]79 LRRM 2658 (N.D. Ill. 1972).

thereafter be put out for bid. The issues have to do with its legality under scheduling rules of the agreement. Following a full-blown hearing, with four board members, two lawyers, and many witnesses, most of whom have come in from cities far removed from the company's headquarters, the matter deadlocks. Under some contracts the matter is then heard *de novo* by the board sitting with a neutral; in others, the transcript and exhibits are forwarded to the neutral, who convenes an executive session after familiarizing himself with the case. We are told that other than the problem presented when a neutral is called upon to make credibility resolutions, little has been lost. Indeed, Stu tells us that in reaching its deadlock the board has spent hours refining and narrowing the arguments for presentation to the neutral, a process which, I believe, is portrayed as a virtue. With all due respect, and perhaps I bring my years of experience as an advocate for relatively small local unions in the packinghouse and printing industries, I am hard pressed to defend such a system.

In the cases where the neutral hears the case *de novo,* the waste in time and expense is staggering. And even if no second hearing is held, the time expended by the neutral to familiarize himself with the case surely approaches if not equals the cost associated with bringing him in in the first place. Moreover, he or she is denied the opportunity of asking the question(s) of particular interest, and thereby permitting the parties to deal with it. Finally, and this may at least in part explain the apparent difficulties experienced by some neutrals which Stuart described, the parties very likely tailor their presentations to the bipartite board, each member of which has had significant exposure to the contract, rather than carefully building a record comprehensible to an intelligent, albeit uninitiated, neutral. This duplication of effort and inordinate delay is difficult to explain to a frustrated grievant, and indeed presumably can only be justified because of some perceived advantage in the cases which do *not* deadlock, and which therefore are disposed of by the bipartite board. Some experienced advocates in the industry assert such additional "advantages" as practice for the witness, an opportunity for "discovery," and the like, but I cannot seriously view these as anything more than make-weight arguments for a proposition accepted on other grounds. Thus, the question reduces itself to one of whether advantages of such dimensions may be found in bipartite proceedings so as to justify the waste inherent

in the deadlocked proceeding. I respectfully submit that in the vast majority of the industry's relationships, the answer is in the negative.

In seeking to comprehend what the bipartite boards attempt to do, at least in the ideal circumstances described by Stu, it is well to understand first of all that virtually every airline contract has a provision such as the one found in the current United-ALPA contract, which reads as follows:

> "It is understood and agreed that each and every Board Member shall be free to discharge his duty in an independent manner, without fear that his individual relation with the Company or with the employees may be affected in any manner by any action taken by him in good faith in his capacity as a Board Member."

Obviously, if a carrier and a union have a bipartite board which works, this provision is taken seriously. It would not take long to render the bipartite board useless if either side could never see fit to vote against his principal's interest. Secondly, boards generally do not deal with grievances in the same fashion as do the parties in a grievance settlement. Rather, they view matters in a quasi-judicial fashion and attempt to find the solution within the four corners of the agreement. Stated otherwise, notwithstanding their name, airline boards do not, as the parties can and do in the grievance process, seek to "adjust" grievances; rather, they attempt in good faith to decide them.

This is all well and good, and in some unique relationships it does work for many, many cases. I believe it is still the case that ALPA and Delta have never utilized a neutral. Thus, that system board clearly reflects the values inherent in that relationship. And it is true, as Stu has said, that at various times on different properties, in some proportion of the cases presented, bipartite boards have worked, and worked well. There is, after all, no reason why a group of sophisticated, dedicated individuals cannot *objectively* assess a set of facts and determine whether or not they can be squared with a collective bargaining agreement. The fact that they are appointed by the parties in and of itself is not terribly meaningful. Federal judges routinely sit in judgment on conduct of the United States. The real question is whether they can do it with such regularity so as to outweigh the costs when they cannot.

When they cannot, one of two things must have occurred. Either they have deadlocked, a possibility which we have already considered, or much more seriously, the judgment which they

have rendered cannot be said with certainty to be objective. This is the real Achilles' heel of the process, and the problem almost invariably involves the union-appointed members. That is so for the obvious reason that the carrier has acted, and a grievance has been filed protesting its action, whether disciplinary or contractual in nature. It is of no moment if the company members vote to deny the grievance. What attracts the attention, then the analysis, and thereafter the occasional attack by an unsuccessful grievant is the fact that the union members have so voted.

These questions can take several forms. Assertions have been made that the union-appointed members are charged, as is the entity which appointed them, with the duty of fair representation.[4] Others have framed the issue as one of due process, urging the fundamental proposition that that concept embodies the right to a fair hearing before an unbiased tribunal. Arrayed against these contentions are the requirements in the collective bargaining agreement that board members discharge their duties in an independent manner, and arguments based upon Justice Frankfurter's view of party-appointed board members, as expressed in *P.P.R. v. Rychlik*:[5]

> "The short of it is that since every railroad employee is represented by union agents who sit on a System Board of Adjustment, such representatives are in what amounts to a fiduciary position: they must not exercise their power in an arbitrary way against some minority interest. The fact of a general conflict of interest between a minority of union members and representatives designated by a majority does not of itself vitiate the presupposition of self-government and does not of itself subject the System Board action to judicial review. Conflict between a majority and a minority is commonplace in the whole collective bargaining process. But the bargaining representatives owe a judicially enforceable duty of fairness to all the components of the working force when a specific claim is in controversy."

The fact of the matter is, of course, that in the real world there are many situations in which men of good faith neither are fiduciaries in the strict sense of the word nor are wholly insensitive to the realities of the situation. At the same time it is also

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[4]Not considered herein is the question of breach of the union's duty of fair representation by reason of the manner in which *it* handled the case *before* the system board. *Hines v. Anchor Motor Freight*, 424 U.S. 554, 91 LRRM 2481 (1976); *Wells v. Southern Airways, Inc.*, 522 F.2d 707 (5th Cir. 1975), *modifying* 517 F.2d 132, *cert. denied*, 425 U.S. 914 (1976); *cf. Robesky v. Qantas Empire Airways*, 573 F.2d 1082, 98 LRRM 2090 (9th Cir. 1978).

[5]352 U.S. 480 at 498–99 (1949).

true that they are neither captives of their principals nor mere extensions in the executive sessions of the advocates.

But the fact that in the bipartite process they are not any or all of these things is frequently disquieting. And that is particularly so because I believe that the law makes it quite clear that actions of RLA bipartite boards are viewed by the courts, and correctly so, as final and binding arbitration, with all that that term connotes. As such their actions are essentially unreviewable.

Indeed, the RLA itself makes decisions of adjustment boards "final and binding," whether the boards are bipartite or tripartite.[6] In *Union Pacific Railroad v. Price,*[7] the Court rejected an effort by an employee to sue the carrier in a diversity action following an adverse decision by an adjustment board, saying that the "final and binding" language of the statute means that "Congress intended that the Board's disposition of a grievance should preclude a subsequent court action by the losing party."[8] Moreover, the Act also provides in Section 153 the sole grounds for review in providing that in an action challenging an award:

> "[T]he findings and order of the . . . [Board] . . . shall be conclusive on the parties, except that the order . . . may be set aside, in whole or in part, or remanded . . . for failure . . . to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of . . . [its] . . . jurisdiction, or for fraud and corruption by a member . . . [of the Board]."

It was this provision which prompted the Fifth Circuit to characterize the scope of review of the courts as "among the narrowest known to law," in *Diamond v. Terminal Railway.*[9] Suffice it to observe here that this approach to the cases is characteristic of cases challenging decisions of both rail and air boards, whether tripartite or bipartite.

Where, then, does this leave us? Stu has pointed to two decisions, the *Edwards* and *Arnold* cases, where the fairness of bipartite boards was questioned. Significantly, however, it is fair to characterize those cases as ones not really involving a dispute between the carrier and employee, but rather between two com-

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[6]45 U.S.C. § 153.

[7]360 U.S. 601 44 LRRM 2316 (1959).

[8]At common law, there had been the right for some period under the RLA to bring a suit for damages *rather than* seeking reinstatement by way of grievance. In *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 80 LRRM 2240 (1972), the Court held that an employee must first utilize his grievance procedure. In fact, however, such a procedure realistically now is the employee's exclusive remedy.

[9]421 F.2d 228 73 LRRM 2230 (5th Cir. 1970).

peting groups of employees. In such cases, quite obviously a bipartite board is inappropriate, and the circumstances cry out for imaginative solutions such as were employed in *Arnold.* More difficult questions are presented by such cases as *Wells v. Southern Airways,*[10] where a Southern pilot, who had been a strike-breaker during ALPA's two-year strike against that carrier in the early 1960s, was discharged for incompetence after nine years of flying. Although that case was initially heard by a tripartite board, Wells nonetheless complained that ALPA and its designees on the Board were "institutionally hostile" to him. The Fifth Circuit rejected that contention, holding that no showing had been made that the members were so biased against him as to have invalidated the proceeding on due process grounds. Similar claims were advanced in *Stanton v. Delta Air Lines,*[11] where a denial of back pay and benefits associated with a reinstatement was upheld by a bipartite board. The trial court had earlier remanded that case to the System Board after ALPA's breach of the duty of fair representation initially prevented Stanton from having his case heard. Notwithstanding this history, a challenge to the Board's composition was rejected by the court. However, the fact that these cases keep arising underscores the problem. Quite simply, there are cases in which it can fairly be said that at least the appearance of fairness is dubious. Yet an employee who cannot demonstrate overt bias on the part of the board members or an openly adverse union position is under the law doomed to failure in challenging the decision of a bipartite board.

Parenthetically, another aspect of this question which has long troubled me is the difference in standards employed by various bipartite boards, differences which tend to be diminished by the introduction of neutrals. For many, many years on an airline which will remain nameless, the company's action in refusing to promote to Captain highly experienced First Officers on the grounds that they had not demonstrated proficiency was routinely upheld by its bipartite pilot board, irrespective of the arguments advanced. From personal exposure to those cases, I am confident that some, if not many, of them could readily have been won before a neutral on another carrier. Similarly, other experienced airline union advocates have told me on numerous occasions that a result in a given case was a foregone conclusion

[10]616 F.2d 107 104 LRRM 2338 (5th Cir. 1980).
[11]669 F.2d 833 109 LRRM 2739 (1st Cir. 1982).

because of the makeup or the prejudices of a particular bipartite system board. While there obviously is a case which can be made for a board at least to a degree reflecting the "tone" of a particular carrier, clearly serious issues can be postulated by reason of such differences.

Stuart tells us that these cases should not go to a bipartite board. He adds that for practical reasons, discharge cases should not either. And I would assume that he would agree that deadlocked cases, by definition, should not go either. The difficulty with all this is that in many instances these facts are not known until after the hearing, or at least not until it opens, at which point little, if anything, constructive can be accomplished. And negotiating the exceptions also would appear to be fraught with problems, particularly where questions involving the position of the union are involved. What union would openly acknowledge that this is a case in which its interests are adverse to the grievant, so that it should not be heard by the bipartite board? It might as well admit liability in the subsequent duty of fair representation suit.

It is for these reasons that I believe that a strong case can be made that a mandatory bipartite hearing, as provided by many airline contracts, is an anachronism which should be eliminated. At a minimum, both the grievant and the union should have the right, once the case is submitted, to request that it be heard initially by a tripartite board. This would preserve, should the parties wish to do so, the use of the bipartite board in situations where it might be appropriate and useful. Alternatively, airline boards should be reconstituted to provide for a neutral in the first instance. If this were done, attention might then productively be focused on the question of whether, as is the case at least with pilot and flight attendant contracts, the maintenance of all four other members remains necessary. Deregulation has not been kind to organized airline employees, and the boards which have served them in more genteel, prosperous times may well have to be reexamined in the light of the faster moving, more rough and tumble environment in which they now operate.