CHAPTER 4

NOVEL ROLES FOR ARBITRATION AND THE ARBITRATOR

I. TRANS WORLD AIRLINES' NONCONTRACT GRIEVANCE PROCEDURE

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Trans World Airlines' (TWA) grievance procedure for noncontract employees is more than 30 years old, having been initiated by the company as a way to discourage the unionization of the agent and clerical work force, a combined group of approximately 7,000 employees. What I would like to do today is review its history and development, describe how it was administered, and highlight some of the things we learned over the years. I will also share with you some feedback I received from the participants when I surveyed them several years ago; I believe their comments are still valid.

History and Development

TWA first established a grievance procedure for all its noncontract employees, including management, in the early 1950s. While it was always a step procedure, patterned after those contained in a typical labor agreement, the first two steps were heard by first and second level management in the grievant's own chain of command, and the final step was heard by a panel of three executives. There was, curiously, a fourth step heard by a professional arbitrator, however, there was no hearing as such; the arbitrator ruled on a written record of the third step, and only a few such reviews occurred. With some minor changes, the

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procedure continued in this fashion until around 1970. One notable exception was the company's decision to make management employees ineligible to use the procedure. The company began to consider such a procedure inappropriate for management, because of some embarrassment created during one executive's discharge hearing.

At first, the employee group for which the procedure was intended did not make much use of it. Those who did tended to be repeaters—those employees we all know so well who seem to encounter difficulties with supervision with great regularity. Most employees felt, with some justification I am sure, that filing a grievance would lead to retaliation, with little protection for them in the absence of union representation.

In 1969, in the face of an organizing drive, the company began to provide for a neutral arbitrator to hear the third step of any appealed case involving discipline or discharge. In a later cost-cutting effort, this was amended to limit outside arbitration to cases involving discharge only.

One interesting feature of TWA's procedure is the ability of a grievant to involve co-workers in the processing of a dispute. This was initiated by the company in the early 1970s to help eliminate the perception that the procedure was biased in favor of management. In establishing the members of the System Board of Adjustment—the third step of the procedure—provision is made for the grievant to name a co-worker as a member. The co-worker can be any other noncontract employee, management or nonmanagement, from the employee's location. The peer involvement feature has been extremely successful, and has generally enjoyed very responsible support from the employee board members and representatives.

Current Structure

Today, the noncontract grievance procedure is a three-step process; the first step is heard and answered in writing by the grievant's immediate supervisor. The second step is heard by a middle manager who is outside the grievant's chain of command. This represents another change from the original procedure; it was designed this way to build more objectivity into the process and also to attempt to resolve more grievances prior to a System Board hearing.

Grievances appealed to the third step are reviewed by a three-person panel—the System Board of Adjustment—whose composition depends on whether the grievance involves a termination or not. In nontermination cases, the chairman of the panel is an executive from the personnel department. The remaining members of the Board are: for the company, a vice president, assigned from a rotating schedule; for the grievant, another noncontract employee. In cases involving termination, the System Board is headed by a member of the National Academy of Arbitrators, selected by the grievant from a list of about 10 names. (I will comment later on the composition of this list.) The personnel executive becomes the company's board member and the grievant again names a peer to the panel.

The grievant may also name a representative; again, the procedure requires that the representative be another noncontract employee. The grievant can be represented by an attorney only in the final step of a termination case. The company's case is presented by the employee's supervisor except where the grievant uses an attorney; in those cases, the company is represented by an attorney.

Administration

There has been very little change in the process for the past 15 years. With the current heightened sense of employee rights, we have been reluctant to change any noncontract policy; to do so raises the issue that we would not be able to make unilateral changes if this group were organized. But more important, the procedure has been working well and we have found it more appropriate to fine tune and improve the administration of the process. The noncontract grievance procedure is administered by the personnel department, where considerable care is taken to assure that it operates objectively, so that it continues to be a credible process. Regional personnel offices handle the scheduling of the procedure's first two steps, including designating the second step hearing officer. The third, or System Board, step is scheduled by the office of the Senior Vice President of Personnel. There are currently 60 to 80 Step 3 hearings a year, and we have found that it is nearly a full-time job to handle all the arrangements. Bringing together all the parties, including hearing officer, board members, representatives, and witnesses can

be extremely complex; in a union procedure, it may be less so since the union can sometimes exercise more influence over the grievant and his witnesses and, indeed, take responsibility for the attendance of its own participants. In the case of the non-contract procedure, the company must exercise great care to assure that schedules are convenient for all involved to avoid the impression that it is insensitive to the personal time constraints of all the participants.

Part of the administration of a discharge case is, of course, the assignment of an arbitrator. TWA's procedure stipulates that the arbitrator will be a member of the National Academy. While we considered from time to time expanding eligibility to others, we finally determined that it was in our best interests to keep this provision, because it lent credibility to the procedure. Again, we were concerned that a change designed to speed up the process, reduce its cost, or eliminate some difficulties we were experiencing would probably have been viewed as a dilution of a policy designed to provide fair treatment for unrepresented employees.

Another important part of the administration of the policy is the fact that the company pays the travel expenses for the grievants and all their participants; and they are also permitted to attend the hearings while on paid company time. (It should be noted that from time to time a hearing may be held on an employee's day off, or early in the day for an employee working a late shift. In such cases the employee is not paid for attendance at the hearing. The policy simply provides that there will be no loss of pay for participation in the procedure.)

Current Experience and Observations

In 1985, there were 61 cases appealed to the System Board of Adjustment. Twenty-four of these were terminations; and interestingly, exactly half were reinstated. Of the 37 grievances not involving termination, the company prevailed in only 11; 5 are still pending, 6 were awarded in part, 13 were awarded, and 2 were removed from the procedure as nongrievable. These figures are representative of prior years' experience. We do watch carefully to make sure there is a reasonable balance, so that the employees will continue to feel that the process serves the pur-

pose for which it is intended. I would like to provide you with a little more information concerning some of the more noteworthy aspects of this procedure.

Peer Review

The involvement of employees' peers has paid real dividends to the company since the co-worker often has insights on an issue that would not be available otherwise. And while there may be a tendency on the part of the co-worker to support the grievant in spite of the evidence, there have been many instances where the co-worker has supported the denial of a grievance based on the facts brought out during the hearing, some of which may not have been obvious or available earlier. And in a number of cases where a grievant has been reinstated provisionally, the co-worker has been extremely helpful in counseling the grievant so that the problem does not recur. Finally, there is often background information that the co-worker provides that is helpful to the personnel department in terms of correcting inappropriate management practices or working conditions, and which may lie at the heart of the issue.

When I surveyed the participants several years ago, this feature received the highest positive rating from the employees; 68 percent of the employees surveyed gave unqualified affirmative answers when questioned as to whether they felt that the co-worker on the System Board helped their cases.

Arbitrators

I said earlier that I would return to what substitutes for a striking list, and this would be an appropriate time to do that. Generally, we have tried to increase the number of arbitrators we worked with so that we would be able to offer employees a choice of several arbitrators when setting up a hearing. (Also we try to hold hearings at the employee's location partly to hold down expenses, and partly to be able to see the workplace firsthand if appropriate during the hearing.) This meant that we were often providing names from the NAA roster of people with whom we had no prior experience. Of course, the employees have an excellent network, so it did not take long for them to choose someone from the list who had reinstated other employ-

ees. Where we have had problems is where employees have consistently been reinstated by an arbitrator who simply appeared not to believe in termination, or who felt he was doing his share to prevent these employees from wanting to join a union, or who did not agree with our rather strict attendance control procedures. While this was the exception rather than the rule, such practices create some rather acute problems for those administering the procedure. Unlike a grievance process contained in a collective bargaining agreement, company executives know that this process can be unilaterally changed. It will come as no surprise to anyone in this room that managers often do not take kindly to seeing a terminated employee reinstated. What may be less obvious is that the backlash in this case can be rather severe, and has led to some high level pressure to eliminate the procedure or at least the use of arbitrators. I have emphasized the importance of maintaining credibility with respect to the noncontract employee group. It is important to recognize, however, that it is equally important to operate so that senior management will continue to support the process. In the survey I mentioned earlier, the supervisors were far less sanguine about the benefits of the process than were the employee-grievants. What I am saying is that a tendency to reinstate employees not covered by a labor agreement may not work in the long-range interest of expanding the use of arbitration for such employees.

One other area where we have encountered some awkwardness is with seasoned labor arbitrators who referred to the "union's position" in their decisions, whenever they commented on the grievant's case. We would just return the decision to the arbitrator and request that the word "grievant" be substituted, and this was generally a simple procedure. However, when the grievant's peer on the Board would receive the revised draft, we would sometimes be accused of pressuring the arbitrator to change his award. Usually this would come from someone whose primary interest was in seeing this work force organized, and for obvious reasons, these employees tended to serve as board members frequently. The point was that they knew (and were advised) exactly what was happening, but it suited their purposes to make an issue of the fact that the original decision was revised at the suggestion of the personnel department. With some care that can be avoided and it must be just as important

for you as arbitrators not to be accused of having a side arrangement with the company as it is for us.

A few years ago we did publish a brochure that was designed for all participants, including arbitrators, covering those areas where we had experienced some confusion. It has been our practice to send a copy to each new arbitrator we work with. I have been very pleased to note that you have reviewed this brochure and it has gone a long way in correcting some lingering and recurring problems.

You should be aware, if you are not already, that we did have a rather unfortunate incident where, upon upholding a discharge for theft, an arbitrator was sued by the employee. What is more, a formal complaint was lodged with the National Academy claiming unprofessional conduct. While both issues were ultimately resolved and the arbitrator was completely exonerated, it left a negative impression on others and caused several arbitrators to remove themselves from our list. The assumption was that a union would have prevented this from happening.

In the final analysis, and notwithstanding the issues I have mentioned, the benefits of using professional arbitrators have, in the long run, far outweighed the problems. I believe also that TWA has avoided litigation through having terminations reviewed by an arbitrator, and where an employee *has* sued following arbitration, the company's position in court has been strengthened by the award.

Based on employee feedback, and our experience over the years, I would like to stress two points with respect to our procedure. First, it is impossible to overemphasize the importance of fastidious administration of this procedure. Because of its unilateral nature, employees tend to be extremely sensitive to impressions that their concerns are not taken seriously by the company. Access to grievance forms, adherence to deadlines, and the demeanor of the management people involved, are all extremely important. Second, while we have come a long way in getting employees to use and to believe in the procedure, the absence of union representation gives the company and the arbitrator a special responsibility to assure that the employee receives the proper support and assistance throughout.