Postal Service and its advocates and arbitrators form a family. We don't like to be criticized by outsiders, and we are working on our problems constantly. Consequently, this has been a short summary of some of the problems one member of the postal arbitration family feels other members of the postal arbitration family should consider. If working together we can find ways to resolve some of these problems, as well as to implement the innovative measures that Postal Service advocates are currently proposing, great progress will be made in the reduction of the case load and the cost of arbitration.

[*Editor's note:* Those who participated in the panel discussion of Postal Service arbitration, besides Williams, were: William J. Downs, Director, Office of Contract Administration, U.S. Postal Service, Washington, D.C.; Thomas A. Neill, Industrial Relations Director, American Postal Workers Union, Washington, D.C.; Thomas B. Newman, Regional Manager, Labor Relations, Central Region, U.S. Postal Service, Chicago, Illinois; and Lawrence Hutchins, Vice President, National Association of Letter Carriers, Washington, D.C.]

III. THE RAILROADS

MARTIN F. SCHEINMAN*

Our topic today is arbitration in the railroad industry. To give you some familiarity with this unique area with long experience in arbitration, I will begin with a historical overview.

Most of the conferences on railroad arbitration have focused on the problems of the process—the delays in hearings, the delays in rendering decisions, inadequate funding, excessive resort to the grievance procedure, failure of the organizations to screen grievances, failure of the carriers to provide due process in discipline, objectives perceived by the parties as antiquated and no longer relevant. I expect we will hear more of these complaints today.

However, I believe that there is another side, and I think we should start with that. Many of the basic tenets of arbitration that we know about, such as just cause in discipline, relationship between language and practice, local practice versus systemwide

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practice, fluidity of the recognition clause (or as we call it, the scope clause), issues of how to deal with veracity and honesty of witnesses—all trace their origins to the railroad industry. This may come as a surprise to those who have cases in the railroad industry and then go out to arbitrate cases in other industries for the first time, to find out just how much applicability there is. This industry is dominated by decisions of individuals who are perceived as giants in the arbitration practice. Many of the founders of this Academy, many who are the greats in the profession, have had some relationship with the railroad industry. The same names keep coming up.

In railroads we have two kinds of arbitration—voluntary and mandatory. Voluntary arbitration applies to interest disputes. Pursuant to Section 7 of the Railway Labor Act of 1926, as amended, in major disputes the parties upon agreement may have their disputes submitted to binding arbitration, that is, interest arbitration. This procedure has been used throughout the years, but not as extensively as some may imagine. In his detailed study of this aspect of arbitration, Benjamin Aaron reported that 350 cases were filed for interest arbitration from 1935 and 1975; 152 terminal and railroad companies and 60 labor organizations were involved. In 1988 we discovered that there were six railroad proffers of arbitration, some of which were accepted, primarily in the commuter railroads. I recommend Aaron's study to those who want to look more closely into this matter of voluntary interest arbitration.

If arbitration is not accepted, the disputes are resolved either through negotiation or through the emergency board procedures set forth in Section 10 of the Railway Labor Act. These are actually factfinding boards and therefore outside the scope of this particular seminar. I mention it because the terminology is familiar to many of us, and many have had some involvement with presidential emergency boards, congressional advisory boards, and the like. In 1988 we had five presidential emergency boards, but there were no congressional advisory boards.

In these interest disputes, the panels are normally tripartite, payment of the partisan members is made by the parties selecting them, and payment of the neutral is made by the National Mediation Board. This is a unique aspect of this type of arbitration, which raises some eyebrows.

The main type of arbitration we are going to talk about this afternoon is called arbitration of minor disputes, mandatory

arbitration, grievance arbitration, rights arbitration—contract interpretation and application, time claims, seniority claims—the run-of-the-mill disputes that labor arbitrators and parties deal with. In most arbitrations outside the railroad industry, one does not begin arbitration without discovering the arbitration clause, by which the parties have agreed that certain issues will be resolved by the machinery called a grievance procedure with the final step being arbitration. This is unnecessary in the railroad industry.

The railroad industry is the only one where Congress has prescribed as mandatory the administrative machinery for resolving minor grievance disputes, and has provided further the payment to resolve these disputes. In 1934 the Railway Labor Act was amended to add Section 3, establishing the National Railroad Adjustment Board, statutorily required to be in Chicago, Illinois. It is composed of four divisions, each containing equal labor and management members, who sit as a sort of supreme court, an appellate body. These are not de novo cases. These cases are decided on the basis of paper, so-called ex parte submissions, documents, briefs, which are based on the evidence, information, witnesses, and facts established on the property. This is a very unusual process which does not exist outside the railroad industry.

As John Dunsford mentioned yesterday when he was talking about just cause, when Carroll Daugherty wrote his seven tests of just cause, he was speaking about an appellate review in the railroad industry. That's one of the reasons some of us have had difficulty with the notion of investigation before the discipline. That is required in railroad cases but may not be applicable to other industries.

Deadlocked cases are given to an outsider who is called the referee, appointed by the National Mediation Board, normally with the acquiescence of the particular parties in the particular division. There are four divisions: (1) operating employees represented by the Locomotive Engineers and the United Transportation Union (UTU), although mergers have caused some changes; (2) shop crafts, represented by the International Brotherhood of Electrical Workers (IBEW), the Carmen, the Sheet Metal Workers, the Fireman and Oilers, and the Machinists; (3) nonoperating employees, represented by the Transportation Communications Union (TCU), Signalmen, and the like;

and (4) a catch-all covering any other employees not represented in the other divisions.

Cases are argued in a unique way, namely, in small panels where there is one union Board member, one Board management member, and the referee. Occasionally parties are permitted to travel to Chicago to have so-called referee hearings, where they have an opportunity to tell their story in five, ten, or fifteen minutes (but not to present new evidence), based totally on what has transpired on the property as articulated in the ex parte submission. Nonreferee hearings (five or ten a day, according to my experience) are normally conducted with ten to fifteen minutes for each side to present the case. There are no discussions of credibility or of the kinds of things that most labor arbitrators spend their time doing outside the railroad industry.

I remember one of my first cases, where I drafted an opinion and indicated that I had no right to make an assessment about the "misdemeanor" of a witness. Of course, it should have been "demeanor," but I guess that was a Freudian slip about the honesty of the witness.

In fiscal 1988, 1,353 cases were handled by all four divisions; 219 were withdrawn; 297 awards were issued without referees; and 837 had refereed decisions by the Adjustment Board.

The 1934 amendments to the Railway Labor Act established the right to have special boards of adjustment. Most of the current ones involve disputes about specific issues, such as protection of employees under merger. In 1966 Congress passed a law permitting boards to be established between particular railroads and particular unions on the property. These are the so-called public law boards, which may be set up without the requirement of mutuality. Either side can petition for it. These PL boards are now the largest source of grievance arbitration in the railroad industry. In fiscal 1988, 6,074 cases were resolved by PL boards; 1,005 were withdrawn, and 4,569 were decided by arbitration. We're talking about an industry of about 350,000 employees, or about one arbitration decision for every six employees.

The members now are called neutral members, rather than referees. PL boards are appellate; the cases are based on the evidence in the record and should not be supplemented by new evidence or even new arguments. That is another big difference between railroad arbitration and other arbitration. In nonrailroad arbitration most of us have to contend with new evidence,

even surprise evidence; in a hearing it is virtually never the case that a new argument cannot be raised. But specifically under the Railway Labor Act with public law boards and the Railroad Adjustment Board, this is not permitted. Occasionally if a public law board feels that it is missing a piece of evidence, since the source is located just down the street, they can ask for it. This is not true of the Railroad Adjustment Board, however.

In summary, the salient differences between railroad and other arbitration are: (1) This process is appellate; it is not a de novo hearing; there are no live witnesses. (2) The fees and expenses of the neutral (not the expenses of the parties) are paid for by the federal government. (3) There is strong reliance on precedent; neutrals are bound by stare decisis. From 1934 to 1988 there were 200,000 awards issued, and there is no index for research purposes. (4) Arguments and evidence are frozen on the property; no new evidence, no surprise evidence, no new argument is permitted. (5) Time frames are different; a grievance that is not denied in a timely fashion is considered granted as presented. (6) The incredible level of usage is unique. One explanation is that since the parties don't have to pay, why not go for it.

[*Editor's note:* Those who participated in the panel discussion of railroad arbitration, besides Scheinman, were: Kenneth R. Peifer, Assistant Vice President, Labor Relations, Southern Pacific Transportation Company, San Francisco, California; William Miller, West Coast General Chairman, Transportation-Communications International Union, Rockville, Maryland; Robert G. Richter, Vice President, Labor Relations, Illinois Central Railroad, Chicago, Illinois; and Fred A. Hardin, President, United Transportation Union, Cleveland, Ohio.]