rules, benefits, retirement, or other aspects of employees' financial well-being. This contrasts markedly with the arbitration panel's obligation to factor in the return of profit to the air carrier.

Consider also the third standard in the McCain-Lott bill—that the rules and working conditions at comparable air carriers be considered in light of market conditions for those services. The second and third standard, taken together, could be argued to require that, if an economic downturn occurred that reduced the demand for an airline's services, the airline would be entitled to demand from a panel the right to "maintain its competitive market position" and "return a reasonable profit, consistent with historic margins and rates of return, for its shareholders" completely at the expense of the pay and quality of life of airline's workers. As drafted, the proposed legislation could lead to outrageous results.

In sum, S. 1327 would undermine union democracy (by taking away employees' right to vote on their contracts) and remove one of organized labor's strongest weapons (economic action, particularly in the form of the strike) and replace it with an arbitration panel with standards designed to result in pro-management resolutions (based on the second and third decision criteria) or simply unsatisfactory resolutions (based on the requirement that one party's entire offer be selected). The McCain-Lott bill would restructure airline labor relations and create a very uneven playing field. The ALPA finds nothing in it worthy of support. On the other hand, the *voluntary* interest arbitration arrangements discussed earlier in this paper can be a stimulus to, or at least an adjunct to, the collective bargaining process. The question about whether interest arbitration is a friend or foe of collective bargaining depends directly on the degree to which the parties are coerced into the process as a substitute for bargaining.

II. CONDUCTING INTEREST ARBITRATION IN THE AIRLINE INDUSTRY

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Interest arbitration is an elusive juxtaposition of terms. "Interests" are personal and subjective. Arbitration entails the adjudica-

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tion of rights and responsibilities. Interest arbitration is somewhat akin to deciding certain questions of constitutional law. For example, how does the constitutional right to the free exercise of religion intersect with the prohibition against the establishment of religion? The accommodation of interests requires the arbitrator to resort to values. There is no underlying rule in the form of an agreement, and the arbitrator is required to do more than find the facts and apply the rule. The rule must be created or teased out of general standards agreed to by the parties.

When management and labor discuss or confront interest arbitration, everyone is uncomfortable. Collective bargaining has failed to result in an agreement, and some third person may be asked to complete the task. The arbitrator has to make a decision without the safety net of an underlying collective bargaining agreement (CBA)—an apprehension that typically finds its outlet in higher per diem rates. It is no wonder then that voluntary interest arbitration has been rarely used, even when the alternative is mutually destructive self-help to force agreement. It is only in the public sector, and the quasi public sector—such as the U. S. Postal Service—that interest arbitration has been used with any frequency. Here the public has made a political judgment that economic warfare entails too many collateral costs.

Background

For more than 75 years, the Railway Labor Act (RLA) and its predecessors have included interest arbitration in their menu of dispute resolution options.[1] A relatively detailed process is set out in Sections 7 and 8 of the RLA for voluntary interest arbitration,[2] and the Act's collective bargaining procedure includes the National Mediation Board's (NMB) proffer of interest arbitration as the Board's last official act to resolve the dispute.[3] These proce-

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[1]The Railway Labor Act (Leslie et al. eds., BNA Books 1995).

[2]Section 7 of the RLA details the manner by which interest arbitration board members are selected, as well as the board's organization, compensation, and hearing procedures concerning testimony before the board, attendance of witnesses, production of documents, subpoenas, and fees. *See* 45 U.S.C. §157. Section 8 details the form and contents of agreements to arbitrate. *See id.* §158.

[3]*See* 45 U.S.C. §155, First.

dures are infrequently accepted as the means to resolve "major disputes"—the RLA term that references collective bargaining.[4] If either one or both parties rejects the proffer, they begin the 30-day countdown to a settlement or economic warfare.[5]

In recent years, there have been a number of developments that may make interest arbitration more attractive to both management and the labor organizations. First and foremost is the public's intolerance of union and employee self-help that disrupts airline operations either during negotiations or after the statutory bargaining procedure has been exhausted. This has been reflected in more frequent judicial intervention during the bargaining process and a newfound willingness on the part of the current Bush administration to appoint presidential emergency boards (PEBs), on recommendation of the NMB.[6] This government involvement has occurred more frequently on the major carriers, but there is no reason it will be so limited. Second, the fragile economics of the industry since deregulation in 1978 make economic warfare self-defeating. The landscape is littered with failed carriers whose labor-management relations contributed to their demise.

The acceptability of interest arbitration will be influenced by the procedures adopted by the parties and the arbitrators. To the degree they are an extension of the collective bargaining process and reflect a tripartite search for common ground, there will be a greater acceptance of the outcome and the process. The excessive legalisms and juridical orientation that have been introduced into rights arbitrations along with the lawyer-advocates should be kept out of interest arbitrations. When two parties go to court over a dispute, they delegate decisionmaking to the judge. They sit across from one another in the courtroom and lob facts and legal arguments like mortar shells. The judge decides which party is still standing at the end of the process. This tendency for arbitration to imitate courtroom combat has not been a salutary development in

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[4]By contrast, "rights arbitration" is used to resolve grievances or "minor disputes."

[5]*See* 45 U.S.C. §155, First ("If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose").

[6]*See, e.g.*, PEB No. 236, United Airlines, Inc. & Machinists (IAM) (2002); PEB No. 235, Northwest Airlines & Aircraft Mechanics (AMFA) (report due May 2001, dispute settled beforehand); PEB No. 233, American Airlines & Allied Pilots (APA) (1997).

rights arbitrations, but that is a subject for another day. It is to be eschewed in the procedures used to conduct interest arbitration. In an interest arbitration, the goal should be to work toward agreement rather than toward victory. Any rule or procedure that polarizes the parties is counterproductive. Groups like the National Academy of Arbitrators (NAA) should provide assistance and leadership in formulating model rules of procedure that can be adopted in ad hoc interest arbitration agreements and collectively bargained procedures.

Forces With Impact

There are several procedural decision points that can influence the overall tenor of interest arbitration.

The Arbitration Agreement

The arbitration agreement sets the rules of the road for the arbitration. The RLA describes the essential components of the agreement, and they must all be covered to have the benefits of finality and enforceability provided by the Act.[7] These include a statement of the issues to be submitted, a timetable for proceeding, the duration of the award, and various acknowledgements about finality, enforceability and post-award jurisdiction to deal with matters of application, and interpretation.[8] If the arbitration is not under the RLA, the parties should formulate an agreement to arbitrate substantially consistent with the legislation governing the collective bargaining relationship or with the Federal Arbitration Act.[9]

Compensation

In interest arbitration under the RLA, the NMB is charged with compensating the neutral Board members.[10] As a matter of practice, the parties frequently agree to share the costs of compensating the arbitrator and the expenses of the arbitration.

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[7] *See* 45 U.S.C. §158.
[8] *Id.*
[9] *See* 9 U.S.C. §1 et seq.
[10] *See* 45 U.S.C. §157, Third (e).

Size of the Panel

The RLA provides for three- and six-member boards.[11] The parties each select one or two members, and the party designees select one or two members.[12] In practice, interest arbitration boards are typically composed of one or three neutral members. Often the parties agree that the neutrals must be members of the NAA. Under the Postal Reorganization Act, a single arbitrator is selected.[13] This is also frequently the case under state public employee interest arbitration legislation. In the private sector, depending on the complexity of the issues, the parties may agree to either a single arbitrator or a panel of three neutrals.

Inclusion of Partisan Neutrals

The RLA provides for the establishment of a board of arbitration that includes representatives of the parties.[14] These designees are commonly called "partisan neutrals." In situations in which the employer and labor organization have discretion, a provision should be made for partisan neutrals, and the individuals selected should be knowledgeable about the industry and issues. Partisan neutrals give the neutral arbitrator an important resource. They are an accessible link to the parties. They can provide information, adjust the flow and tenor of the proceedings, and articulate interests and priorities.

For their part, partisan neutrals and their representatives must understand the special role that is reflected in their title. It is not an oxymoron. As board members they are charged with responsibility to assist in the formulation of a good decision. It is not expected that they will become independent of the parties who appointed them—that would be naïve. Neither, however, are they simply adversarial extensions of the parties. If their relationship devolves in that manner, their utility is diminished and they can become a distraction to the process.

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[11] *See* 45 U.S.C. §157, First.
[12] *See* 45 U.S.C. §157, Second.
[13] *See* 39 U.S.C. §1207.
[14] *See* 45 U.S.C. §157, Second.

Standards for the Interest Arbitration Decision

Most public employee interest arbitration statutes contain standards for the Board to apply.[15] These standards range from "the public's interest" to some measure or measures of "comparability."[16] The RLA is silent on this topic, and, in practice, the parties have difficulty agreeing to a statement of decisional standards and the arbitration agreement is silent. In those situations, the arbitrator is empowered to apply the factors that are normally taken into consideration in establishing rates of pay rules and working conditions.

The Arbitration

Format for the Arbitration

The RLA does not provide for a particular flavor of arbitration. Other statutes provide for some form of "final offer arbitration."[17] In situations in which there are a limited number of open issues, and they are primarily "money items," final offer arbitration tends to narrow the differences between the parties and facilitates reaching an award. Where there are numerous issues, including subjects such as scope, scheduling, or work rules, final offer arbitration is less practical, and the parties need to rely on the prudential judgment of the arbitrator.

Prehearing Statements

This is an invaluable device to require the parties to concisely crystallize their positions, the status quo, and their perceptions of the positions of the other party. The statements will inform the arbitrator about the dispute, and a comparison of the statements will reflect how well the parties have communicated during the prior phases of the negotiation.

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[15]Anderson & Krause, *Interest Arbitration: the Alternative to the Strike*, 56 Fordham L. Rev. 153 (1987).

[16]*See* 39 U.S.C. §§101(c) and 1003(a) (obligating the U.S. Postal Service to compensate employees "comparable to the rates and types of compensation paid in the private sector of the economy of the United States").

[17]*See* Act of April 18, 1991, Pub. L. No. 102-29, 1991 U.S.C.C.A.N. (105 Stat.) 169 (agreement between the Brotherhood of Locomotive Engineers and the National Carriers' Conference Committee reducing to contract terms the report and recommendations of PEB No. 219, as clarified and modified by Special Board 102-29, to settle a national railroad industry labor dispute).

Presentation of Evidence

The hearing should be legislative in character. Sequential presentation of facts and argument by one party and then the other will inform the arbitrator and provide much of the data upon which to base a decision. The process of sequential submissions and clarifying questions will provide a balanced record.

The purpose of the information is to educate the arbitrator about the interests of the parties as they relate to the open issues. The arbitrator needs to have a thorough context along with all the facts necessary to understand the positions of the parties. Leading questions facilitate the presentation of information, as does narrative testimony. Argument of counsel should be part of the record and given evidentiary value. The traditional question-and-answer format is a convention. Does it really matter who presents the facts in interest arbitration? Everything said to the arbitrator should be part of the record and grist for the decision.

If there are numerous issues, the testimony and evidence can be submitted by issue or by groups of issues. This will enable the arbitrator to develop a full picture without having to put a component of the case on hold and return to it days or weeks later when the responding party has its turn to present testimony.

Cross Examination

There is nothing like a bruising cross-examination to polarize the parties. What is accomplished besides massaging the egos of the advocates? There is rarely a question of credibility in interest arbitration. Questions to witnesses sponsored by the other party should be infrequent, nonconfrontational in tone, and clarifying in purpose. It has been suggested that the questioning should be legislative rather than judicial in character.[18]

Objections

Objections should be discouraged.[19] Arbitrators are perfectly capable of ascribing weight and relevance. The arbitrator can keep

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[18]Anderson, *Presenting an Interest Arbitration Case: An Arbitrator's View*, 3 Lab. Law. J. 745, 745–46 (1988).

[19]*Id.* at 746 (suggesting that, in presenting their case, the parties should not be overly concerned with the rules of evidence, but emphasizing that objections on relevancy grounds are particularly important).

the proceeding moving when a witness wanders away from what is helpful to a decision. An exception to a rule against objections is matters of privilege. Attorney-client-privileged communications—conversations during bargaining that the parties agreed were off the record—require intervention in the flow of presentation.

Exhibits

Exhibits providing information relevant to the issues before the arbitrator should be encouraged and become part of the record without debate. PowerPoint or similar presentations accompanying testimony facilitate understanding and are diversions to the tedium of long stretches of oral testimony.

For the Arbitrator

Arbitrator Involvement

Solomonic silence does not work. To harvest the information necessary to formulate an agreement, the arbitrator should interact with the evidence as it is presented at the hearing. Questions should be put to the parties orally or in writing throughout the proceeding. A bridge between the positions cannot be erected without the relevant information. The parties should encourage the arbitrator to advise them when he or she understands a component of testimony. Similarly, if testimony prompts questions of the other side, the arbitrator should not have to wait days or weeks to hear the response or ask a question.

Interest arbitration is not an adversarial proceeding—the arbitrator is not confined to information that the parties decide to present. The enhanced responsibility vested in the arbitrator warrants control over the formation of the record. Active questioning will signal what the arbitrator believes is important to resolution of the issues.

The use of active arbitrator questioning is preferable to the arbitrator accumulating information on an ex parte basis. Obviously, the arbitrator is not a tabula rasa. To the contrary, the arbitrator is frequently selected because he or she is knowledgeable about the industry or issues. It is important for the arbitrator to give the parties an opportunity to respond to any assumptions or predispositions that the arbitrator brings to the proceeding.

Priorities

Crystallizing the priorities of the parties is perhaps the most challenging aspect of the interest arbitration process. Frequently, one party or both either does not have priorities or for various political reasons cannot articulate those priorities. Apart from reaching a decision, the arbitrator's most valued contribution is assisting the parties to prioritize their proposals. It is a short step from that process to a narrowing of the issues to be decided. The parties will often send subliminal signals in the organization and presentation of testimony. Early priority-setting exercises imposed by the arbitrator will meet with resistance and frequently will result in artificial positions. Rather, as the hearing goes along, the adept arbitrator can test his or her perception of the really important issues through questions, "what-ifs," and focused musings as to possible outcomes. Where the arbitrator is able to establish a productive relationship with the partisan neutrals and build trust, this process can be more direct. The parties know there will be a decision at the end of the road, and it will not be a zero-sum outcome.

Mediation

Implicit throughout this paper is the thesis that mediation is a central part of the interest arbitration process. If one were permitted to watch a sophisticated interest arbitrator work with experienced party representatives, the proceeding would resemble a fugue, with alternate themes of decisionmaking and negotiation. In fact, if one were to look closely, there would be three negotiations taking place: two between the arbitrator and each of the parties, and a third between the parties themselves. The object of each of these negotiations is to narrow the differences in positions using the decisionmaking process as the catalyst. At the end, the outcome will not surprise either party, and in most cases will be tolerable or even acceptable. The distance between the parties will have been narrowed, the interests of each identified, and the accommodations embodied in the award will be the basis for a modus vivendi over its term.

Useful Reading on the Subject of Interest Arbitration

Anderson & Krause, *Interest Arbitration: The Alternative to the Strike*, 56 Fordham L. Rev. 153, 157–65 (1987) (discussing the various

types of interest arbitration procedures adopted by the states and the statutory standards that guide arbitrators in reaching decisions).

Gallagher & Spurlin, *Interest Arbitration Under the Railway Labor Act*, SA31 ALI-ABA 459, 468–80 (1996) (discussing standards for decision in interest arbitrations).

Rissetto & Lamar, *Interest Arbitration in the Public and Private Sectors*, 1994 Wiley Employment Law Update 107 (1994).

III. INTEREST ARBITRATION IN THE AIRLINE INDUSTRY: ONE ARBITRATOR'S PERSPECTIVE

ROBERT O. HARRIS*

Interest arbitration is a creative solution to the desire for producing the results of collective bargaining without the give and take needed to reach a collective bargaining agreement (CBA). It is actually a contradiction in terms, for it assumes that an outsider to the relationship is better able to discover the compromises necessary to an industrial system of governance than the parties (who will be bound by the agreement). Unlike grievance arbitration, interest arbitration comes in many forms and sizes. In most cases, the scope of the arbitration is limited not by the factual situation or the law, but by the agreement of the parties as to the issues that are to be decided by the arbitrator.

Examples of Interest Arbitration Agreements in the Airline Industry

Interest arbitration agreements can be institutionalized. For example, the agreement between Alaska Airlines and the Air Line Pilots Association (ALPA) requires a period of mediation and an attempt to bargain to agreement, to be followed by the submission of the issues in dispute to arbitration. This was first agreed to in a 1976 side letter, which stated:

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