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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> The award shall incorporate all provisions of this Letter of Agreement for arbitration in the next ensuing agreement and each agreement thereafter unless either party hereto shall upon 120 days' written notice prior to the amendable date of the then current agreement give notice to the other terminating the provision for future arbitration. Said right to voluntarily terminate shall not be applicable to the now current agreement.[1]

This arbitration is conducted by a three-member System Board of Adjustment (SBA) with a neutral chair who is jointly chosen by the parties.

Similarly, under the 1997 agreement between American Eagle and ALPA, each party was permitted to submit no more than five single, separate, and specific proposed changes to the agreement to interest arbitration (e.g., company contributions to the 401(k) plan). These changes were to consist of single, separate, and specific changes to provisions currently in the agreement and/or new single, separate, and specific provisions, provided that the aggregate number of specific provisions submitted by each party did not exceed five and that they were mandatory subjects of bargaining. The parties also agreed to exempt a number of items from interest arbitration, including "governance/ownership" and any hourly rate, length of scale, and indexing provisions contained in Section 3 of the agreement.[2]

The arbitration board created by the American Eagle-ALPA agreement consists of five members, one appointed by each of the parties and three neutrals picked from lists provided by the National Mediation Board (NMB) and the American Arbitration Association (AAA).

Another example of an interest arbitration agreement is the provision in the recently agreed-to Delta Airlines-ALPA contract, which attempts to avoid the type of conflict that resulted when Delta attempted to introduce the Boeing 777 into its fleet and, without an agreement on the rates of pay for that equipment, Delta was unable to fly the planes and had to postpone delivery of two of them. The new Delta-ALPA contract provides for arbitration of all new equipment pay disputes.

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[1]Side Letter No. 9, ¶10, of the 1984 Alaska Airlines-ALPA Agreement. The 1997 agreement, which does not expire until April 30, 2003, contains similar provisions.

[2]Section 30, AMR Eagle, Inc. & ALPA Agreement (effective Sept. 1, 1997). This agreement allows interest arbitration in the years 2000, 2004, 2008, and 2012.

Underlying Reasons

Why do airlines and their pilots choose to utilize interest arbitration? It is not because of a similarity to police or firefighters, whose services are essential and must be continued without interruption for the benefit of society. While it is true that the Railway Labor Act (RLA) provides for the appointment of a presidential emergency board (PEB) if the President of the United States finds that a section of the country is deprived of essential transportation service, such a finding is not always made.[3] Furthermore, as will be discussed more fully later, PEBs are not without danger from the narrow, parochial views of both management and labor. Economic considerations are more important. For airline management, the monetary losses caused by a decline in advance bookings, which occur when a strike is threatened, may be substantial. For pilots, whose earnings are substantial, the threat of a loss of wages if a strike occurs can be a deterrent to what may be an unnecessary confrontation.

A second major consideration for both sides in establishing a system of interest arbitration is the establishment of standards to guide the neutral or neutrals in reaching a decision. The Alaska-ALPA side letter in 1984 stated:

> The Arbitration Board shall be limited in its award to the open issues, and within the offers or positions of the parties. The award shall embody the average for the domestic major carriers for each open issue, except that the total award or agreement shall embody the average for the agreements of the domestic major carriers.[4]

This language appears clear. However, at the time the side letter was written, there were, insofar as pilots were concerned, no nonunion carriers. Furthermore, the language was drafted prior to deregulation, when there was a clear differentiation between "major" carriers and regional and commuter carriers. In 1986, the parties could not agree on the definition of "major carrier," and it became necessary for the arbitrator to determine that the parties must have meant to use the Civil Aeronautics Board (CAB) "major carrier" definition. The American Eagle-ALPA agreement, written more than 10 years later, was much more specific:

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[3]See, e.g., the recent United Airlines-Machinists (IAM) dispute, where the time limitation on self-help was allowed to run out, with the parties eventually reaching a voluntary agreement.

[4]Alaska Airlines-ALPA Agreement, *supra* note 1, at ¶8.

> The parties will submit to the Interest Arbitration Board the single, separate and specific last offers or positions of each of the parties made on the remaining open issues, identified and limited as described in paragraphs 4 and 5, above, and excluding those items specified in paragraph 6, above, as constituting their respective positions including any evidence or arguments in support thereof. The Interest Arbitration Board will be limited in its award to the open issues, and the award must be within the limits set by the offers or positions of the parties, and must embody and reflect the industry average of the regional carrier's (sic) included in the pay indexing formula set forth in Section 3, paragraph M.[5]

In other words, experience helps the parties to focus their demands and guide the arbitrator(s) as to their intentions.

If the parties do not agree in their CBA to include interest arbitration as the final step to settle disputes regarding the terms of their contract, the RLA, in Sections 7, 8, and 9, provides a framework for the arbitration of interest disputes. These provisions have frequently been used in the railroad industry where the parties generally agree on the issues in dispute. However, the use of these provisions in the airline industry has been infrequent, because the parties either settle their disputes or resort to self-help.

Presidential emergency boards are established under Section 10 of the RLA. The boards usually are comprised of three neutrals appointed by the President of the United States. The boards do not have final and binding authority to settle any dispute placed before them. Rather, the statute provides that the parties shall consider the PEB's recommendations for 30 days, after which the union may strike and the company may change working conditions. While PEBs often seem to substitute for collective bargaining in the railroad industry, in the 32 years between 1965 and 1997 there were no PEBs in the airline industry. In 1997, however, a PEB was appointed in a dispute between American Airlines and its pilots. Although that Board did issue a report, the parties actually settled their dispute with mediatory help. Just three years later, in 2000, another Board was appointed to help resolve a dispute between Northwest Airlines and its mechanics. Again, after some pleading by the PEB, the parties were able to reach an agreement by themselves. The third use of a PEB in the airline industry occurred in 2002 in a dispute between United Airlines and its mechanics. In

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[5]AMR Eagle, Inc.-ALPA Agreement, *supra* note 2, at §30(C)(9).

this case, the PEB was required to issue a report making recommendations on settlement terms. The union then asked its members to vote, and they voted down the recommendations overwhelmingly. The parties resumed bargaining and reached a new agreement, more favorable to the union, which was again sent out for union membership ratification and was finally approved.

The failure of PEBs to bring finality to the collective bargaining process has caused a bill to be introduced in the Senate—S. 1327. This bill is discussed in detail in Ken Cooper's paper.[6]

One final type of interest arbitration should be mentioned. When airlines merge, the integration of the work forces is of major importance both to the unions and to the management of the merged airline. Historically, and because of the CAB decision in the Allegheny-Mohawk merger, airline management has, with certain limitations and the right of veto, turned the integration of seniority lists over to the union or unions involved. For example, ALPA, in its merger policy, provides for facilitation (mediation), mediation-arbitration, and arbitration at the choice of the pilot groups, but, in the end, either mediation-arbitration or binding arbitration must be chosen if facilitation does not result in an agreement.

The Arbitrator's Perspective

Not Grievance Arbitration

With that as background, an attempt will be made to explain how at least one mediator-arbitrator approaches an interest arbitration assignment. Prior to considering any issues in dispute, certain assumptions that arbitrators make in *grievance arbitrations* must be set aside. The first assumption to be set aside is that the arbitrator is primarily a contract reader. While the contractual standards for interest arbitration must be read in the same way as any other contract, the wording of both the opinion and the award will be examined very closely by both parties. When parties amend a CBA, they take great care not to change contractual language, which has an agreed-upon meaning, no matter how esoteric. If an arbitrator unknowingly changes such language, that arbitrator may be doing

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[6][*Editor's Note:* This paper is reprinted in Section I of this chapter, above.]

a great disservice to the parties and may create a dispute where previously none existed.

Why Me?

A second and most relevant consideration for an arbitrator is: Why was I chosen to arbitrate in this instance? This leads us to ask: What special talents does a particular person bring to a particular case? Possible answers may be that an individual may bring special familiarity with the previous agreement, knowledge of the industry, or knowledge of problems that are in dispute. It may also be that the individual has experience as a facilitator, as a draftsperson, or in economic analysis.

What Do They Want?

Quickly following is the next question: What do the parties expect from the arbitrator? Even though the contract calls for *arbitration*, should mediation or mediation-arbitration be offered? And if so, when should they be offered? If mediation, rather than mediation-arbitration, is offered as an alternative, should the parties be told that, because of the difference in roles and the need to probe party positions in an "off the record" manner, the person who now has become the *mediator* will not subsequently function as an *arbitrator?* The author's experience has been that if the mediator expects to "push" the parties toward a settlement, continuing to act as an arbitrator can lead to serious misunderstandings because the pushing may raise unfounded expectations as to an arbitral result.

Another part of the question about parties' expectations is whether the parties are using the arbitration to avoid having to make hard decisions, in effect abrogating their collective bargaining responsibilities, or whether they are using the interest arbitration as play-acting, with the script (and the result) already written. Should an interest arbitrator refuse to put a "private" agreement into effect because that is abrogating the decisionmaking function, or is the role of an interest arbitrator to reach the solution that both sides want?

Developing the Facts

Then there is the question of how to develop the facts needed for coming to a decision. For example, how can proprietary information be protected if there is a need for the company to use it? One

way to protect the information is for the union representatives and lawyers to sign a nondisclosure agreement; another way is to limit dissemination of the information to individuals for whom the parties agree there is a "need to know," and have only those individuals sign the nondisclosure agreement. Where the union has refused to accept limitations on dissemination, one solution is either to accept offers of proof or to accept such evidence under seal, with the union being allowed to see such information only if a confidentiality agreement is signed. This often has the effect of causing the union to sign the confidentiality agreement.

There are many ways to develop the facts: submission of documentary evidence with subsequent argument by counsel, the usual hearing with witnesses and documents and cross examination, on-the-record ex parte witness presentations with exchange of transcripts and subsequent cross-examination where deemed appropriate, or interest-based bargaining meetings with a transcript. In each case, it is helpful to have the parties either prepare briefs or make oral summations.

If the parties will consider the benefits of abandoning the usual adversarial method of producing evidence for the arbitrator, a joint conference call setting forth the various alternatives can cause reconsideration by both sides of how they want to proceed. This form of conference call has been found to work particularly well where there is a single issue to be decided, such as rates of pay or the creation of a seniority list.

Where?

One issue that should be discussed in a prehearing conference is the location and setting of the meetings. This is especially true when the senior executives of an airline are to be involved in a nontraditional presentation. Holding a meeting or hearing at the headquarters of the company or union often prevents the principals from giving their full attention to what is a very important matter. Sometimes moving the meetings to an informal location, especially when some form of mediation is part of the process, can enhance concentration, change the personal dynamics between the parties, and promote an agreed-upon solution.

Three or One?

As has been mentioned, some contracts call for a single neutral arbitrator, while others require three neutrals. From an arbitrator's

point of view, three heads often are better than one. Each individual brings different experience and different expertise to the table, and where millions of dollars may be at stake, the parties are probably better served by allowing the neutrals to feed off each other's experience and sound out new solutions with expert colleagues. Also, the old accusation that an arbitrator will "split the difference" doesn't hold water when there are three individuals involved in the decisionmaking process.

This discussion leads to a comment on the use of partisan members of an arbitration panel. Such members can be very useful where there is a technical issue in dispute; however, where the basic issue is an economic one, experience has shown that even where there are three neutrals, the partisan members' input is considered to be additional advocacy from one side or the other and, as such, is disregarded.

Presidential Emergency Boards

Finally, a few comments on PEBs are needed. I have served on about half a dozen of these boards. They were designed for the railroad industry, where they have served the useful purpose of allowing the parties to blame someone else when they were unwilling to stand up and be counted when a difficult decision had to be made. The overutilization of PEBs in the railroad industry has led to the atrophy of collective bargaining. But this is hardly a loss, because the parties did not want to bargain anyway, and PEBs hide their unwillingness to do so. For example, in 1990 and 1991, PEB 219 was given the job of settling the wage, rule, and health and welfare disputes between all of the Class I railroads in the United States and 16 of the 17 unions that were recognized on those carriers. That was total and public abrogation of responsibility by both sides. Were it not for the PEB process, including appeal to Congress, the inability of the parties to engage successfully in the most basic collective bargaining would have been exposed to the public, to the unions' members, and to the railroads' shareholders.

Presidential emergency boards have not been employed very often in the airline industry, as has been indicated earlier. There was a period before 1965 when the airlines began to go in the same direction as the railroads. But the 1965 strike of seven airlines by the International Association of Machinists (IAM), and Congress' refusal to intervene, ended that path. There were no subsequent PEBs in the airline industry for the next 32 years, until the late

1990s, when they were employed to help settle disputes at American, Northwest, and United Airlines (discussed earlier). The 1997 American Airlines dispute and the 1999 Northwest Airlines dispute required the use of a PEB to reach a negotiated settlement. And in 2002, in a dispute between United Airlines and its mechanics, who were represented by the IAM, the PEB issued a report, which the parties adopted after making two modifications. This recent experience with PEBs is the result of the economic crisis in the industry and management's desire to reduce costs. In the airline industry, however, where the parties truly believe in the principles of collective bargaining, PEBs do work.

A Few Words on S. 1327

There is, however, one problem with PEBs for airlines. During the period prior to the end of the statutory period of no-strike / no-lockout, the advance bookings of a carrier drop off dramatically, and so do its revenue and profits. In the view of the carriers, this makes the use of a PEB more favorable to the unions. Senate Bill 1327, discussed more fully in Ken Cooper's paper,[7] was introduced by Senator John McCain (R-Ariz.) and was named the Airline Labor Dispute Resolution Act. It provides for compulsory arbitration of disputes in the airline industry when the Secretary of Transportation finds that a curtailment of operations would significantly injure the economy of a region. It provides for the parties to the dispute to choose three arbitrators (who must be members of the NAA) from lists supplied by the AAA. The panel of arbitrators shall "select either the offer in its entirety concerning rates of pay, rules, and working conditions presented by the carrier or carriers involved, or the offer in its entirety concerning rates of pay, rules, and working conditions presented by the employee organization involved."

The solution offered by S. 1327 bears a striking similarity to baseball salary arbitration; however, in baseball salary arbitration there is just a single issue to be decided—what salary a player will receive. In the airline industry, work rules, such as scheduling, deal not only with costs, but also, from the employees' point of view, with quality of life. While those who believe that all of life can be quantified in economic terms may find this type of solution

[7] [*Editor's Note:* This paper is reprinted in Section I of this chapter, above.]

appealing, work rule issues are by their very nature complicated problems and cannot be dealt with purely as a matter of cost. The Senate bill gives the impression that its author does not trust arbitrators to arrive at a rational balancing of the various interests involved in the changing of a CBA. Perhaps a less simplistic solution can be devised to modify the way disputes involving the creation or renewal of CBAs in the airline industry can achieve finality.

Changes in labor law through legislation happen very infrequently. In the transportation arena, the RLA was passed in 1926, amended in 1936 to cover airlines, and no substantial change has been made since then. If there is to be a change in the way collective bargaining occurs in the airline industry, it behooves all of us who are directly and indirectly involved in such collective bargaining to publicly consider whether changes in the law are necessary and, if so, what they should be. But that is a topic for another time and place.