CHAPTER 5

LABOR RELATIONS AND ARBITRATION POST-9/11: THE US AIRWAYS EXPERIENCE

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I. INTRODUCTION

We are still feeling the impact of the disaster that occurred on September 11, 2001. This discussion focuses on the effect that 9/11 had upon US Airways. The company has been struggling financially for a number of years, went into bankruptcy, and its problems were exacerbated by the events of 9/11. One of the company's approaches to its problems was to attempt to negotiate concessionary agreements with its labor unions. This panel discusses those agreements and their impact on the employees, their unions, and the company.

II. THE PANEL DISCUSSION

Jeffrey Small: It's good to be back at the NAA meetings. I was pleased to be a member of any panel that Gil is chairing. Gil, to my knowledge, is the only NAA member who has ever eaten an exhibit at a hearing. Gil served as the neutral on an Air Line Pilots Association (ALPA) case regarding whether the "crew meals" that the company was providing were adequate. I sent some of our pilots over to National Airport to obtain examples of the passenger

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snacks that we alleged were masquerading as crew meals. We sent the snacks around the room. They were sealed in cellophane. I noticed that the System Board members were carefully examining the snacks. When they got to Gil, he opened one and a gherkin fell out. The rest was history. Acting on Gil's lead, the entire System Board decided to devour my exhibits. Empty trays were all that remained to explain the issue in the case.

I've attended most of these meetings since I have been employed by the ALPA. Last year I was unable to attend because we were engaged in heavy duty negotiations. Much of this talk will tie in to the Timeline Exhibit that has been distributed to you [Appendix 2]. If you look at that exhibit you will see first that we have had a recent change in management. You will also see that the United Airlines (UAL) merger collapsed and that set the stage for what followed. For about 13 or 14 months, US Air had been singularly focused on trying to integrate with United and, during this time, the competitive issues that we were addressing were totally left in the dust. In fact, our small jet negotiations ground to a total halt. Even though US Air, as a stand-alone carrier, had considered these negotiations critical, we had only one brief meeting on the topic during this 14-month period. While the competitive issues were ignored, US Air continued to lose market share, and, when the merger with United collapsed, US Air's financial problems became even more severe.

The events of 9/11 compounded those problems. ALPA gave: the pilots ended up making the deepest concessions. The concessions we agreed to in order to "save the company" were valued at $465 million a year for the 6½-year term of the contract. We gave these concessions because the company explained that this level of concession was necessary to get a loan from the Airline Transportation Stabilization Board (ATSB). This package incorporated $7 million a year in productivity givebacks, $12.7 million a year in health and welfare givebacks, and $445 million a year in wage cuts with a consequent lowering of pension funding. That was "Restructuring One." The pilots ratified that by a vote of more than three to one, including retroactivity to July 1, 2002.

The only problem was that the company filed for bankruptcy protection immediately thereafter, claiming that this move was necessary to secure the same concessions from other labor groups, from leaseholders of aircraft, and from other interested parties. Then, 3 months later, the company came back for more. The

company said that the $465 million in concessions was not adequate to secure the ATSB loan and it needed $400 million a year more. Half of that was to come from labor and half of labor's share from the pilots. This led to a second round of negotiations that lasted until December 11. On December 13, we ratified what I've called Restructuring Two, which yielded another $100 million a year in concessions for the contract term plus a change in the pension program that provided some $77 million a year more.

Each time we believed that our concessions would rescue the company by enabling it to secure the ATSB loan and continue in business. Under the threat of liquidation, the union obviously did some extraordinary things. The company secured up to a 46 percent cut in pilot costs for the company. The annual pilot payroll fell from approximately $1.4 billion a year at the start of this process to some $757 million. The only problem, however, is that once again these concessions failed to do the job because, according to the company, it still could not achieve the numbers necessary to obtain the ATSB loan.

So the company went into bankruptcy court and proposed to terminate the pilots' defined benefit pension plan. The final part of Appendix 2 outlines the issues in the bankruptcy court proceeding. The court made a ruling stating that the company had met its Employee Retirement Income Security Act (ERISA) requirement for terminating the pension plan, although it referred the dispute back to the System Board for final resolution. Again threatened with liquidation, ALPA agreed to terminate the defined benefit plan in favor of a defined contribution plan.

From our point of view, the problem today is that the pilot group believes that it is not being treated fairly or appropriately considering the huge level of concessions it has given. Even with these huge givebacks, the company does not seem to recognize that it was saved by the pilot group. The pilots' concessions created the situation where the company can continue.

We have had many implementation problems: problems with getting the company to follow through on agreements it has made and problems with settled issues that have been reopened by the company in an attempt to secure more concessions. But the pilot group is in no mood to make further concessions. As one of our union officials said, "The bank is closed." Unfortunately, because of these implementations and other problems, we will see more litigation in the future. Now this may mean more work for National

Academy members, but unfortunately it doesn't bode well for the future of labor relations at US Airways. The pilots believe that their concessions entitle them to be a partner at the table and a respected member of the team that is working to keep this company running. Instead, what we see is confrontation and future litigation, and the pilots are in no mood to continue in that situation.

Nick Manicone: The Communications Workers of America (CWA) represents approximately 7,000 US Airways employees who work at the ticket counters, at the gates, and take your reservations. Essentially, anyone that you would meet at the airport or speak to on the telephone before you get on a US Airways plane would be one of our members. I am very pleased and happy to be here today and I would like to thank the NAA for inviting me. This is my first meeting before this group and it is appropriate that I should be speaking about the fallout from 9/11 on airline industry labor relations. I was in an arbitration with Alan Symonette that day and we canceled the hearing when the scope of what was going on outside the arbitration room became clear. The issue in that arbitration had to do with the company's right to outsource work. After we canceled the arbitration, the matter became moot because of the effects of 9/11. The company decided to return the outsourced work to the bargaining unit. This example shows some of the ripples that spread from the 9/11 event. The problem that brought us to the hearing was not settled through arbitration. Grave and more important events wound up settling the dispute for us.

The changes that 9/11 brought about in labor relations cannot be overestimated. It's an old saw in litigation practice that if the law is against you, you argue the facts; if the facts are against you, you argue the law; and if the law and the facts are against you, you bang on the table. Something that frequently occurs at arbitrations, if you are not banging on the table, is trying to tug on the heartstrings. I think the bankruptcy situation at US Airways has allowed the company the opportunity to tug on some heartstrings.

I've heard frequently at arbitrations that the company's dire financial situation will not allow or should not require it to reemploy workers who, in the company's view, should have been discharged because of their lack of work ability or skills. It is important for arbitrators to remember that when they hear this argument, there was hardship on both sides of the equation. The employees of US Air gave up a lot. The CWA members gave up

wages, health benefits, vacation benefits, and sick leave benefits, and agreed to changes to the scope provisions of the contract that allowed some work that had formerly been theirs to be subcontracted out. They gave in just about every area of the contract except in the just cause provision. That clause remains vital and important: even though our members are now working under conditions that provide far less pay, there is no reduction in their protections under the contract.

The company may argue that its bankruptcy or its financial situation has presented it with hardships. However, it is important to remember that the company has emerged from bankruptcy. It has become stronger by being able to void contracts or gain concessions from its unions. And it got the ATSB loan discussed previously, even though its employees today work under much less secure conditions for much less pay than even 1 year ago.

Donna Lewis: This is truly a historic moment in labor relations at US Airways. For the first time in my tenure at US Airways, we actually have a point of agreement with Jeffrey Small of ALPA. We've agreed that in the post-9/11 circumstance there will be increased litigation—a point that we will address in a few moments.

We also have a point of agreement with CWA—another historic first. We agree with the CWA contention that the concept of just cause has not changed in the post-9/11 environment. Furthermore, we don't expect it to change and we certainly won't make any contrary arguments. Just cause is still a viable concept that governs the relationship and the discipline at US Airways. The Association of Flight Attendants (AFA) has not spoken yet, but I'm sure I'll have at least one point of agreement with Stephani.

Let me turn to what I see as a more general approach to the issues that are in front of us. Before 9/11, the focus of the entire airline industry was on that competitive edge. How do you find it, exploit it, maintain your position, and stay afloat as an airline? There are a lot of successes in the industry—airlines that found that competitive edge and continued to exploit it. But there were also a lot of failures. Metro Jet, the discount airline within an airline, was our quest for a competitive edge and it can be counted as one of those failures.

Another quest for a competitive edge was our proposed merger with United Airlines. We thought that this merger would give us survivability and put us on top—that the synergy between the two operations would benefit both. But then we had the incredible scrutiny by the Department of Transportation and by other govern-

mental agencies looking into the antitrust implications. We all know what happened to that plan. The current code-share agreement between United Airlines and US Airways in many ways replicates the advantages that we would have seen from that merger, and it works in the post-9/11 situation. In the pre-9/11 situation, the merger was deemed anti-competitive.

Since 9/11, the industry focus has shifted from that competitive edge to a much more critical issue—survivability. How do we survive in the context of these dire financial circumstances and in terms of passengers willing to fly? It is that quest for survival that put the airlines in general and US Airways in particular on a collision course with our unions and has created a new concept about what it means to be obligated to bargain collectively for changes.

Collective bargaining limits flexibility. This is particularly true in the airline and railroad industries where so many standards have been imposed by the government on how you can go about changing things. We do not have the same free hand found in other industries, so we are faced with a dire circumstance. We have to respond to the 9/11 challenges while faced with the old, restrictive collective bargaining agreements. The question concerns how the industry can achieve the flexibility needed to survive while abiding with and respecting those bargaining agreements.

As Jeff indicated to you, US Airways engaged in restructuring discussions with our unions. Contrary to Jeff's point of view, the union that first recognized the circumstances at US Air and the need for survival was not ALPA. This was a break from tradition because ALPA usually leads the pack in our industry. ALPA negotiates the new agreements and the rest of the unions follow suit. In this case, the AFA broke from this tradition and faced the survivability question—survival for everyone. AFA leadership stepped up to the plate and came to the table first. We reached a restructuring agreement with AFA first; then ALPA came scrambling to the table and the other unions followed.

What did we get out of those hastily-put-together agreements? As arbitrators, I'm sure you have all dealt with poorly drafted contract language where the parties intentions somehow did not get translated into the written word. Take that problem and magnify it a hundredfold. Our restructuring agreements were not detailed, carefully crafted agreements. What we reached were pretty much agreements in principle. For some of our unions it was nothing more than a page or two of bullet points. The process has been how to translate those broad agreements into operating documents.

You don't bring that to the workplace without great difficulty. There are incredible disagreements over the parties' intentions, over what these bullet points mean, and over what the restructuring meant.

Unfortunately, now that we are at the point of implementing those agreements, we again have lost focus on what we need to achieve as an airline—which is survival. We have gone back into the mentality of labor versus management. "This is what the agreement says. We don't care about the overall implications on the survivability of the airline. This is what we think we achieved and we're going to fight you tooth and nail for it. The consequences for the survival of the aircraft or the airline be damned."

We are seeing an increase in hostility. ALPA's Master Executive Council (MEC) recently passed a resolution proclaiming in great detail that we were scoundrels—not only attacking management generally but personally attacking three of our senior managers. Such actions exacerbate the existing strains brought about by forces over which we have no control. When you exacerbate those strains, you create additional problems in the work force. The factions within the various unions become incredibly more defined, leading to more internal fighting and more grievances filed. We have today a situation where our attempt to accomplish what we needed to accomplish has created problems that will be with us for many years as we sort through the consequences and implications of the restructuring. I fear that we may lose sight of the overall objective, and that is survival.

From my experience at Continental and Eastern, I can tell you that US Airways' emergence from bankruptcy is not the last chapter in the book. We still have not brought back the marketplace. We still have concerns with the passengers. We are not seeing revenues and we are not seeing things that were projected to rebound. We are in dire circumstances and survival is still an issue. Whether we survive will depend, in part, on how we work out the relationship in the post-restructuring with various unions.

Stephani Brown: I think that the flight attendants' union recognized the need for changes in the industry and we participated in the restructuring negotiations largely because our top priority was job preservation. At the beginning of the negotiation process it became abundantly clear to us that we were trying compress a 2- to 3-year negotiations process into 2 months. At the onset it was quite challenging to find ways to absorb the level of reductions and incorporate the concessions that were being asked. In a way, we

were redefining our responsibility as the union. We were still caught up in the normal contract violations and discipline cases, but 9/11 redefined priorities for many of us personally and for the union in general. It showed us that our union needed to peel back, return to our historic roots, and focus on job preservation and minimizing the impact on our membership.

The company approached us with a menu of items. We were given the opportunity to select how we wanted to take the suggested cuts and you can imagine the resultant dissension. It's like attempting to get a bunch of people to agree on how to take poison. The negotiations became a process where we had to go through our contract and determine the impact of the cuts in wages, in productivity, and in health benefits. Those were the three areas where the AFA decided to make our contribution.

The company opened its books for review by all of the unions. In the beginning of the process, we hired our own analyst to review the information given to us by the company. Our analyst told us that the painful process that we were about to encounter at US Airways was going to be the first of many. Even for those who believed that the bankruptcy threat was exaggerated, it soon became obvious that US Airways was going to be the first of many carriers to go through this or a similar process. Indeed, as we sit here today, we can confirm that the analyst was right. The changes that 9/11 provoked were part of a bigger picture, but 9/11 accelerated what was happening in the industry and helped to define what changes were going to be permanent.

We took the role as the first union to sit down with the company and as the first union to make a deal. We did not do so hastily or with a "caving in" mindset. We did so responsibly because we wanted to protect our membership as well as we could and I think that the AFA achieved that. As has been said, the restructuring agreements that came out were bullet points where the language is neither clear nor unequivocal. We believe that there will be a host of arbitrations to clear up this problem and define the intentions of the company and the union more specifically. This happens in many contract negotiations, but our problem will be particularly severe because we tried to condense some pretty heavy contract changes in such a short period of time. I don't believe that it's necessarily a management versus union hostility. What we have is an attempt to redefine an industry and how the union and the company are going to move forward, fairly and collectively.

Donna Lewis: My first arbitration with Stephani took 5 days in a termination case, 5 days over the course of a year and a half in three different locations. The case involved a crepe myrtle tree, a bale of straw, and a bag of sugar. We have now gone from one case in 5 days to five cases in 1 day, and, despite the strains of the restructuring environment, we hope to continue achieving resolution of our disagreements in that manner.

III. QUESTIONS AND ANSWERS

Gil Vernon: With the broad bullet-type language, do the parties agree that your expectation of an arbitrator has changed or that it has not changed?

Donna Lewis: The general language puts a greater demand on an arbitrator to resolve a contract dispute. I really don't see how arbitrators can resolve those cases in the same way they resolve an issue under a full-blown, written-out contract. I hope that we can actually work together before we get to the arbitration and deprive you of much of the work by resolving among ourselves what these bullet points mean. I don't know that we will succeed. I think it depends on our relationships with the unions. We will see increased litigation with some and I think we will continue to see cooperation with others.

Stephani Brown: I think arbitrators will have to throw away some of their traditional notions in contract violation cases. We don't have a lot going on with respect to the meeting of the minds and we don't have any past practice to help you interpret some of the language and its implementation. Our negotiation compressed a 2-year project into about 24 hours. You cannot expect the same kind of language as that which you would find in a contract that had been negotiated over a number of years. I believe that the role of the arbitrator is going to have to change with respect to how the language itself came about.

Donna Lewis: It is also going to change the focus because when an arbitrator is called upon to decide what those bullet points mean, the argument is undoubtedly going to hark back to the context that created the need for those restructuring talks—survival of the airline. I think you will see different arguments than you have perhaps seen at this point. I think the arguments will go outside the context of the collective bargaining agreement, and

perhaps that is an appropriate thing. But in order to understand what the parties were trying to achieve, you have to go back to the dire circumstances, the need to restructure, the need to achieve cost savings, and the need to do it in a way that would allow the airline to survive. The arguments that we pitch will be somewhat different. What you do with them will be very interesting to see.

Jeffrey Small: Not all the language in the restructuring agreement consisted of bullet points. In the ALPA agreement, the original restructuring letter is 83 pages long. I do agree that in some areas the language is not fully developed and consists largely of statements of principle. Where the arbitrator is dealing with such general language, the rules of contract construction will still have to be followed. The arbitrator will have to consider the table discussions, whether there was a meeting of the minds, and the intent of the parties. But the language that is fully developed should be interpreted through the normal rules of contract construction.

Nick Manicone: I don't think that the context in which the agreement was reached should ultimately affect the interpretation of contract language. I think arbitrators should apply all the usual principles to interpreting contract language to decide what was agreed to. There was an agreement or there wasn't; there was a meeting of the minds or there wasn't. The language that was put into a bullet point or in a side letter might have some meaning to the parties and it is up to the arbitrator to decide what that meaning was. However, arbitrators should not substitute a generalized statement about the context of the negotiations for a particular understanding of what the parties thought they were agreeing to when they drafted the particular language that appears in the agreement.

Donna Lewis: We do have cases pending as a result both of the implementation of the bullet points and of the 83 pages of outlines and sketches. We do have issues pending that involve technical compliance with some of the time frames where the unions are pursuing their challenges to the company's actions. But those unions, behind the scenes, are acknowledging that these are cases they don't necessarily want to win because they will do great damage and might unravel the effect of the restructuring agreements. We are in an interesting situation with some of our unions that are pursuing grievances whose result could be contrary to what the parties attempted to achieve in the restructuring agreement.

How an arbitrator resolves those cases will be incredibly challenging. And those are the cases that are unlikely to be solved by the

parties themselves because things not related to the issues are actually in play and prevent the parties from reaching an agreement. What matters to me is that there is a reality at play that is interfering with the resolution of these issues. This reality is going to lead the parties to present these issues to an arbitrator where the technical outcome may be the correct outcome from the contract interpretation view but is also an outcome that neither of the parties intended and that would do great harm to the airline, its survivability, and its cost structure.

Jeffrey Small: I don't know the case you're talking about, but I have an example where survivability became an excuse for an amazing grab. The company is now undertaking an implementation and interpretation of these restructuring agreements. There is a clause in Restructuring Two called "war contingency." In addition to all these other givebacks that we have been discussing, there is a paragraph that the company insisted upon that says there will be an immediate 5 percent pay deferral for up to 18 months if the United States invades Iraq. The deferral will begin to be repaid in the first month following the end of the conflict. It will be repaid in the same number of monthly installments; and it will only be accelerated if US Airways reports a pre-tax profit. Five percent has been taken away on top of all of the other concessions. The company implemented that provision as we expected it to.

Now the company has set up Mid Atlantic Airlines (MDA)—a small jet operator that is going to be a division of US Airways. MDA has the management staff but no pilot line employees now. The company has announced that the 5 percent pay deferral will apply to the rates that will be paid to pilots in MDA, without discussing whether this pay deferral would be extended beyond the main line to this new division. We're just amazed. From our perspective, management at US Air is looking for an opportunity to do what they haven't been able to do previously: that is, to interpret the restructuring agreement in ways that allow it to maximize its benefits under the agreement. And we, of course, react. Management acts and we react. We discover now that those pilots who are to be hired into this new division are going to be given unilaterally 5 percent less income than authorized in the restructuring agreement. The only statement regarding MDA wage rates is that the rates would be based on the American Eagle wage rates. There is no language supporting the application of this provision to MDA.

Gil Vernon: A related question. Does anyone believe that in the troubled waters of the transportation industry post-9/11 arbitrators have changed the burden of proof, with or without

articulation? Have they raised or lowered the bar? And is there a difference in the way that arbitrators look at the different types of cases?

Stephani Brown: I think that the atmosphere changed after 9/11. And I don't think that there was a way to avoid that. One of the premier cases filed right after 9/11 dealt with the "no furlough" clauses in the agreements with the pilots and the flight attendants. I believe that we were the only unions on the property with those clauses in our contracts. You can imagine the situation shortly after 9/11 when we were faced with management's immediate need to furlough employees despite the language that was in both contracts. ALPA was the first to file a grievance, and AFA recognized that whatever decision came out of the ALPA arbitration would affect AFA because of the similarity in contract language.

In this arbitration, you have on one side the catastrophic impact to the industry and, on the other, contract language that doesn't allow the company to furlough except for certain situations including a force majeure. The company attempted to call the 9/11 catastrophe a force majeure exception and thereby ignore the no-furlough clause. The case was ultimately withdrawn as part of the July 2002 restructuring agreement, but the company agreed to not invoke the force majeure proviso in connection with 9/11. But surely an arbitrator cannot ignore a situation where the company is hemorrhaging financially.

Donna Lewis: My view is that the events of 9/11 and their impact on the airline industry were factors that came into play in the decision. The issue concerned whether the conditions to trigger the force majeure clause in the contract had been met, and arbitrators cannot answer that question without looking at the events of 9/11. I don't view that particular situation as moving or changing an arbitrator's approach. My concern with the approach taken by arbitrators in the post-9/11 force majeure cases is going to be where things are not quite as clear. In cases that are driven by a catastrophic event, are arbitrators going to consider the long-term implications of a contract dispute? For example, are arbitrators going to take a closer look at those cases that have such an impact on a cost structure that the case affects the survivability of an airline?

I think that both the company and the union are concerned with survivability, but they take a different approach. I don't know how survivability issues are going to play out in the next few years, because we haven't had any arbitration decisions on our property

where those issues have been a factor. I think the jury is still out with respect to the impact of these events on contract disputes. When it comes to the discipline disputes, however, we still believe that the concept of just cause should be driving those decisions.

I don't know whether arbitrators will show more sympathy toward management in the post-9/11 context. We've tried a lot of cases but we haven't received many decisions yet. Here's an example of one of the things that does concern me. Suppose an employee experiences a moment of misjudgment with another employee and finds that he or she is now on the discipline track as a result of that ill-considered act. In the grievance process, the employee argues that he or she was driven to the action by financial pressures caused by the impact of the pay cuts on his or her family life. I think we'll see more of those cases as we go forward in this process and I don't know if they will ring a bell with arbitrators. I certainly hope that we can evaluate future discipline cases in the same manner as we have done up to this date.

Gil Vernon: This would be a good point for Jeff to discuss his case abstracts.

Jeffrey Small:

ABSTRACT OF MEC 01-10-01

MEC 01-10-01, Bid 05-95A Contractual Violations (Force Majeure)

Arbitrator:	Robert Douglas sitting with the US Airways System Board of Adjustment
Hearing Dates:	December 17, 2001; February 5, 2002; February 12, 2002; April 29, 2002; and May 7, 2002

After the September 11, 2001, terrorist attacks, US Airways implemented the force majeure provisions of the ALPA Agreement. Section 1(G) of the contract exempts the company from compliance with the no-furlough clause and minimum captain position requirements "to the extent that a circumstance over which the Company does not have control is a cause of such noncompliance." "Circumstance" is defined to include the grounding of company aircraft or war emergency.

The Association took the position that US Airways made a decision to shrink long before the events of September 11. A company plan announced in August 2002 anticipated major cut-

backs. The company countered by stating that the events of 9/11 were the cause of their downsizing.

This case was withdrawn as part of the July 2002 Restructuring Agreement. In exchange the company agreed not to invoke force majeure due to the September 11, 2002, terrorist attacks as the basis for any additional furloughs. The Restructuring Agreement also contained enhanced fragmentation protection, enhanced Contingent Acquisition Rights, and snapback protection in the event of a change in control. US Airways also agreed to provide employee pass privileges for furloughed pilots and their families.

Jeffrey Small: Above is the force majeure case, mentioned previously, that was filed under our expedited procedure. The "expedited procedure" lasted about 6 months. Robert Douglas sat with the System Board and conducted the hearing. This case was settled as part of the first restructuring agreement.

Our position when the furloughs were announced and connected to 9/11 was that the no-furlough clause protected all of the pilots. We argued that the cuts were too deep. The company attributed the furloughs to circumstances "beyond its control" and we ended up arguing about whether 9/11 qualified as such a circumstance. We felt that the 1997 agreement traded parity for growth. The company promised an aggressive growth strategy. In return, the pilots at US Air would be brought into parity on wages and productivity with the other major airlines. That was the cornerstone of the agreement, and the protection of jobs was part of the deal. From our point of view, the no-furlough clause was an essential element of that agreement.

The company announced shortly after 9/11 that there were going to be massive furloughs that were justified under the force majeure clause. The case that came to arbitration involved negotiating history as well as economic testimony. From our point of view, US Air's downturn started long before 9/11 with declining passenger demand. The events of 9/11 only accelerated the results of the original downturn, declining yields, and lack of profitability. The case was withdrawn as part of the restructuring agreement. The company agreed that they would not invoke the force majeure provision due to the terrorist attacks as a basis for any additional furloughs.

Gil Vernon: I'm going to ask a broader question. On April 2, 2003, Larry Lindsey, former advisor to President Bush, had an op ed piece in the *Wall Street Journal* saying that to break the bankruptcy/concessionary bargaining cycle we should have final-offer,

either/or interest arbitration in the airline industry. Senator McCain introduced Senate Bill 1327 in the last session of Congress to implement either/or arbitration in airline interest disputes. If that system had been in effect post-9/11, would your experience have been better or worse? What is your organization's position on the possible passage of such legislation in the future?

Nick Manicone: A proposal to implement a baseball-style arbitration process on collective bargaining negotiation in the airline industry doesn't make any sense. In baseball arbitration the difference between the parties is money—it's how much your bonus is going to be for each home run and that type of thing. Everything else is frozen: you're going to play 162 games, you're going to wear the home team's uniform at home games.

This is not the case when you are talking about the airline industry. A whole host of issues are at stake, including scope language, health benefits, wages, and many other terms and conditions of employment. Look at the size of the ALPA collective bargaining agreement. It involves about 400 pages and only about 20 of those pages deal with wages. There's no way to use a baseball style arbitration in this sort of case. It would lead to a kind of brinkmanship. Rather than trying to reach agreement, the two parties are going to go to either end of the spectrum, stake out a claim, and hope that the arbitrator will head in their direction. There's no incentive to move toward the middle, because if you move toward the middle, you are potentially giving up something that could be given to you through the winner-takes-all arbitration process.

Donna Lewis: I agree with Nick. There is no incentive for the parties to reach agreement under that structure. One of the statements in this article that hit me most was that the last-offer arbitration option offers incentive to the parties to appear reasonable in stating their positions. I couldn't disagree more. If you had that form of dispute resolution in the airline industry, you would see the parties taking more extreme positions. My concern with that kind of arbitration in the airline industry is that the survivability factor, which so often causes the company and the union to work together, is put into the hands of an arbitrator who may or may not understand the implications of a decision. If we had been in an arbitration context after 9/11, there would have been no restructuring and US Airways would be shut down.

Jeffrey Small: Under the Railway Labor Act (RLA), we were not obligated to participate in any negotiation until 60 days prior to the

amendable date of the agreement, or January 2, 2003. All of our negotiations occurred on a voluntary basis outside the RLA. Every few years somebody attacks the Railway Labor Act. Whoever doesn't like the status quo comes forward and says that the Act doesn't work anymore. Certainly when we were getting double-digit wage increases, we were happy with the Act. Now it seems to be that management is unhappy with the Act because they want major changes.

The RLA has provided a framework for labor relations in the airline industry for a long time. Contrary to the critics, I think it works fine. Obviously there are situations that are difficult, but generally we have been able to find solutions in negotiations without resorting to strikes, and most of the parties survive. I'm surprised that the McCain bill was introduced. Our information was that it wasn't going to be introduced for a while because the managements in the industry are not happy with a new issue being brought to the table. They've got enough on their plate for now.

Let me just add one more issue. Perhaps there is a hidden agenda. When a writer lodges protests about foreign ownership, the real issue may be cabotage. Some in the industry are trying to allow a foreign airline to fly anywhere in the world, picking up and discharging passengers in any country. With the advent of multinational alliances**,** management could find the cheapest pilots and fly them anywhere they wanted. Some international airline could come into Kennedy and then keep going to Los Angeles, using the least expensive foreign pilots. We are very sensitive to this issue. "Let's have a truly international airline system" and "let's allow airlines to fly anywhere they want" may be code words for the objective of cutting labor costs by the use of foreign pilots on domestic routes.

Stephani Brown: I echo Nick's sentiments with respect to final-offer arbitration. In my 6½ years with AFA, I have come to understand that in some grievances it is easier to have an arbitrator take the responsibility, and sometimes you do that for political reasons. But in the broader picture, the membership wants to see the union do as much as it can to protect the contract and the members. To defer to the arbitrator too often may be viewed as a failure to step up to the plate and represent the membership as they should. The all-or-nothing approach is dangerous and would not benefit the majority of the union members.

Gil Vernon: I don't take a position on the Lindsey article or the bill. I find it interesting that you all believe that final-offer

either/or arbitration would push the parties to the extreme position because the theory is just the opposite. If you would like to comment?

From the Floor: I don't want anything that I say as being construed as advocating final-offer arbitration. With regard to firefighters and police officers, you could have the arbitrator pick one side or the other on the basis of single issues or the package as a whole. ALPA has lived with the Alaska and American Eagle systems where, if negotiations break down, each party picks the five most important issues, submits those issues to a panel, and the panel can pick and choose. Do those systems also drive the parties away from each other or do they really drive them closer?

Jeffrey Small: I think that you can find ways to offer contract arbitration. In the 1970s, the Flight Attendants participated in an arbitration where 10 issues were brought forth and made subject to final-offer arbitration. The problem is that there are a lot of issues that don't easily lend themselves to final-offer arbitration. For example, how do you assign reserves? Is it by low time, is it by seniority, or is it by whoever had a trip that was coming in at the beginning of the month? Do they go to the bottom of the list—first in, last out—or do you follow a different order or priority? It worked in the '70s because we only had a limited number of issues submitted and didn't have to reopen the whole book. If you are reopening significant technical sections, I think you then run the risk of not getting a complete deal or a complete agreement that really resolves the open issues. You're going to end up with some issues that really need hard table time if they are to be fully resolved.

Nick Manicone: In some situations I can imagine resolving a dispute over the contents of a collective bargaining agreement by an arbitration. I can see doing that in certain limited situations and not as to a first contract. The subtext of the controversy over interest arbitration is that some parties would like to stop strikes in our industry and this baseball arbitration proposal seems to be a way to do that.

I don't think the McCain proposal will benefit labor. The threat of a strike tends to focus parties on the negotiation and on reaching an agreement. I think there are a number of reasons why strikes should continue to be an option in the airline industry, not least of which is that there is a statutory right to act collectively in that way. We also should see the proposal for what it is. It is not an endorsement of the baseball arbitration system. It is a way to get rid of the threat of unions striking.

Donna Lewis: I think that there might be a time and a place for that type of approach, but I'm not certain that this is the time and the airline industry is the place. Those arbitration systems work best when you have a relationship between labor and management that is different from that found in the airline industry today. They work best when there is less suspicion, less acrimony, less hostility, more of a sense of working together, and when there is a joint objective. The airline industry is not there. Given what we've just gone through, the relationships with many of our unions are going to be more troubled than they have been. With that type of culture, I don't think arbitration alternatives will work. In this culture of acrimony, hostility, and suspicion, the parties will be forced to extreme positions in any "winner take all" type of situation. This is not the time in the airline industry for those resolutions.

From the Floor: I think the baseball example is not the proper analogy. The steel industry is a much better one because there is a rich experience with interest arbitration running over a number of years, even though it's a mixed experience. But I would say that the steel experience shows that it is feasible to adopt interest arbitration in a very complicated and extensive collective bargaining contract with many provisions on many technical subjects. The process is one that does drive the parties closer together, as the theory suggests. However, it doesn't necessarily get them to agreement because they realize they can pass the buck to the arbitrator. They will get close, but not close enough to complete the negotiations.

From the Floor: Might I throw this on the table—an idea that flips over the conventional mediation and arbitration? Begin with arbitration and follow it with mediation in the following manner. Do an issue-by-issue arbitration on a conventional basis because it gives the arbitrator the opportunity to get all the information necessary for an arbitration award. After the arbitration decision is written, the arbitrator puts it into his pocket and then mediates. It sounds off the wall but happens when you have mediation first or any kind of negotiation with arbitration; the parties hold back their compromises for fear that they will be affected adversely when they get to the arbitration.

If you have arbitration first and the decision is written, nothing is held back and everything is presented. Then you get your opportunity to parse out all the language that you need in a new collective bargaining agreement rather than have an arbitrator throw something down your throat which you then have to renego-

tiate. I've used it and it is used in South Africa, and I think it is far more appropriate for the complex issues that you deal with in a collective bargaining agreement as distinguished from a straight-line issue like money, and it gives the parties an opportunity to really work over the dispute.

From the Floor: I would like you to comment on the use of your tripartite system board, and I would like to add that I think you are putting an awful load on an arbitrator who already has looked at language, practice, and bargaining history and now you want him or her to consider the hasty writing that went into the restructurings.

Donna Lewis: I'm not looking for arbitrators to bail us out of hastily put together agreements that consist primarily of bullet points and that are certainly less than full, carefully thought-out, and scripted agreements. My point was to ask the arbitrators to put these disputes in the context in which they arose, to understand what the parties were trying to achieve when they entered into these sketchy agreements, and to try to work toward that objective.

Nick Manicone: I would like to respond to that first question and then move onto the tripartite board. The company's argument for reading these things in context is an argument that any language that could be interpreted the company's way should be interpreted that way! If the arbitrator is to look at the bankruptcy and things are going poorly and the company is bleeding money, arbitrators are going to interpret the language in ways that permit an answer that will save the company. That's not the proper application here. Arbitrators have to look at why the parties are renegotiating an agreement in the middle of a contract, but at the same time they have to look at all the traditional things that an arbitrator looks at to decide what the language means.

Donna Lewis: I don't think context is limited to that by any stretch of the imagination. I think there are situations where certain points in the restructuring agreements may work to the disadvantage of union members. Hopefully we look at those things and we try to resolve them among parties. I still think there are arbitration cases that are pending where a decision can disadvantage the membership in ways that neither the company nor the union would like to see. Rather than being slaves to technicalities, I am asking or at least hoping that arbitrators will put these decisions in context and realize that the decisions don't stand in isolation but are part of an overall operation of an airline.

From the Floor: One of you said that the technical outcome might be correct but would do great harm to the parties and I asked

about using your system board in a sophisticated or politically incorrect way. I don't know that my question was answered.

Donna Lewis: I disagree with using the system board members in that way. If we're going to go to arbitration, I want the arbitrators to make the decision based on the case that's been presented and not on extraneous matters brought in by system board members. I would absolutely object to that process.

From the Floor: I wrote the first dissertation on interest arbitration for police and firefighters. At the time, Karl Stevens's ideas on final offer arbitration were part of mainstream thinking. I concluded that conventional arbitration was best because the neutral arbitrator could mediate after the stuff was put on the table by the advocate arbitrators. At that time there were a lot of arbitrators who didn't want to mediate, and many cases concluded with what I call the least, last lousy offer. Sometimes sophisticated parties will come closer together and it depends on if you have package arbitration or item by item, because one of the reasons for wanting final-offer arbitration by package is to prevent arbitrators from splitting the baby in order to be invited back, and you can certainly do that with item-by-item arbitration.

Switching venue for a second, I just had, with the help of a representative from the company and a representative from CWA, a very successful arbitration and award where we got a unanimous decision and solved the problem. So I think if arbitrators mediate, we can survive well with conventional arbitration and take into consideration everything on the table.

From the Floor: I'm wondering whether we don't have a definitional problem with respect to this baseball-style arbitration. Baseball arbitration is confined to salaries. It does not apply to the collective bargaining agreement as a whole. Furthermore, salary is not only confined, but it is solely an issue between an individual player and the owner, rather than the work force as a whole. I have serious questions about whether Lindsay and McCain understand that.

Gil Vernon: I don't know whether McCain understands that baseball arbitration only applies to salaries. I do want to say in the public sector, at least in Wisconsin, final-offer either/or arbitration applies to the whole package—language, salaries, benefits, you name it. We used to be expected to mediate before final offers existed. We were expected to mediate and then determine when there was an impasse that justified arbitration. The theory was that the process moved the parties to the middle because no one wanted

to lose. In fact, when I walked into one of these cases I would say, "One thing that's true about final offer interest arbitration is that 100 percent of the people think they have a good case and exactly 50 percent find out they were wrong. Does anybody care if they lose?" That was a jumping off point to mediate. I actually had a guy who responded "no" when I asked if anybody cared if they lost . . . .

APPENDIX 1

RELEVANT ARBITRATION CASES BETWEEN US AIRWAYS AND ALPA

PARITY PLUS 1%

Arbitrator: Anthony Sinicropi sitting as the Chairman of the Neutral Review Panel with Ivy Broder and Robin Cantor

Hearing Dates: March 27–29, 2001; April 26, 2001; and April 16–18, 2002

Pursuant to Letter of Agreement 47, Mainline Parity Adjustments, the company and association agreed that on the parity dates (originally January 1, 2002, and January 1 of the 2 years thereafter—modified to May 1, 2001, and May 1 of the 2 years thereafter) the pilots' hourly rates of pay and productivity would equal one hundred and one percent (101%) of the "weighted average" of the hourly rate of pay and productivity of the mainline pilots at American, Delta, Northwest, and United.

The Board awarded increases of 16.99 percent effective on the May 1, 2001, parity date, and 16.07 percent on the May 1, 2002, parity date.

The increases were rescinded to supply a large portion of the cost savings necessary in the July 2002 Restructuring Agreement.

MEC 01-10-04, TRANSFER OF ROUTE SEGMENTS

Arbitrator: Anthony Sinicropi sitting with US Airways System Board of Adjustment

Hearing Dates: January 22 and 23, 2002

The association contended that the company furloughed approximately 200 pilots in violation of the scope clause. Section 1(B)4a. states that no pilot shall be furloughed if "in anticipation or as a result of such action" the company transfers route segments to affiliate or subsidiary airlines. The association provided evidence showing that the furloughs occurred concurrently with the transfer of 28 markets from the mainline to US Airways Express Carriers as part of the post-9/11 changes to the schedules.

The Board found that the association did not meet its burden to establish that any of the pilot layoffs were caused by the transfer of route segments. The Board found that while work was transferred from mainline to Express, there was no company intent that furloughs would occur as a result. Instead, intervening events, the September 11th terrorist attacks and their aftermath, were the cause of the furloughs.

MEC 03-02-07, VIOLATION OF ACCELERATED SMALL JETS AGREEMENT/MESA AIRLINES

Arbitrator: Edward Krinksy

Hearing Dates: May 7 and 8, 2003

As part of the restructuring program at US Airways, the parties negotiated and signed Letter of Agreement #83, Accelerated Small Jets. This letter allowed the company to place small jets into revenue operation at affiliate carriers under certain conditions, including agreement of the affiliates to participate in the "Jets for Jobs" program. The association alleges that in February of 2003, US Airways placed small jets into revenue service at MESA Airlines without fulfilling the terms of the Letter of Agreement, specifically without providing an equal number of jobs for US Airways furloughees on the MESA small jets.

Arbitrator Krinsky ruled in favor of the company. He found that the company had complied with the "Jets for Jobs" protocol because the association had given the company an "oral agreement" to proceed with the disputed flying.

APPENDIX 2
US AIRWAYS PILOTS' TIMELINE OF RELEVANT DATES

• December 4, 1997	Signing date of 1998–2003 Agreement (Airbus order is confirmed; vigorous expansion plans undertaken)
• January 1, 1998	Effective date of Agreement
• 1999	Last profitable year for company; between 1995 and 1999, the company reported approximately $2 billion in profits
• April 7, 2000	Letter of Agreement 79 signed; expands permissible number of small jets (SJs) in exchange for parity review modifications and increases in minimum growth commitment
• April 14, 2000	UAL merger announced (SJ negotiations cease; issues related to the merger take priority. Management "singularly focused" on consummating the merger. During the next year, company loses competitive position in key markets.)
• 2000	Company reports a loss of $165 million for the year
• July 10, 2001	UAL merger terminated
• August 15, 2001	Plan "B" announced by President Gangwal (downsizing of airline with SJs flown on mainline)
• November 27, 2001	President Gangwal resigns
• December 3, 2001	SJ negotiations renewed
• 2001	Company reports a loss of $2.1 billion for the year
• January 2002	S. Wolf conducts road shows announcing the need for employee concessions
• March 7, 2002	Wolf announces resignation
• March 9, 2002	SJ negotiations conclude without an agreement; company will not provide

	job security as a term of an SJ agreement
• March 11, 2002	David Siegel becomes new CEO; brings in new management team
• May 16, 2002	Company unveils its restructuring plan in a meeting with all of the carrier's unions
• May 21, 2002	Company meets with ALPA; explains details of restructuring demands for pilot group
• May 23, 2002	ALPA's Master Executive Council (MEC) authorizes restructuring negotiations
• June 3, 2002	ALPA makes first proposal; expedited negotiations commence
• July 10, 2002	ATSB conditionally approves loan
• July 12, 2002	Company makes "final" restructuring proposal
• July 13, 2002	MEC agrees to send out final offer to pilots for ratification; total package grants company 85 percent of their request—approximately $465 million in yearly concessions for 6½ years
• August 8, 2002	Ratification vote completed; pilots vote in favor by 75%–24%; **Restructuring I** becomes effective (retroactive to July 1, 2002)
• August 11, 2002	Company files for bankruptcy protection
• October 30, 2002	Company informs the MEC that restructuring concessions are not adequate because of revenue shortfall; additional yearly concessions of $400 million are needed—one-half to come from labor
• November 7, 2002	MEC passes resolutions authorizing additional SJ relief and continued discussion of company's needs for concessions

• December 13, 2002	MEC ratifies **Restructuring II** authorizing additional productivity and wage concessions valued at $101 million yearly and additional pension concessions valued at $78 million yearly
• January, 2003	Second conditional loan approval from ATSB
• January 30, 2003	Company announces that to obtain ATSB loan they must terminate pilots' Defined Benefit Pension Plan; issues "Notice of Intent to Terminate" to all Plan participants
• February, 2003	ALPA opposes the company's proposed termination of the pension plan through filing formal objection in bankruptcy court
• March 1, 2003	Bankruptcy court decision issued—judge rules that company request to terminate pilots' DB Plan is permissible under ERISA, but finds that labor issues must be decided by the System Board, not the federal bankruptcy court; also, company may enter into a follow-on DC Plan similar to that which was previously proposed to the association
• March 19, 2003	Bombing of Iraq begins, company reports bookings down 40 percent
• March 22, 2003	MEC agrees to follow-on DC Plan and contractual modifications; opposition to termination of pension plan withdrawn by ALPA
• March 28, 2003	Pension Benefit Guaranty Corp. approves pilots' modified DC plan
• March 31, 2003	Company emerges from bankruptcy; receives RSA investment ($240 million) and ATSB loan funds (total of $1 billion)