tion, however effective, is almost always less preferable than anything the parties can cook up by themselves.[61]

The realities of the airline labor relations process have changed dramatically in the aftermath of economic turbulence and massive employee concessions. There is no better time or place to explore other forms of dispute resolution, and the parties to the process would benefit greatly from assistance. NAA member talents are indispensable to this process.

III. The Role of the Neutral in Airline Labor Relations: Challenges and Approaches to Dispute Resolution

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Economic and labor challenges facing the U.S. airline industry lead some observers to consider existing dispute resolution processes and practices inadequate. Recommendations for change necessarily implicate the role of the neutral—whether as mediator, arbitrator, or some combination thereof. Although airline labor relations can benefit from process improvements and the judicious influence of neutrals, more critical are the parties' own commitments to their relationships and shared interests. Genuine commitment from labor and management is essential to the success of the neutral, whose role should include advancing cultural change.

Business and Labor Relations Challenges

The airline industry and workforce have suffered tremendously in the past six years. The terrorist attacks, recession, low-cost

[61]Richard Bloch, *Arbitration in a Litigious Society: Arbitration, Innovation, and Imagination—Escaping the Missionary Position*, in Arbitration 2003: Arbitral Decision-Making: Confronting Current and Recurrent Issues, Proceedings of the 56th Annual Meeting, National Academy of Arbitrators, ed. Coleman (BNA Books 2004), at 9.

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competition, furloughs, bankruptcies, pay and benefit reductions, loss of pensions, problematic mergers, congested airspace, an antiquated air traffic system, spiraling oil prices, and disgruntled passengers and legislators tell a story of woe about which much has already been written.

Now, after just two years of very modest profits, many employees and labor organizations are calling for restoration of wages and benefits to pre-9/11 levels. Contract negotiations are being conducted in an atmosphere of increasingly confrontational and aggressive rhetoric. Some pilots fight among themselves over seniority integration, while others fight management by forcing flight cancellations or publicly criticizing their own passenger service.

If all this were not enough, as 2008 approaches a recession seems likely, demand and pricing power appear to be declining, and analysts predict that the industry may be past the financial peak of this cycle. Not a single major collective bargaining agreement has been executed, and most employees continue to work under concessionary arrangements.

Challenges and Suggestions for the Dispute Resolution Process

Given these circumstances, some practitioners anticipate an explosion and backlog of grievances that will overwhelm the traditional arbitration process, thereby multiplying the existing anger and frustration level of employees who fail to get "their day in court." Long a common tactic, especially in advance of Section 6 negotiations, "contract enforcement" through the mass filing of grievances is likely to exacerbate the unfavorable perception of arbitration as an increasingly legalistic, lengthy, arbitrary, and inadequate process.

Others see a bargaining landscape where exaggerated expectations, manipulation of the Railway Labor Act process, and inordinate delay in reaching agreement similarly lead to frustration and poor morale—or worse, that the complete failure of bargaining leads to threatened or actual work stoppages, bringing into play outside forces such as presidential emergency boards or congressional action. Lack of trust and open communications would render labor and management unable—or unwilling—to find room for compromise and "win/win" solutions.

Failure of the parties to resolve their differences on their own—whether the issues are "major disputes" (over bargaining and the formation of agreements) or "minor disputes" (over grievances and contract interpretation/application)—leads to the nearly universally condemned "loss of control" over the process and result. Keeping the parties in "control" of the process is thus a key objective of improved dispute resolution and, consequently, improved labor relations. Yet in many instances the parties' control over the process becomes the fundamental problem.

In addition to healthy recommendations for non-traditional ADR (e.g., grievance mediation, mediation-arbitration, expedited arbitration, interest-based bargaining, and interest arbitration), there is merit to the notion that airline dispute resolution can be improved through more information sharing among the parties and more involvement from neutrals with expertise in the industry. More profound understanding of the parties' interests and subjects of bargaining, as well as earlier monitoring or intervention, can produce not only more credible arbitrators, mediators and facilitators, but also more timely and palatable resolutions. Members of the Academy and National Mediation Board Members can, and should, develop and apply their expertise to assist labor and management in meeting the challenges we face over the next few years.

Improvements in either process or practice, however, will not "save" the industry—certainly not from itself. By far the most important element in the equation is the commitment of the parties themselves to resolve their problems.

Culture and Commitment are Critical

What does "culture" mean in the context of labor relations? Some refer to a problem-solving culture, or a culture of respect or commitment. Regardless of the jargon fashioned to embellish the concept, the culture of the employment relationship and workplace is critical to successful labor relations outcomes.

At Continental, we call it a "Working Together" culture. We are committed to open and honest communications, treating each other with dignity and respect, and rewarding our co-workers through profit sharing and performance incentives. We treat our represented and non-represented co-workers equally, we try to achieve pay and benefit arrangements that are fair to co-workers

and fair to the company, and we strive to resolve our disputes in a timely manner.

Did these words and ideas create a culture that enables successful labor relations? Of course not. They are nice words and ideas—not rocket science by any means—but without the commitment to make this culture a reality, that is all they would be. The words and ideas were the easy part; the hard work happens every single day in every choice we make. Let me give a few examples.

Grievances and Arbitration

Continental employs approximately 45,000 people. We have four major national unions representing several of our largest workgroups, and we see our share of grievances. Yet, in 2006 we arbitrated a total of 20 cases, and in 2007 we arbitrated 15 cases. These numbers are representative of the level of arbitration we've done for the last 10 years.

It's not that we're adverse to arbitration. It's simply that we are committed—as our labor partners are also—to resolving our disputes. We not only believe, but also act on, the notions that the parties should maintain control over the dispute resolution process and that arbitration can be (or at least be perceived as) the least favorable method of resolving disputes. We've taken several approaches to achieve our objectives, none of which are ground-breaking.

Although four-person system boards of adjustment have lost their appeal to many carriers and organizations, Continental and our Teamster-represented aircraft technicians have successfully utilized the four-person board to resolve literally thousands of disputes over the past few years. Whereas some airlines have seen their four-person boards deteriorate through pure partisanship, intransigence, intrigue, or manipulation (and, frankly, we've faced these same challenges), Continental and the Teamsters have committed to making this process work. That requires making compromises you don't like and sometimes abandoning what you firmly believe are contractual rights or obligations. It requires a willingness to see things from the other side's point of view, moderating your advocacy, and showing respect for sometimes unsound positions or arguments. It requires a commitment from senior management and union leaders to make the process work even at the cost of other financial, operational, or political

interests. By contrast, any approach to the four-person board process that focuses on winning cases is bound to fail.

In partnership with the Air Line Pilots Association, Continental has essentially instilled the principles of grievance mediation in virtually all aspects of dispute resolution. In many cases, we've engaged in "formal" grievance mediation with the assistance of a neutral; for the most part we simply apply the tools in our day-to-day relationship. Success in this arena entails open sharing of information, candid communications, acknowledgement of conflicting interests, and the key ingredient: trust. The parties must develop a relationship and track record of following through on their understandings and commitments. Once again, the desire to "prevail" in any given dispute is incompatible with consensual dispute resolution.

Obviously, despite the best good-faith efforts, there will be disputes that simply cannot be settled by the parties themselves. For the most part, at Continental we arbitrate only cases that cannot reasonably be resolved without adjudication (in fact, we don't regularly arbitrate our most significant disputes—we resolve them by mutual agreement). For these cases, traditional arbitration remains an effective and efficient forum for resolution; expedited or streamlined procedures would likely be insufficient. That's not to say that arbitration becomes drawn-out litigation. Even complicated sets of facts and contractual issues can be, and generally are, presented in single-day hearings if the parties show due regard for the process, the neutral, and each other.

Within the Academy many suggestions are offered to modify the arbitration process. Should we impose or abolish pre-hearing discovery and post-hearing briefs? Has the process become overly legalistic? Should we follow suggestions to streamline the process, taking the lawyers out of it? Are expedited arbitration and "small claims" procedures the answer?

In my view, the arbitration process is not the problem, and changing the process is not the answer. The problem comes when the parties fail to resolve the vast majority of their disputes on their own and turn to arbitration as the only real way to address their differences. When that happens, grievance dockets grow long and cases languish for years without hearing or resolution. Certainly, conducting a full-blown arbitration hearing and producing a lengthy written award to address a "small claim" seems absurd. But the root of the problem is that the parties never should have

brought that small claim to arbitration—not that arbitration is broken.

Collective Bargaining

Many of the same principles apply with respect to collective bargaining. The parties' commitment to resolve their differences is critical. Culture and trust are keys to success. Relationships grounded in respect, cooperation, and partnership are not built overnight, but their creation and nurture are essential if the collective bargaining processes is to function. The events of the past several years tested such relationships, but also held opportunities for revitalization.

After 9/11, Continental reduced operations dramatically. We immediately furloughed thousands of our co-workers. We put a laser focus on cost reduction and control, ultimately cutting costs by more than $1.2 billion annually—without touching our co-workers' pay, benefits, or work rules. Despite sustaining substantial operating losses, we continued bargaining our open labor contracts and agreed to modest, equitable, and appropriate improvements in pay and benefits.

Unfortunately, by late 2004—long after most of our competitors had either sought Chapter 11 protections and/or implemented employee concessions upwards of 30 or 40 percent—we still needed further cost reductions. Rather than file or threaten bankruptcy, we simply explained the situation to our co-workers, and then worked with them to achieve $500 million in payroll savings (representing a 17 percent reduction). While other airlines spent years in contentious negotiations and court proceedings to finally impose lower labor costs, Continental achieved virtually all the savings we needed within four months—consensually, by working together with our union and employee representatives.

In return, we promised to expand our fleet and particularly our international network. We created new jobs and new opportunities for co-workers—all of whom had made significant sacrifices. We made commitments to our co-workers to preserve our pensions, to contain health care costs and protect existing benefits, and to treat everyone equally by implementing modest pay increases in future years. We also developed an Enhanced Profit Sharing Plan that shares 30 percent of the first $250 million, plus 25 percent of the next $250 million, plus 20 percent of all pre-tax net income over $500 million—far and away the best profit sharing plan in

the business. We issued stock options and continued our industry leading On-Time Bonus performance incentives and Perfect Attendance programs.

From 2005 to 2007, Continental has grown nearly 40 percent. We've contributed nearly $1 billion to our pensions. We've paid our 45,000 co-workers more than $260 million in Profit Sharing and $50 million in On-Time Bonuses. Of course, not everyone is wildly happy. But, more importantly, our co-workers generally recognize that we've kept our promises.

Does any of this mean that Continental and our labor partners will not face difficult negotiations in the next few years? Not at all. For one thing, because we asked for only the absolute minimum reductions we required, Continental's labor costs are currently among the highest in the industry. However, the environment of trust we've worked hard to establish provides the foundation for those indispensable elements of successful bargaining: the recognition and commitment to achieve common interests and goals; the shared desire to compromise and resolve disputes; and the ability to work cooperatively to develop solutions to the economic, competitive, operational, and cultural challenges faced by the airline and workforce. We are committed to doing just that.

The Role of the Neutral

The role of the neutral in grievance resolution where the parties lack the commitment to compromise on their own will always be problematic. There is little the neutral can do—other than decide cases—when the relationship is non-existent, dysfunctional, or marked by outright animosity: the neutral may sometimes feel like a therapist, but as in therapy the parties have to want to change. Where the relationship is marginally positive, but the commitment to compromise is absent or immature, the neutral can play a role in encouraging change. Neutrals can seek out occasions to identify shared goals and common ground (as well as introduce the prospect of "lose/lose" outcomes), solicit voluntary exchange of information, and create safe avenues for open communications. To be credible and effective in these endeavors, the neutral must come to the table with respect for each party and the desire for a deeper understanding of their issues and interests.

In collective bargaining, the neutral's role may be similar. Rather than simply addressing contract sections, specific work rule proposals, or economic comparisons, neutrals can and should

understand the culture of the airline or union, their competitive challenges and interests, and the conflicts that may have reduced or destroyed their ability to form relationships based on open communication and trust. The neutral will thus be better positioned to effect cultural change and cultivate solutions acceptable to the parties. Ultimately, however, it's up to the parties themselves to resolve their disputes.