Here, as elsewhere, the credence and weight to be given a decision depends on the quality of the process, the character of the tribunal, and the reasons given for the decisions. Teamster joint grievance committee decisions fall short of arbitration on all counts. They were created as a repudiation of arbitration; they are treated by the parties as distinct from arbitration; lawyers, the Board, and the courts should cease misusing the good name of arbitration.

## IV. BIPARTITE AIRLINE SYSTEM BOARDS

STUART BERNSTEIN*

My assignment is to say a few kind words about a bipartite system board of adjustment—the type of board involved in the *Del Casal* case described by Dave Feller in the closing portion of his remarks.

For 18 years I served as a company appointee on the United Air Lines Pilots System Board of Adjustment, so obviously my views are shaped almost exclusively by that experience.

For the first nine years of my tenure all hearings were conducted by a bipartite Board—two members selected by the carrier and two by ALPA—the Air Line Pilots Association. During these years the Board could not sit with a neutral unless it deadlocked after hearing, and then the Board and neutral would consider and decide the case on the record made before the bipartite Board.

The underlying collective bargaining agreement was subsequently changed to provide that the company or union could opt to have a neutral sit with the Board from the inception of its proceedings. From then on, no case of any significance was heard by the bipartite Board. In fact, if a neutral was not requested it was a rather unsubtle signal that neither party had much interest in the case.

System boards are mandated by the Railway Labor Act[1]—unlike joint committees which are solely contractual. The Act contemplates there be no work stoppage over minor—grievance—disputes.

---

*Mayer, Brown & Platt, Chicago, Illinois.

[1]45 U.S.C. § 151, *et seq.*

Resort to self-help in a minor dispute can be judicially restrained; awards of the boards are final and binding and can be judicially enforced.[2]

The details of the board structure are filled in by contract. They may be bipartite, tripartite, and on occasion made up solely of one or more neutrals.[3]

Let me turn to Dave Feller's challenge. He described the plight of the Eastern pilot who was denied membership in ALPA because of incompetence and then fired by the airline on the same ground. The four-person system board upheld the discharge. The Court of Appeals for the Fifth Circuit upheld the board's decision against a charge by the pilot that the procedure was inherently unfair because no one on the board represented his interest. The court held that the board members "were obligated to determine disputes before it in an independent, impartial manner. And absent a showing of partiality or bias on the part of individual members of the Board, this court will not disturb its conclusions."[4]

Dave left to Bob Nichols and me the question whether it can really be said that the Eastern pilot had a fair hearing before the Board on the competency question.

Of course, the Eastern pilot did not have a fair hearing and it demeans the process to suggest he did. A fair hearing means fair process, not only the correct result. It is unlikely that a neutral would have returned this gentleman to the flight deck after both the union and the company had declared him incompetent. But it was unseemly, if not lacking in due process, for a board, all of whose members had been appointed by those who had already decided the issue, to review the decision of their appointers. Why the Board did not bring in a neutral I cannot guess.

In my view the Fifth Circuit was clearly wrong. Bipartite board members are not impartial. They are designated as "representatives" of the parties by the Railway Labor Act. The theory of

---

[2]*Machinists v. Central Airlines,* 372 U.S. 682, 52 LRRM 2806 (1963); *BRT v. Chicago River R.R.*, 353 U.S. 30, 39 LRRM 2578 (1957); *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 80 LRRM 2240 (1972).

[3]For an analysis of the Act by members of the Academy, *see* The Railway Labor Act at Fifty ed., Charles M. Rehmus (National Mediation Board 1976); *Symposium on Air Transport Labor Relations,* J. of Air Law and Commerce (Summer 1969); *Procedures under the Railway Labor Act: A Panel Discussion* in Proceedings of the 18th Annual Meeting of the National Academy of Arbitrators 1965, National Academy of Arbitrators, ed. Dallas L. Jones (Washington: BNA Books, 1965).

[4]*Del Casal v. Eastern Airlines, Inc.*, 634 F.2d 295, 299, 106 LRRM 2276 (5th Cir. 1981).

the statute is that the interest of the grievant will not be hostile to that of the union and that the presence of union representatives on the board will assure that the grievant will get a fair shake—which does not mean that the grievant's position must always be supported by the union-appointed members of the board. When the union has taken a position overtly opposed to that of the grievant, the premise falls.

Earlier decisions, particularly in the Courts of Appeal of this Circuit—the Seventh—and of the District of Columbia do not agree with the Fifth Circuit.

In the District of Columbia case, the court examined and reversed a board award where the union itself appealed to the board a seniority determination by the carrier in favor of two pilots, neither of whom was a union member. The court posed this question:

> "While the union could well agree to bind itself to the awards of a board of four members, two of whom were union nominees, could it bind minority non-member employees in cases in which it actively pressed the interests of the member majority? In short, does not the non-member minority have a right to a court review of an award made in such a case by a board thus constituted?"[5]

The position of the Eastern pilot, already found to be incompetent by the union of which he could not become a member, is conceptually the same as that of the pilots whose seniority rights were challenged by the union of which they were not members.

The Seventh Circuit case not only more accurately defines the status of board members than does the *Eastern* case, but illustrates a better response to a situation where the interest of the board members may appear to the grievant to be adverse to his interest.

In the Seventh Circuit case a group of pilots protested their position on the seniority list. Their counsel moved the Board to disqualify itself because of alleged bias. The claim of bias was based on my participation as a lawyer in prior related litigation before I was a Board member, and an inquiry by ALPA—a passive party to this point—whether the grievants would share the fees and expenses of a neutral should the Board deadlock.

The company, in turn, moved to dismiss the grievance arguing that the prior litigation had resulted in a final decision, binding on the parties in this case.

---

[5]*Edwards v. Capital Airlines,* 176 F.2d 755, 759 (D.C. Cir. 1949).

The Board heard argument on both motions, then deadlocked without consideration of either. It agreed among itself that it would not participate in any deliberations with the neutral it would designate, and that all members would join the decision of the neutral, whatever it might be. Dave Wolff—a past president of the Academy—was designated; he concluded that the grievance before the Board was the same as had been previously presented and on which there had been a final and binding determination. The appeal to the Board was dismissed and the grievants went to court.

The decision of the Board was attacked in court on a number of grounds: the Board members were biased; the bias was not cured by the deadlock and designation of a referee, because the grievants were entitled to the deliberations of all members of the Board, not merely the conclusion of the sole neutral; and that the decision was arbitrary and capricious.

The Court of Appeals for the Seventh Circuit held that the board members "are not in legal contemplation, or in fact, supposed to be neutral members. They are carrier and labor organization representatives . . . [P]rovision is made [under the Railway Labor Act] for designation of a 'neutral person, to be known as a referee' in event of a deadlock. The Board is bipartisan rather than impartial and disinterested."[6]

Bias or hostility to the grievants' position would be disqualifying under the doctrine of the *Edwards* case—the District of Columbia case—but on this issue the court found that none had been shown. ALPA's inquiry about sharing costs did not manifest any bias by it or its board appointees, and my participation in the prior litigation made me no more or less partial than any other person identified with the carrier would have been. In any event, the court noted, the designation of the neutral effectively gave the grievants what they asked for, and a decision by him alone was not a procedural or substantive due process deprivation.

The Seventh Circuit was sound in its analysis of the status of the appointed members of system boards. They are representatives of the parties; they are bipartisan, not impartial or disinterested.

Clearly then, there are cases that ought not be heard by bipartite boards, however objective the board may believe itself

---

[6]*Arnold v. United Air Lines*, 296 F.2d 191, 195 (7th Cir. 1961).

to be. Where the position of the grievant is overtly opposed by the labor organization whose representatives sit on the board, then that case should be heard and decided by a tripartite board or neutral sitting alone. The same limitation does not arise through the participation of the company-appointed representatives, since the grievant would not be before the board if the company had not denied the grievance. It is the presence of the union-appointed members which assures that the grievant's case will be fairly considered.

This is not to suggest that company appointees always support the company position. But the grievant, particularly the unsophisticated grievant, cannot find much comfort there.

If a significant number of grievances which came before system boards involved circumstances where the interest of the labor organization was overtly opposed or hostile to that of the grievant, then not much of a case could be made for a bipartite board.

But these cases are not common. Those that do arise usually involve seniority disputes between relatively large groups and these are frequently handled through special ad hoc procedures because of the conflicting employee interests.

The seniority dispute I described is the only one I can recall during my time on the United Board where any question of the Board's integrity was raised.

Are there other kinds of cases where it would be inappropriate or inefficient for a bipartite board to conduct the hearing? To approach this question I did something the Board itself never did—I tallied the score for the nine-year period when the Board heard all cases without a neutral. Of the 99 cases presented, 68 were decided without deadlock. Perhaps other bipartite boards or committees produce equal or better results. But this was not a barter board or a star chamber board. The elements of due process were observed: open hearings; representation by counsel; examination and cross-examination of witnesses; the right to call adverse witnesses; opportunity for oral and written argument; proceedings were transcribed and transcripts were readily available; awards were supported by written opinions.

Although not impartial, the Board members were not expected to rubber stamp the position of their respective principals. In fact, the underlying Agreement provided that "every Board member shall be free to discharge his duty in an indepen-

dent manner, without fear that his individual relation with the Company or with the employees may be affected in any manner by any action taken by him in good faith in his capacity as a Board member." The implementation of this sentiment may not have been universal with all system boards. At one airline the senior official responsible for deciding the grievance at the last company step was also a board member. It must have been difficult for him ever to reverse himself.

Seventy-six of the 99 cases heard by the Board during this period involved contract provisions relating to bidding, scheduling and pay practices. These issues were quite complex and understandably generated most of the disputes. The board was able to resolve 57 or 75 percent of these cases without deadlock.[7]

There were 16 discharge cases—9 involving competence and 7 misconduct.[8] Here the results were reversed: 75 percent of these cases were deadlocked. Only two competency cases were decided by the bipartite Board, both in favor of the grievant. Whatever may have been the apparent merits of a competency case, the grievant did indeed have vigorous representation on the Board. The company position in these cases almost always included the argument that since it was charged with the highest degree of care and safety in the performance of its obligation as a common carrier by air, its judgment as to the grievant's competence should not be disturbed. To the union representatives on the Board this was taken as an argument that the Board had no function in competency cases and the carrier could do whatever it pleased without critical scrutiny, a position with which they understandably did not concur. Neither did the neutrals who sat with the Board after deadlock; they upheld the grievant in four of the seven cases.

Five of the seven misconduct cases were deadlocked. The discharge was upheld by the neutral in four, and a long-term suspension was imposed in the fifth. Of the two decided by the Board, discharge was affirmed in one and a long-term suspension was imposed in the other. Thus in no misconduct discharge case was the grievant exonerated.

What conclusions can be drawn from this rather large sample?

---

[7]The carrier prevailed in two-thirds of these 57 cases. This ratio did not change in the 19 contract dispute cases decided after deadlock. There the carrier prevailed in 12 and the grievant in 7.

[8]The 7 other cases were disciplinary suspensions. None of these were deadlocked.

The first consideration is whether there is any virtue in a bipartite hearing without a neutral if the probability is high that the case will be deadlocked. I can find none other than vanity.

Thus I would conclude that discharge cases, whether for competence or misconduct, should not be heard by bipartite boards. Experience has demonstrated what might be suspected—the overwhelming majority of these are deadlocked and there is no useful purpose to be served by not bringing in a neutral at the outset.[9]

Contract application or interpretation disputes are another matter. These accounted for 76 percent of the cases heard and 75 percent of these were decided without benefit of a neutral. Here, I believe, the bipartite board performs not only best, but better than it could with a neutral present.

Bidding, scheduling and pay practices in the industry are complex if not arcane. Cranking up the neutral so he can reasonably understand what is going on is really an exercise in futility if in fact the partisan members can decide the matter without his input. Lest you think I exaggerate: there are two separate occasions when a pair of related cases were taken to a neutral. It was obvious after a few hours of discussion that there was no way these gentlemen would ever understand what we were talking about. Their frustration was clear. Each in his own way let it be known that even if he did not understand the cases, there was no way one of the parties could prevail on both. One neutral forthrightly stated the cases would be split and we could decide which way they would go. The other fellow tried to con us a bit, split the cases, wrote two unintelligible opinions, and refused to discuss them with the Board. His awards were ignored in a subsequent case which raised the same issues. His tenure on the panel of neutrals was short lived.

In another case the neutral arrived at a fair result but had trouble explaining how he got there. The partisan members finally took over and wrote the critical part of his opinion.

---

[9]One observer has suggested that competency cases require such specialized expertise in aircraft mechanics and operation that they should be heard by a panel of experts rather than lay arbitrators—much as medical cases are heard by a panel of physicians. Hill, *Airline Grievance Procedures and System Boards*, J. of Air Law and Commerce (Summer 1969) 338, 356. My experience has been that sufficient expertise is provided by the competing witnesses and the parties' representatives on the Board. The competency cases are difficult, but so are many other issues which able artibrators frequently handle. One competency case, heard by Benjamin Aaron, required 13 hearing days and a 123-page opinion.

There is one other factor in the equation. As Dave Feller noted, the general view under the Railway Labor Act is that the employee, not the labor organization, owns the grievance and the employee can invoke the board's processes without the union's prior consent. Thus it is not unheard of for frivolous cases to come before system boards. Use of a neutral in such a case is grossly inefficient and uneconomic. There was one that arose after the tripartite board was contractually mandated, involving about $10 in a situation that could never recur. As I recall, the neutral awarded the grievant $5—and no opinion.

In all candor, I must confess that I am not certain that my defense of the bipartite board is anything other than an elaborate rationalization to justify a significant phase in my career.

The years I sat on this Board in its bipartite format were among the best I have known professionally. The absence of a neutral at the hearings imposed a responsibility on the members to appear to be objective, and acting that way tended to make them so. The executive sessions were exciting; honest effort was made to pursue each argument and to attempt to arrive at a consensus. Some cases spelled deadlock from the outset, but the Board nonetheless spent hours refining the parties' positions, the better to present them to the neutral who would have only the transcript and the Board to guide him. New members would come on as advocates and soon catch the spirit of sincere effort to arrive at the truth, however it be defined in this context.

The bipartite board also had a flexibility that a tripartite could not have.

The first drinking case to come before the Board involved a pilot who had a few beers within the 24 hours before a scheduled flight. The union made a good case for him but it did not attack the 24 hour no-drinking rule, which in fact it firmly supported. The essence of its case was that in the past others had been suspended, not discharged, for similar violations although the rule required discharge. The union was circumspect in the presentation of its evidence since it wanted to avoid identifying other offenders or the compromising supervisors. The company did not press for names and dates.

Board members are not expected to be aloof from the underlying currents. We were aware of the ambivalence of the parties. On the one hand the desire to uphold and reinforce the rule; on the other a feeling that perhaps equity had not been done in the particular application. One concern was that if this pilot was

given a pass it would mean anyone caught drinking in the future could get a pass the first time out.

The Board converted the discharge into a suspension which extended 2½ months beyond the date of its decision, for a total of nine months, a considerable fine for an airline pilot.

The Board concluded its opinion:

> "It has been suggested that any disposition of this case other than support of the discharge would mean that in no instance would discharge for a first discovered offense be appropriate. We, in turn, suggest that no one be lulled into such a misconception of the Board's intent. The action taken by the Company in this case can reasonably be interpreted to mean that the Company intends firm enforcement of the 24-hour rule. This action itself has changed the circumstances and if the Board has not accepted this retroactively it does not mean that the Board intends its decision to stand for the principle that any violator of the 24-hour rule is automatically entitled to a second chance."[10]

No discharge in a drinking case was reversed thereafter.

I do not want to appear overzealous in my defense of bipartite boards and my purpose here is not necessarily to advocate their use. Rather, as I said at the beginning, it is to say a few kind words about a now departed institution which I remember fondly.

## V. BIPARTITE AIRLINE SYSTEM BOARDS OF ADJUSTMENT

ROBERT H. NICHOLS*

My role today, as defined by our distinguished Chair, is to react to Stu Bernstein's observations concerning bipartite boards in the airline industry, and not, at least as I choose to define my assignment, to attempt to persuade anybody that Mr. Del Casal received a fair hearing before Eastern's Pilot Board. Parenthetically, as an advocate who from time to time represents the

---

[10]I have heard only one criticism from any of the neutrals with whom we dealt. He said that he would have been more comfortable in a discharge case had he had an opportunity to see the witnesses and observe their demeanor. There may be something to the point, but I have yet to have an arbitrator in any case in which I have appeared as an advocate make a credibility determination. It seems to be one of the unstated principles that you do whatever you can to avoid that. Further, I do not believe any of us can tell a skilled liar from a nervous truth teller just by watching. There are sitting judges who are unsighted. Recently, a blind judge in Denver was asked and refused to recuse himself on motion of one of the parties who claimed he was unable to observe the demeanor of a witness whose testimony was videotaped. The Colorado Supreme Court upheld the refusal of the judge to step aside. *Chicago Sun-Times*, May 20, 1984, p. 8.

*Cotton, Watt, Jones & King, Chicago, Illinois.