II. PANEL DISCUSSION

Moderator: **Barry E. Simon,** National Academy of Arbitrators, Arlington Heights, IL

Speakers: **Mary Johnson,** National Mediation Board, Washington, DC

Bruce York, Air Line Pilots Association, Herndon, VA

Jeff Wall, United Airlines, Chicago, IL

Barry E. Simon: We have three wonderful speakers here today. Bruce York is here from the Air Line Pilots Association (ALPA). Jeff Wall is from the merged carrier, United Airlines. Jeff was formerly with Continental and he survived the merger. And Mary Johnson is the General Counsel for the National Mediation Board (NMB).

The two gentlemen have been speakers here at Academy meetings before. This is the first time Mary is giving a presentation, although Mary is a frequent participant in our meetings at the designating agency sessions.

For those of you who are new to the Railway Labor Act (RLA), let me give you the entire lecture that I received on the RLA when I was in law school: (1) there's a separate law governing labor relations in the airline and railroad industry, and it's called the Railway Labor Act; and (2) none of you will ever practice under it, so that's all you really need to know.

Then I became an RLA attorney. The RLA bar is in competition with the Admiralty bar to see which one is the smallest group of attorneys in the United States.

One of the things that distinguishes the airline and railroad industries from industries under the Wagner and Taft-Hartley Acts is that the RLA is really set up to foster craft unionization. It's that craft unionization that sets the structure for collective bargaining in both the railroad and airline industries.

Another factor that's significantly different from other industries is that the union represents all of the employees in a particular craft throughout the entire system. You don't have one union representing baggage handlers in Dallas and a different union representing baggage handlers on the same carrier in Chicago. It is a national bargaining unit and that really has an effect on the organization, the representation, and the negotiations.

This program is something that seems to have run in cycles. Every time there is a merger of the airlines, we trot out the people who are involved to talk about how the merger went with regard to labor relations, the arbitration aspects, and, of course, this year we're talking about the United-Continental merger. I imagine next year, or the following year, we'll be talking about American Airlines and US Airways. Two years down the road, who knows what we will have.

There are, in our Proceedings, articles that have preceded this session. In addition to what you're going to be hearing today, I recommend that you go back to the Proceedings, which are available on the Academy Web site, to see what has been said by these gentlemen and others dealing with these subjects.

One of the ground rules for our presentation today is that we will not discuss or entertain questions dealing with any issues that are presently in negotiation or in arbitration. We're here to talk about the processes, not the plans or strategies, unless the parties want to talk about that.

Bruce York: As the oldest of three boys in my family, I want to talk about primogeniture, that old English concept where the first-born son inherits everything. Now, I haven't found that primogeniture carries over very well these days, but I did use it once when my mom asked me and my brothers to paint our house. I said, with those two being younger, "You two are using the trim brush and I'm using the roller."

That's because I like to see and I like to talk about broad-sweeping topics. I will touch on the trim-brush elements of my speech for a few moments. Before I do that, I'd like to talk a little about the important things about the Academy members' role. Despite contrary reports, the mergers of our lifetimes are not over, even after United and after American.

Believe it or not, for those of you who don't know, we have one going on at Express Jet and Atlantic Southeast Air (ASA), two airlines you may never have heard of. That results in 4,000 pilots being part of one airline. Four thousand pilots, for those of you who remember, is about three times the size Continental was in 1983, at its strike. It's more than three times the size of Western Airlines when it merged with Delta. So, there's still significance to the merger discussion.

I also want to highlight that this is not only related to Seniority List Integration. There are many more parts than that. Before I do

that, I want to say that U.S. airlines are a key driver of our economy. They are an essential part of our nation's defense, for those of you who know the relationship between Defense Department and the willingness of the airlines to carry troops during conflict.

No one likes going through a merger; neither company nor union folks find it a rewarding experience. I don't think it's hyperbole to say that without mergers, our industry is threatened with extinction. I believe that. That's because of growth and intentions of Middle East carriers and, sooner or later, Chinese carriers; they hope to monopolize the high-value international traffic. Without mergers, U.S. airlines will be unable to survive.

The survivability and success of U.S. airlines is important to all of us. It's certainly important to those of us on the labor side. It's certainly important to my colleagues at United. I think it's important for Academy members, too. If you think back to the time just after World War II, there were many disputes in the shipping industry. We had a shoe manufacturing industry in this country. We had a textile manufacturing industry. We had a much more robust steel industry than we do now. I'm fearful that without doing the things we need to, there won't be an airline industry.

Qantas, the second-longest operating company in the world—an iconic figure for those of you who've been to Australia—just came to an agreement with Emirates. The deal was out of necessity. Of all the Qantas flights to Europe and beyond, Emirates will be flying about 80 flights a week, and Qantas will be flying 20. That is a worrisome development of which we should be aware of in this industry.

Mergers are good. They are happening internationally, if we want to talk about survivability of our industry despite the difficulty of going through them. They rationalize capacity. They eliminate redundant costs. They allow employees to recover what they gave up in large measure in the bankruptcy era. They obviously provide places for Academy members to work. They are also complex and fragile undertakings.

There are antitrust issues. There are information technology (IT) issues. There are customer issues. There's politics of local legislators who will lose their hometown airline. I would say the labor issues are as big a part of those consolidations as anything. Here is where I will challenge us in using the roller instead of the trim brush, to think creatively and expansively about our role to ensure we can help these processes succeed. That is very important for those of you who have worked a lot in the airline industry.

The contract cases are more complex, perhaps, than anywhere else with the set of work rules and pay. Discipline cases certainly are very interesting with the overlay of regulation, and safety, and everything else.

Let me touch on ALPA merger policy and, to some extent, McCaskill-Bond and how that plays out. ALPA merger policy relates to three different areas, not merely seniority list integration. It addresses the completion of a joint collective bargaining agreement, integrating seniority lists, and the consolidation of local pilot governing structures. I will not address the latter. As part of that process, we typically enter into transition and process agreements, formerly known as fence agreements. Those address many issues. One is how the contract will be bargained. That's a single agreement. Another is how we administer the existing agreements until that happens. It typically addresses the separation of fleets until a merger is complete. It addresses the process for seniority list integration. Most noteworthy perhaps for you, it talks about dispute resolution. When we can process a dispute with the company, the union needs a single position. The ability to get to that single position is often not easy. I will address that in a moment.

I think there are at least five ways that Academy members can participate. One is by helping us efficiently resolve the disputes that exist at the premerger carriers. It is really important to get a fresh start in mergers, free of problems, free of disputes, and move forward as a new carrier. So, anything that can be done beyond just hearing each case as it comes up is extremely important. Use the carrot, use the whip if you have to, since we're in the middle of horse racing season. Don't be satisfied with the hand ride. Urge the parties to take advantage of opportunities to settle existing disputes. Use cancelled days to offer your services to settle other outstanding disputes. Do whatever you can, and offer your good offices and your services to do that.

The second major area is in the transition and process agreement (TPA) disputes. One is determining, in our case, ALPA's single position before you can tackle a dispute with the company. Another way is helping us process those disputes efficiently with the company.

The third major area is in the joint collective bargaining agreement completion. We do use Academy arbitrators in the private dispute mediation/facilitation role. The NMB has certainly played a major role using their statutory facilitation authority

more typically than mediation authority. There's a role for Academy members in helping us complete a joint collective bargaining agreement.

The fourth area is the seniority list integration (SLI). There are a few different roles. One of them is a mediation role that's required under ALPA's merger policy. It's not often extensively used, but it is a role, and it's a serious role that we would like to take advantage of when there are opportunities. For seniority integration, we use panels of three Academy members, not one.

It shouldn't go unsaid, but there are often long run-outs of decisions in what we call Dispute Resolution Committee (DRC) proceedings where there are disputes that flow from the award that must be decided. I think I lost count at 23 or 24 of those decisions in the Northwest Republic merger.[24] It went on for a very long time.

The fifth area is the joint collective bargaining agreement implementation. We are working hard at United and Continental, now that we have a joint agreement, to implement it. That's not always an easy process. We're working—pilots and company—successfully to do that. Disputes arise and help is occasionally needed in that area as well. That can come up in many different forms.

To conclude, we really do have to think expansively about our role and to see if you can help with that. We need to solve problems more generally, rather than just case-by-case. I say that for two reasons. First, it's in our collective self-interest to do that if we want to see these things work and the industry survive and have a robust business follow. Second, there's empirical evidence that alternative dispute resolution (ADR) and more creative approaches produce higher levels of employee and company satisfaction. Higher employee satisfaction leads to more motivated employees, better service, and more successful carriers.

In my view, the least favorable method of resolving disputes is arbitrating them. Now when I say that, I'm not suggesting we diminish your role. In fact, just the reverse. I'm suggesting we enhance and expand your role to help you more broadly and participate in new and more expansive ways than typically.

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[24]The DRC consists of an equal number of pilots from each of the pre-merger airlines who receive and decide claims related to Seniority Integration Awards before they get to a neutral arbitrator.

In 2003, then-NAA President Richard I. Bloch stated that "however uneasy the parties are in one another's company at times, the industrial relationship continues.[25] The process of arbitration itself is honed and polished to a fine point. We know how to do that, but our skills at alternative dispute resolution within the grievance procedure—short of arbitration—are considerably less well developed.

Too often that's simply because the parties haven't explored other possibilities. There's room to better utilize those and to expand the use of neutrals. Mr. Bloch's case, as he describes, for more exploitation of the possibilities, begins with thinking more creatively and expansively about your role. It's almost always preferable to the reverse, which is just hearing the case.

Jeff Wall: We cause a lot of problems in the airline industry, and mergers cause even more problems. That's good news for you because we need you to help solve them.

The United Airlines and Continental cultures could not have been more different. Putting those two companies together—actually more than two companies as I'll explain—was and is still a difficult and complicated process. United now employs about 85,000 of our co-workers around the globe and 80 percent of them are unionized. When we went into this merger, many of the work groups were represented by different unions, so we had the representation issues that the NMB helps us resolve.

From an operational perspective, the scope of our network with 85,000 employees is just massive. We fly with our alliance partners to approximately almost 200 countries. We have over 400 destinations. We have over 700 main line aircraft and over 550 regional express aircraft. We really have not just two airlines that most people think we have—but we have three. We have Continental Airlines. We have Continental Micronesia, which is our Guam-based Pacific operation. And, we have, of course, the subsidiary United Airlines.

Most of the time in negotiations, we are putting together three separate agreements and trying to join them into one. That's very complicated.

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[25]Richard I. Bloch, *Presidential Address: 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 9 (2004).

Traditionally in a merger, seniority integration is one of the first things to happen. Often, you have the various unions that represented the employees on each carrier going into that seniority integration process and being advocates on behalf of their constituents.

Since the US Airways debacle, the trend, not only for ALPA, but for all the other unions, has been to put off seniority integration until everything else is done. That means we resolve representation issues first. We resolve joint collective bargaining issues first. Then, we get to seniority integration.

The process of our merger at United has been slow from a labor perspective. There have been multiple issues to resolve, including representation. We still have groups that do not have a common representative and won't get a common representative until we give them a joint collective bargaining agreement. This makes bargaining difficult because there is a factionalized work group bargaining the contract. In December of last year, we achieved a joint collective agreement with ALPA for the pilots. That's the only joint agreement that we have. All the other groups have their separate agreements at Continental, Continental Micronesia, and United.

In three years, we have accomplished much. In fact, in those three years, we have reached nine different collective agreements, including the pilots. Many of those, other than the pilots, were for the separate carriers whose contracts were amendable. That meant, however, delaying the synergies of the merger out of respect for the fact that the employees were due something. They had an expectation that their contract would be amended and be renewed. There was a balancing act of trying to meet those expectations.

One of the things about joint bargaining in the merger context is that it's complicated—not only by structural differences, such as different levels of compensation and productivity, and different benefits plans—but also the cultural differences. The cultural differences are huge between the two and, really, three companies.

The cultural differences manifest themselves in bargaining in a number of different ways, but primarily it becomes a very natural human tendency for people to want what they have and what they've had. They don't want to change. When there are three different agreements and three different parties are being asked to change, it gets very difficult. People want to maintain what they

have. They believe that their practices are the best practices or, otherwise, they would not have them. If there's anything better, we would have done it.

The fact of the matter is we can always change and learn. Getting that message through is a difficult one. At United, we have relied on the NMB in large measure to help us work through these kinds of issues. We've used the facilitated problem-solving model with aid from NMB. This was previously known as interest-based bargaining (IBB).

It's been a good process to get through. We still come to areas where we cannot reach agreement on fundamental things. Do you want more pay to be more productive? Most people would say, "I want more pay." Some people, though, have a hard time getting away from the work rules that they've been entrenched in for many years. They think they are being asked to give up something and not get the value back in compensation. That makes it very difficult.

The Mediation Board has been extremely helpful. Yet, when we finally do reach these collective agreements, we're going to have a number of disputes that come to the members. We're going to rely on your expertise, your experience, and your good judgment to help us resolve them.

One of the things that I think is going to come up over the next few years is a renewed focus on the idea of past practice. This arises out of the notion that I've just been talking about, where folks want to hang on to what they have and what they've had in the past, which is difficult to do when you're forging new agreements. When the new agreements are reached, the members of the Academy—when facing contract interpretation cases at any of the merged carriers—will be faced with the dilemma of differing past practices at the two merged carriers. The language doesn't unambiguously address a particular question of application and what weight does past practice have in that context?

We've had with our non-pilot work groups—the Teamsters, the Machinists, the Flight Attendants—an ongoing dialogue about whether the adoption of language from one existing agreement carries all of its past practices. There are arbitration decisions that may be 30 years old, precedents and settlements that have been reached that aren't reflected in that plain language that the parties have agreed to adopt. Nevertheless, the language itself appears to accomplish what they've agreed on.

I think those issues are going to come up to NAA members. I think you'll see that become one of those things where today the bargaining histories are fairly straightforward. People know how important bargaining history is to the ultimate interpretation at arbitration, but the past practice stuff is really going to present some dilemmas where there are conflicts. I think that's something you'll have to pay attention to.

Barry E. Simon: Let me take the Moderator's prerogative and ask the first question of either Bruce or Jeff, or both of you. It's a question probably a lot of the arbitrators in the room are asking. When you have a need for arbitrators, I presume that, like any large industry, there's a little bit of "round up the usual suspects." When you go beyond that? What is your process for selecting arbitrators? Do you go to the NMB? Do you go to the Federal Mediation and Conciliation Service (FMCS)?

Bruce York: The pilots and most companies use a few different approaches. We bargain panels of arbitrators that are included in the collective bargaining agreement. We list the names of arbitrators we agree to use for the next few years in order to avoid the time delay in the selection process. We know who we can go to and we schedule them in. Another way is ad hoc, case by case. Sometimes we go to the NMB. I would say, for the most part, we have a few arbitrators that are our go-to guys and gals here, too. For the most part, we use Academy members and we're always looking for new names. There are arbitrators who send us their résumés, and we try and circulate them, to our folks when we're both talking with each other about adding folks to a panel or using them on an individual case.

Jeff Wall: Yeah, same thing. It's a mixed bag for us. We do both ways.

John Sands: This is addressed to Jeff. Jeff, I was a platinum at Continental. When the idea of the merger started to bubble up, I wrote to Jeff Smisek and suggested the importance of planning early for the merger of the two very different corporate cultures. I never received a response. I have no problem with that. But, now, what I find is that the former Continental flight attendants—many of whom I've spoken to—and two former Continental pilots, refer to themselves as ex-Cons. I find myself referring to myself as an ex-Con. It really sounds like what I suggested didn't happen. My question is, first of all, did anything happen before this process, as management unilaterally, to try to address the problems of merging the cultures—not merging the units, but just getting everybody

to assume at least a single identity? It seems to me that there's a lot you can do unilaterally to get people thinking differently, so that the kinds of creative ADR processes that Bruce is talking about may bear quicker fruit.

Barry E. Simon: Jeff is an ex-Con who now lives down the road from me.

Jeff Wall: We started planning for the cultural changes before the merger was even announced. Yes, we ran into problems with that. We are focused and have been focused on culture as the prerequisite for success. We have a very robust program from both of the operating divisions, the Human Resources Division, and straight down from the top. We are focused from the CEO straight down to the front lines.

It is difficult. People are coming from different backgrounds and different perspectives. Frankly, these are not things that you can change with a system, or structure, or a program. These are things that are human nature, and you have to respect people's notions that they're giving something up, they're losing something of value. I wish it were the way it used to be. You have to respect that, and yet we still have to move on. So, it's a difficult process.

Michael Rappaport: I'd like to ask Mr. Wall something about the comment that there are three airlines involved: Continental, United, and also Continental Air Micronesia. Can you discuss, given the unique route structure that follows Continental Air Micronesia, any particular issues that you suspect are going to come up and the difficulties in dealing with and merging Continental Air Micronesia?

Jeff Wall: Continental Micronesia doesn't present any real issues for us in a substantive way. I'll speak to one because I know we have some folks here from the Association of Flight Attendants, and many of them may be aware of what's happened.

When we received our single operating certificate approximately a year after we consummated the corporate merger, we began redeploying our various aircraft. Now, as many of you know, pilots and flight attendants are tied to metal. They operate their airplanes at their carrier. Not all other employees are so strongly tied to metal. When we started redeploying aircraft—that is taking a United 757 and moving it into a more appropriate market in our global combined system and, perhaps, replacing that route with a 737 800 from the Continental side—we ran into changes

in the amount of flying available to respective work groups. In Bruce's case, the pilots negotiated a transition process agreement or FENCE agreement that contained provisions for a balance of available seat miles (ASMs), which is the fundamental measure of an airline's capacity and a core financial metric, or a balance of a ratio of flying to ensure that one group was not harmed relative to the other.

The flight attendants do not have that same arrangement. The difficulty of the market in the Pacific is that it's rather unique and cut off, and it needs to support itself. There has been less flying available for the flight attendants at Continental Micronesia than there has been in the past. This would happen naturally, sometimes as a result of volume changes, but in this case, it happened also partly as a result of what we've done in redeploying airplanes. That's something that comes up in that context and it comes up in other contexts, as well.

Elizabeth Wesman: My question is for Bruce. I applaud your preference for alternate dispute resolution of some kind for arbitration. Clearly, that's what we all learn at the knees of our collective bargaining professors. But I'm wondering what is the feel of the rank and file, maybe not even down the rank and file, maybe between you and the next group, in your organization, when you talk about this sort of thing?

Bruce York: It's a really important question. I think the ADR processes are varied and many. I'm not pinpointing one. I'm also not naïve enough to think that we don't have to try cases now and then. When we do, I hope we can do them efficiently and I think you want that, too.

Our Association has really embarked on a different path more generally under our current president, Captain Moke. It's really been a thing we have evolved into, in many respects. The philosophy is, by and large, we share common views with the companies on about 95 percent of the business we do and disagree on a relatively few things. We have to find ways, under the Railway Labor Act, of being much more efficient in our labor relations processes. We can't let problems build up for years and have the huge cataclysmic negotiating events where everyone lives or dies at the end. We have to find ways to move that process much more efficiently.

I would say that same thing about the dispute resolution process. If you accept that on the bargaining side, well, you have to do that on the dispute resolution side, because there's no way to get there in bargaining if you walk into bargaining with two or

three hundred grievances outstanding and the pressure built up over those issues. One is impossible without the other. I think the shorter answer to your question is we spend a lot of time talking to our members about that philosophy and about that approach.

Alaska Airlines employed that with its pilots, really in a very profound way. We reached a new agreement, remarkably enough in the month that it was amendable. It was very focused and part of that came from solving problems during the life of the agreement much more effectively. That was a real change for Alaska Airlines. They always, for many years, relied on interest arbitration at the end of their agreement. We both got rid of that a few years ago. There was a lot of trepidation about what the result would be. That philosophy that I just described, we worked hard on.

Barry E. Simon: Let me just add to that my own personal experience on disposing of outstanding grievances before a merger. Before I became an arbitrator, I was labor counsel for the Chicago and Northwestern Railroad (C&NW), which is now merged with the Union Pacific. As part of that merger, the Union Pacific made an offer to the United Transportation Union (UTU), in which the C&NW had an astronomical number of grievances.

They made an offer of something like $11 million to dispose of all the grievances, although I don't know if that involved discipline cases at the same time. That check was given to the UTU and their general committee was delegated to come up with a way of allocating that money among all of the grievances. They spent a considerable amount of time going through all of the grievances, deciding which ones had merit, which ones had some merit and could be compromised, and which ones had no merit. Then they had a dispute because they didn't come up with a full $11 million and they ended up going to the Eighth Circuit on how to spread out the surplus funds. This process facilitated the merger between the two carriers. I don't think the Union Pacific would have been interested in carrying forward all of those grievances, the liability, and the need to arbitrate them eventually.

Josh Javits: For about 30 years, after the deregulation era, there were virtually no new mergers, and then with the trauma of the multiple bankruptcies after 2001, the consolidation agreement is pretty apt. There are so many hurdles, I think, that both sides were fearful of the merger. At this point, the big birthing pain was American going through that seniority list integration. It was natural to have birthing pains within. Some of the mergers since have gone more smoothly. They all take a long time and essential

elements were joint collective bargaining agreement and seniority list integration.

On process, and I know ALPA has looked at it a lot in its developing process for integration, have you looked at the sequence of events—whether it gets joint collective bargaining agreement first, or do SLI first, or a combination of both, or having an umpire handle both, a preemptive collective bargaining?

Pay issues are tough because it's only one number or another. You throw in the mix joint collective bargaining, maybe it's easier. What creative alternatives are there?

Bruce York: We went many years in processing the integrated list first. Frankly, the company didn't do a very good job in many areas. You'll remember the IT issues, and there were a huge number of issues in that case. It was overall a very problematic set of circumstances. We tried for a long time dealing with the seniority list first. Under our policy, the seniority list couldn't be used until there was a joint collective bargaining agreement. Our pilot groups used the ability of not getting to an agreement to frustrate the implementation of the seniority list. That was the primary reason for the change in ALPA's policy to say, "No we're going to get a joint collective bargaining agreement first," as Jeff described, in United, and we did before we process the SLI.

Now if you were going to do this differently right from the start, and you had the opportunity to do it, which you don't, everyone wants to go to heaven. No one wants to die, right? I mean these things we don't have are choice on all these things. We look at a Delta, Northwest type process where we prepackaged essentially all of this. We had a new collective bargaining agreement. We had an SLI completed. We had a timetable for merging our governing systems. All of that was ready, essentially, on the date of corporate close, and implemented shortly thereafter.

Like I said, that is a wonderful thing. Execution is a little difficult. If we could do it that way always we probably would. I think the company would welcome that, as well.

Ed Krinsky: When there are two ALPA groups, what is the role of the international?

Bruce York: I'm in the undesirable position of being the one whose department is largely charged with administering this. The international's role is essentially to provide the framework, to provide the venue, to provide the referees—you folks—and to stay away from seniority issues. Really, we provide that structure—that

overlay. We pay for the whole process. We make sure it's operating effectively. We try not to weigh in on the merits at all.

As you know, outside attorneys are hired to represent each group. Each group raises its own merger fund. Those fees aren't paid by ALPA. We provide the stadium and the referees and make sure it all works. Our policy says there is a standard that we provide, as well. It's, as you know, pretty capable of being interpreted different ways. It's a fair and equitable list. It's what we insist on.

Amedeo Greco: There was an earlier reference to Rich Bloch. He was also on the panel for the Federal Aviation Administration and Air Traffic Controllers. He came up with a system in which they present cases in front of an arbitrator for an advisory opinion. You can do about 10—or even more than 10 a day—to work things out before they go to arbitration. I think that process is working well.