

NAA FEC
Panel on “What is an Arbitrator’s Role?”
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At least half of my practice is under the Railway Labor Act (RLA), railroads and airlines. Those industries are about 80 or 90% organized, versus the NLRA’s 8% of the private sector and 12 % including the public sector. Those statistics translate to a culture, relationship and attitude towards labor management relations that are dramatically different.

The difference in the laws are at least partly responsible for the difference in union penetration for three reasons: first, unlike the LMRA, the RLA lacks a clear decertification provision; second, RLA contracts continue beyond amendable dates; and third, the National Mediation Board

NMB) controls the right of the parties to use self-help (union strikes and company lockouts or unilateral changes).

The stability of high unionization rates in these industries means that the carriers can rest easy that their competition will face similar labor costs and employees have the expectation that unionization will enhance, not threaten, their working conditions.

These are also protected industries, not dissimilar to the auto or steel industries of the 1950s and 60s, the period of the height of US unionization rates. On the railroad side, it is physically and financially impossible to start a new Class 1 railroad line. On the airline side, the four biggest airlines now control over 85% of the revenue, have near market control over 3 or 4 huge city hubs each and foreign competition is limited by law and international treaties.

The relationships under the RLA tend to be strong,

respectful and fully engaged. Dispute resolution is quite active and given priority in order to avoid festering issues. The labor management environment in which Harry Shulman thrived in the 1950s and 60s was probably more like a dispute resolution practice under the RLA than the NLRA of today.

I am going to discuss a few of my roles in RLA cases to bring out some of the issues Shulman wrote about in his 1955 article, "Reason, Contract, and Law in Labor Relations." Shulman's focus on labor relations as a system of "self-government" and neutrals' role as being "responsible for its success" matches my experience under the RLA. The variety of roles I have played reflects the variety of disputes that arise. The RLA and the parties' relationships allow for flexible and creative dispute resolutions. approaches.

RLA: A Flexible Law and Stable Labor Management

Relationship

First a few notes about the RLA. The Act covers Freight RRs, commuter RRs and airlines, both freight and passenger. De-certifications of unions are very rare. There is a general acceptance of role of unions, or at least a recognition that they are not going away.

Railroads have been organized since at least the 1860s and there were a series of unsuccessful laws regulating rail labor relations prior to the passage of the RLA in 1926. The 1926 Act was a direct result of a mutual agreement of labor and management, adopted wholesale by Congress. Airlines were added in 1936 partly because out of concern the Supreme Court would find recently enacted NLRA unconstitutional. Since the parties wrote the RLA, they have taken ownership of it and have made it work.

While the NLRB was designed to encourage and structure collective-bargaining and is imbued with litigation, the RLA's central purpose is to avoid interruptions in interstate commerce, and there are very few ULPs or litigation.

Despite its age, the RLA processes include a panoply of dispute resolution techniques: direct negotiations, mediation, arbitration and emergency boards. It allows for alternative approaches at each stage.

Contracts under the RLA don't expire but are amendable. Self-help is impermissible until the National Mediation Board (NMB) determines it should release the parties to use self-help. Emergency boards or Congress may prevent self-help after that.

Within this structure, the parties eventually and inevitably reach agreements. Section 2 First is the heart of the Act and

requires the parties to “exert every reasonable effort to make and maintain agreements... and to settle all disputes... in order to avoid any interruption to commerce.”

Cultural issues also support a strong labor-management relationship. First, pilots, mechanics and flight attendants almost all start as rank-and-file employees and become supervisors and managers, many return to the ranks. Second, airlines exist in a very dynamic environment. The industry is still competitive despite industry consolidation into 4 dominant players – LCCs and foreign airlines keep the industry competitive. Third, the constant interface between airline employees and the public, the public nature of the business and the powerful regulatory overlay all lead to a feeling of unity, that “we’re all in this together,” and even at times, a siege mentality. All that is unifying.

The nature of flight crew work produces enormously

complicated scheduling and pay issues. At the same time the airline industry demands intense and precise planning and logistics which creates friction and the inevitable disputes. Contract issues arise regularly where there are mergers (JCBA's, seniority integration), new routes, new equipment, or new duty, rest and training regulations.

Also, there is a small and intimate labor and management bar, and everybody knows everybody, labor reps, managers, owners, and NMB personnel.

Thus the parties want and need to make deals, must work together, and generally respect each other. Like a family, the parties hesitate to all out war against each other, knowing they will meet again.

So I thought I would describe the variety of roles and approaches I have been involved in as a neutral under the

RLA.

CSX/BRS: Consolidation Issue; Combined NMB

Mediator/Arbitrator Process

CXT Transportation and Brotherhood of Railroad

Signalmen (BRS) agreed to negotiate an agreement that would reduce their eleven collective bargaining agreements into five (5) CBAs, with uniform rules. The 11 separate CBAs stemmed from 11 railroads that had been merged into CSX over a 30-year period but still maintained separate CBAs with BRS. The parties also agreed to consolidate the 11 separate geographic regions in which construction gangs worked into only three (3) regions.

The task was formidable since each of the former railroad agreements had distinct work rules, pay, employee complements and union representation. Differences between

contracts needed to be reconciled on issues such as start times, worksite reporting, travel time pay, pay rates for various classifications, lunch periods, disciplinary rules, seniority rights for layoffs, vacation bidding etc. The Carrier was seeking to achieve maximum uniformity and cost containment while the union was seeking to balance the adverse impact of the changes between the employee groups, keep the best work rules and enhance pay to compensate for the changes.

All signalman employees were represented by BRS but different General Committees represented the employees from each of the former railroads.

The parties had been engaged in bilateral negotiations for about four (4) years. They then applied to use the mediatory services of the NMB and an NMB mediator attempted to mediate a resolution for about one (1) year, narrowing the issues but still facing numerous differences. Senior Mediator Pat Sims of the NMB, suggested and the

parties agreed to a unique med-arb process. That process involved setting aside a three (3) day period for a general overview discussion of the issues, mediation and then the issuance of an “advisory opinion” by the arbitrator, myself, on all outstanding issues. The key unique ingredients of the plan were the short 3-day timeline and the presence of the arbitrator throughout, and his issuance of an advisory opinion if the parties were unable to reach an agreement in mediation.

If the parties did not reach an agreement at the end of this process, two consequences hung over their heads. First, the mediator indicated she would not call the parties together for a long time so it was clear that they needed her to make any progress. Second the statutory consolidation process under protective arrangements required by the Surface Transportation Board and modified by all railroads and rail unions in their June 25, 2001 agreement, would be initiated. Part of the statutory process involved arbitration. That

process was expected to be extremely litigious, time consuming (potentially several years) and expensive for all involved.

About 17 union representatives were present for the med-“arb” sessions, including the General Chairman of each of the 11 former railroads and about 8 management representatives from operations, finance, legal and labor relations.

At the outset of the process, the parties were significantly apart on several basic issues, including even whether there should be 3 or 2 geographic construction regions, and which of the 11 former railroads should be merged into which 5 former railroads for CBA coverage and general maintenance (as opposed to construction) work.

The mediator and arbitrator, working together, gauged that the parties were “stuck” on some major structural issues and that unless they were resolved, progress on the other related issues could not effectively begin. I therefore sat

down with each party, suggested how I thought each issue would be resolved by a neutral arbitrator and a short rationale for each suggestion. The parties then used those suggestions to resolve several threshold issues.

The parties engaged in further mediated talks lasting into the early morning hours of the third day. At about 2 am, by agreement of the parties, I issued written findings on the remaining seven (7) issues that were unresolved. After another few hours of negotiations, the parties reached agreement, subject to ratification by the union and approval by company management.

The lessons learned from the process can be summarized as follows:

1. Flexibility: although there was a general idea of how and when to use mediation and arbitration when the process was created by the mediator working with the parties, but it turned out they were used in less predictable ways.

Mediation was the steady oar; I jumped in as arbitrator in

any significant way only twice: once to give verbal input to both sides on where I would end up on certain key issues; and second, at the end, when I gave a written list of recommendations on the key remaining issues. In other cases, different timing and uses of both med and arb might be appropriate. So the first lesson is to have a plan but stay flexible.

2. Shake it up: I think the change in approach from direct negotiations and mediation to med-arb gave the parties a greater expectation that there would be a deal and helped motivate them to make a deal. The parties had been negotiating nearly 4 years and mediating for about a year, so the opportunity for a new approach led to higher expectations and a more positive attitude. Moreover, it was clear that if the parties did not reach agreement, there would be no further near-term negotiations and a torturous litigation process would ensue. Thus, the stakes were higher - "now or never" - and the parties knew that the process constituted

the full array of dispute resolution final options to assist the parties to achieve an agreement.

3. Nudging: Each time the parties felt they were at impasse, or seriously discouraged, I would step into the arbitration mode and suggest a path to agreement. The parties took it from there. Modeling that viable alternative brought them back to a constructive give and take each time.

4. "Mediator Proposal" avoided: How many times has a "mediator proposal" been on the tip a mediator's tongue but held back for fear of endorsing a position that then makes the mediator appear committed to a position and biased?

These moments arise when the parties have negotiated to the point of impasse, and the neutral can identify an avenue for resolution. The matter remains unresolved, clogging progress and spreading pessimism. Instead, in med-arb, an arbitrator can step in and identify and offer potential resolutions to key issues. The parties' frustration gives way and there may be a greater willingness to embrace the

suggestion since it comes from a neutral. That was generally helpful here.

5. Reassure and speed up the process: Parties typically move incrementally as they test each other's depth of commitment to a position, but often react blindly in the process. Especially at the end of negotiations when commitment on big issues is necessary, less than fully informed decision-making is typical and the parties tend to leave value on the table. The alternative is a suggestion by the arbitrator, informed by speaking with both parties. That suggestion can be reassuring and alleviates some of the doubts at the end of negotiations that prevent full agreement.

I think this happened here in both instances where I intervened. The first time, both sides were aware they were dealing with the "big ticket items" and were looking for some assurance that they were not giving in too easily. The second time, with the final list of items in dispute, I asked management for a few additional items that put the icing on

the cake so that the union leaders were able to take to the members what they could claim was the maximum obtainable.

6. "The arbitrator made me do it": It is a bit more convincing to be able to say, "the arbitrator made me do it" than "the mediator made me do it" because the arbitrator has final and binding authority (here, since only "recommendations," the sheen of that authority). The mediator, by contrast, only has the power of persuasion. In our case, I think the arbitration suggestions helped the leadership of both sides to overcome their risk-averse propensities.

7. Helpful but not indispensable: The med-arb provided additional arrows in the quiver of the mediator. The extra "muscle" of arbitrator recommendations gave both parties the confidence and solace that they were getting the best deal they could, kept the political divisions on the union side in check, helped the union deflate expectations, and got

management to compromise on key issues. The process enabled the parties to bypass some of the angst of a more incremental approach.

Summary: The NMB created, coordinated and convinced the parties to use this process which turned out to be a success. The NMB had the credibility to do it, as it is regularly and repeatedly in the middle of disputes between the parties. If ever there was a permanent Umpire or Referee for the two industries it is the NMB. It does not make decisions on the substance of disputes, like an arbitrator or judge, but it guides the process, perhaps a more important role. When it needed the added authority of an arbitrator to opine on substance, it combined forces. So as an institution the NMB plays something of the role that Shulman envisioned neutrals would play.

Compass/ALPA: Mid-contract major change; med-arb process

There are other types of disputes where powerful market forces challenge contract provisions mid-contract. It has arisen in the regional airline context of a grievance mediation in which I was involved. Last year I spent four days as the “med-arb” of about 30 grievances at a regional airline carrier with their pilots. The discussions were motivated in large part by the carrier’s challenges in recruiting pilots, as their understaffing jeopardized their ability to meet their marketing obligations to their major carrier partners. Clearly the labor market shortage of pilots underlay the bargaining.

The pilot shortage is currently most acute at the regional hiring level and it impacts their ability to fulfill their

marketing agreements with the majors. The Regionals are under considerable pressure by the majors to provide inexpensive passenger feed while increasing spending to recruit pilots in order to maintain service requirements. The pilots are looking for the best compensation and life style while gaining the experience to be hired by a major airline.

But the several dozen grievances grouped together for the mediation were highly specific to the carrier's operations. In many cases the carrier was using aggressive crew planning and scheduling (read "questionable contractual interpretations") to address staffing shortage concerns.

Ultimately, during the settlement discussions of the 30 grievances an innovative solution was found involving training certain pilots to qualify and fly in the right and left seat in the same month ("dual qualification") along with pay improvements. This eased the carrier's staffing pressures

and provided benefits and opportunities for the pilots. It gave both sides desired flexibility. Numerous other significant issues were resolved as well as part of the overall agreement.

An alternative used by many regional airlines is to give the signing bonuses to recruit new pilots. But there are legal and practical issues involved that make this difficult. ALPA objects to the unilateral setting of bonuses for new pilots contending that it must be negotiated. According to ALPA, absent bargaining and agreement, it constitutes a “major dispute” justifying self-help or a court injunction prohibiting it.

The carriers assert that the bonuses are given to non-employees and thus there is no legal prohibition. However there is a practical problem with the provision of bonuses since they may not have been given to second, third and fourth year pilots who may resent of the favoritism to first-

year pilots.

The global agreement reached in this case included an explicit allowance for the carrier to give recruitment bonuses as well as some pay increases for some current pilots. In this context it enabled the carrier to resist calls for similar treatment (“parity”) from other employee groups at the carrier, at least to some extent.

Often when one party has an urgent need for a change and multiple issues are on the table, there exists sufficient incentive and ingredients to reach agreement. The effect of the global agreement reached was to reduce tensions, add value and hopefully to initiate a new and better working relationship between the parties.

The dividing line between contract interpretation and the contract creation was blurred in this process but served

both parties' interests. The company got needed staffing relief; the union got favorable resolution of numerous grievances that had built up over time.

The market forced a need for a resolution to the situation, which was badly hurting the parties' relationship. The parties needed a forum and a process to resolve its challenges quickly and satisfactorily. Grievance med-arb assisted the parties enabled the parties to address contract creation and interpretation issues at the same time.

PSA/ALPA: Issue: Negotiate new provision or interpret contract as written? Complex case; potential unintended or undesirable consequences

Sometimes a contract interpretation case is presented and based on the openings and early testimony it is apparent that the matter is highly complex. Complex in the

sense both that it is difficult to understand, that technical language is used with hidden or unique industry-specific meanings, that each side genuinely believes that its interpretation reflected the intent of the parties. It is also complex in terms of its unpredictable impact on both parties.

It was clear in my case that the parties failed to deal with or even see the full impact of the application of the contract provision at issue. Key language was missing from the provision, which would have addressed the issue directly. In the end, the language used was adequate to decide between the two opposing positions of the parties but was by no means optimal.

Such cases are not a-typical in airline scheduling cases. The area is highly complex due to the regulatory and contractual rules governing how pilots are scheduled to work. (FAA regulatory limits **1,000 hours** in any calendar

year; **100 hours** in any calendar month; **30 hours** in any 7 consecutive days; **9 hours** during any single day).

For carriers, pilot availability for flying is the priority, especially reserve pilots who replace scheduled pilots who call in sick, or who “time out.” Bad weather in one part of the country can throw the whole interdependent system into a tizzy of late or cancelled flights and the reserve pilot system is the fail safe for keeping the system at least afloat for the traveling public.

For the pilots, suddenly having to fly trips which might involve multiple legs and overnights is disruptive to their lives. For both sides, premium pilot pay for certain unanticipated flights is a significant cost for carriers and a benefit for pilots.

The case I had a few years ago involved a regional airline and its pilots who had agreed to a new electronic bidding and scheduling system which allows pilots to pick up open time trips and to trade trips. The company publishes a monthly “reserve grid” showing the minimum number of reserves needed for each day at each base and seat. When net reserves fall below the minimum required reserves, the day is designated as “critical” and pilots who volunteer to sit reserve on that day are paid critical pay at time and a half.

The grievance arose because the company believed it had the right to change the number of reserves it needed for each day of the month at any time during the month whereas the pilots believed that the number of reserves needed on any particular day could not be changed after being initially published at the beginning of the period that pilots were still bidding on their schedules for the following month.

The pilots said they bid their monthly lines of flying based on the initial published bid, in part by calculating the likelihood of picking up certain “critical” flying days. Allowing the company to change the reserve grid anytime they chose was contrary to the purpose and exchanges made during negotiations.

To my mind this was a case that was ripe for resolution by the parties. Both parties said the language and intent supported their positions, and both had coherent and credible arguments in support of their positions, but it was clear that the bargaining did not put the issue to bed. This was a case, as Harry Shulman put it, where there was “more or less specific standards which require reason and judgement.”

I directed the parties to engage in discussions aimed at settling the dispute. My system board members concurred in

this approach. Fortunately we had multiple arbitration hearing dates between which the parties could talk.

The parties did talk but could not reach agreement. Partly this was due to the difficulty of the issues and each side's commitment to its position and conviction that it was right. But it was also due to the fact that the relationship between the parties was not good, communications were strained and they did not have the inclination to compromise, where compromise might well have produced a better result. Bargaining the matter could have produced accommodations both sides could have lived with.

Instead the parties turned it over to me. My job was not to re-write the contract and fashion a compromise that was practical and met both sides' interests. Rather, my job was to choose between the parties and give the "win" to the party with the better facts and argument.

In this case, the precise language of the key provision, which included the term “real time,” supported the carrier argument that it could change the minimum reserve requirement throughout the month. So I found for the carrier. But it was clearly a second best option compared with a trade-off based on each sides’ differing priorities and needs that only the parties could voluntarily agree to.

So I was frustrated that the process precluded a rational compromise. Had I been tasked with being the med-arb, as I was at Compass/ALPA, I might have assisted the parties to get to that rational compromise.

At the same time, it was clear that it was time for a decision. Also, they were not in the mood to re-negotiate the contract. The parties wanted a decision by a third party more than they were willing to work towards a voluntary agreement, with all the risks that might produce.

There are advantages to having a clear dividing line between negotiations and contract interpretation and application. Every disagreement within the contract term cannot set off negotiations or nothing would be settled and all issues would be up in the air. Interestingly this was the state of affairs on the railroads before they agreed to moratorium clauses in their national contracts. Technically it is still the fact in local negotiations in the railroad freight industry that there are no moratorium clauses and any issue can be negotiated, where there are no moratorium clauses and any issue that arises even if the subject is covered in a current contracts is subject to Section 6 negotiations. Of course there is still no right to self-help until there is an NMB release.

Part of the reason for the introduction of moratorium clauses in railroad national bargaining is the chaos and

hostility that resulted from constant negotiations over minor disputes. If the parties were free to change anything at any time, they would be aggressively doing so, and instability would result.

Instead, the parties maintain a dividing line between the process of negotiations and the process of contract administration. But this is not to say that during the contract term, the parties are precluded from negotiating new provisions. That is done all the time at the airlines, through memoranda or letters of agreement.

Such negotiations within the contract term are also accommodated through contract provisions for grievance mediation, which are becoming increasingly prevalent in the industry. Ad hoc grievance mediation such as at Compass/ALPA, which I discussed, is also a feature of intra contract dispute resolution.

So the system of self-government that Harry Shulman describes, has found a welcome home under the flexible dispute resolution regime of the RLA and the way in which the airline and railroad industries and unions work things out. There are full contract negotiations leading to agreements, there are contract interpretation processes to resolve contract disputes and there are functioning alternatives in between, such as med-arb or MOUs and LOAs to address everything in between.