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Howard C. Westwood

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AIR TRANSPORT RULES OF ARBITRATION

By Howard C. Westwood

Virtually all the scheduled air carriers have recently set up a machinery for arbitration of disputes arising out of agreements between them. The machinery itself is of interest to the student of extra-State institutions of government, and its adoption may mark a significant point in the gradual evolution of the industry.

The machinery is incorporated in the Air Transport Rules of Arbitration, to be administered by the American Arbitration Association whose record in commercial arbitration has won nation-wide confidence.

Scope of the Procedure

The carriers have provided that when any agreement between any of them specifies that it shall be subject to the Rules of Arbitration, any controversy or claim of any nature arising out of that agreement shall be settled in accordance with those Rules, and judgment rendered in the arbitration may be entered in court. While the provision is quite like the ordinary submission to arbitration, two features should be noted.

In the first place the arbitration machinery is to be available for the settlement of disputes concerning *any kind* of agreements. The agreements may range from leases or sales of equipment to agreements providing for self-regulation of trade practices and operating methods.

In the second place the arbitration procedure provided for in these rules, as is true generally of arbitration procedure administered by the American Arbitration Association, is to be voluntary in character based upon a voluntary contractual relationship; arbitration is not to be imposed upon any carrier unless it voluntarily agrees thereto. It is only when an inter-carrier agreement specifically provides therefor that it will be subject to the arbitration procedure. Thus the carriers have, in this particular measure, rejected the always

tempting course of bending a minority to the majority's will.

NATURE OF ARBITRATION TRIBUNALS

The Rules themselves do not provide for a sole arbiter, or a permanent tribunal of any nature. Rather they establish a panel to consist of a standing list of persons approved by the directors of the American Arbitration Association and of the Air Transport Association, of which all the participating carriers are members. Then, whenever a case arises, three persons are to be selected from that panel, in a manner described below, to act as arbitrators in that particular case. While the panel has not yet been announced it would appear likely that it will include persons widely distributed over the country.

In providing for a panel, with a special tribunal to be selected in each case, there are both risks and advantages. Since no single person or single group will decide all cases, there is risk of diverging interpretations upon occasion and of lack of continuity. These risks are substantial. Against their development there are three safeguards. In the first place the administration of the Rules by the American Arbitration Association's staff will enable the arbitrators in a particular case to be informed respecting problems of procedure which may have arisen theretofore, and the Rules themselves state that any differences concerning the application or meaning of the procedure provided for in the Rules shall be settled by the Arbitration Committee of the Arbitration Association. In this and in other respects the Arbitration Association can introduce a cohesive influence among the transitory and loose-knit tribunals. In the second place, as experience dictates, the panel can be kept relatively small in number or certain particular members of the panel can be drawn upon repeatedly in cases where continuity of decision and procedure is of special importance. And in the third place the carriers have provided that in the case of their traffic agreements, reached by way of Air Traffic Conference resolution, decisions of arbitrators in one case shall constitute an interpretation of the agreement binding upon all members of the Conference whether or not they were parties to the case and with respect to their conduct both before and after the decision was rendered, just as though the interpretation had been incorporated in the original agreement.[1] This is a somewhat daring

1. In the Conference, a division of the Air Transport Association, the carriers are represented by their traffic and sales executives under by-laws which permit agreements to be entered into by simple resolution. The Conference and its procedures are an interesting and significant institution which, if successful, may very well prove a model for similar institutionalization of other facets of industry activity. Wherever industry-wide action of a consensual nature is desirable, the advantages of providing a forum for convenient and prompt action are obvious.

effort, by agreement, to incorporate the principle of *stare decisis* into the functioning of private tribunals.

If, in the face of these safeguards, the risk of lack of continuity still appears substantial, one can only recognize that the carriers' choice provides for a convenient, economical and elastic system which has its own virtues. A sole arbiter, or even a permanent tribunal or set of tribunals, could hardly be provided as conveniently or as economically. [2]And if arbitration is to occur in a wide variety of situations, involving sometimes rather fine legal points, sometimes peculiar knowledge of business practices, and sometimes complex technological issues, resort to fixed tribunals might be most impractical. Moreover, the system chosen by the carriers guards against the charge of prejudice which might someday eventuate were a sole arbiter or permanent tribunal or tribunals to have been set up.

The choice is certainly not an easy one. Arbitration, it is contemplated, will be used to enforce, among other things, trade practices established by agreement. Continuity and consistency of decisions respecting such practices is very important. Yet suspicion of favor for one or another conflicting interest is more likely to arise in the enforcement of a trade practice governing competitive methods than in any other type of case. At this stage of the industry's development the carriers certainly cannot be deemed to have been unreasonable in having adopted a machinery which, even at the possible impairment of continuity and consistency of decisions, is most free of engendering charges of favor on the part of the deciding tribunals.

In this connection, the method of choosing the tribunal, from the panel, to sit in a particular case is, of course, of significance.

Choice of Arbitrators

The Rules provide for two types of proceeding. One is a proceeding instituted upon a complaint by a carrier that another has violated an agreement. The other is a proceeding instituted upon a request by a carrier for an opinion as to the meaning of an agreement. The former would ordinarily seek not only an interpretation of an agreement but also damages or other relief. The latter would seek only an interpretation, and could be instituted quite independently of any immediate controversy.

The former type of proceeding will ordinarily involve only a limited number of parties—frequently, no doubt, only two. [3]Upon such a proceeding the Arbitration Association will submit to the

2. Under the carriers' Rules the arbitrators receive no compensation unless with the consent of the Arbitration Association. This is a common provision in connection with arbitration administered by the Arbitration Association.

3. See n. 4, *infra*.

parties a list of names selected from the panel. Each party will then indicate to the Arbitration Association which of such persons it would object to. The Association will then select the three arbitrators from those persons not objected to. Only if this proves impossible will the Association be free to select arbitrators in some other manner (but still only from the panel) which "appears to it to be fair". In general, this is the usual method followed by the Arbitration Association for selection of arbitrators in connection with its regular commercial arbitration procedure, and has been found to be eminently satisfactory.

In the case of a proceeding upon a request for an opinion, however, there will, typically it would seem, be many more parties. Under the Rules any party to an agreement involved in such a request may become a party to the proceeding by filing notice of its intention to do so. It would seem likely that, since in such a proceeding involvement in costs would be very slight, since there is no question of award of damages, and since the issue will be purely abstract (at least in theory), most if not all the parties to the agreement brought into question will become parties to the proceeding. In view of the fact that the decision will affect them all—indeed in the case of an Air Traffic Conference agreement it is to be formally binding upon them all—there is a special incentive to become parties. Thus in these cases there may be ten or twenty parties, and the submission ahead of time of lists of persons from the panel, with objections to be noted by all parties, would be impractical and of doubtful value. It is therefore provided that in such a case the Arbitration Association may, with or without the prior submission of lists of names, select the three arbitrators "in whatever manner appears to it to be fair." Fortunately the unquestioned integrity and enviable reputation of the Arbitration Association frees from suspicion the granting of this broad power, and it may be expected that the Association will in any case follow the practice of prior submission of lists wherever practical or wherever of value.[4]

The Arbitration Association likewise has the power to disqualify any arbitrator for cause.

4. In the case of a proceeding upon a complaint there is also the possibility of multiplicity of parties, for the Rules give to any party to an agreement involved in a complaint, whether or not it is charged with a violation, the same right to become a party to the proceeding which is conferred in the case of a proceeding upon a request for an opinion. The reason is that an interpretation rendered in a proceeding upon a complaint will have the same effect, upon all parties to an agreement, as does an interpretation rendered in a proceeding upon a request for an opinion. But it seems probable that the complaint-procedure will not be so likely to precipitate widespread intervention, since on many occasions the gravamen of the proceeding will doubtless involve disputed issues of fact, rather than important questions of interpretation of the agreement. However the possibility of widespread intervention even in such a case cannot be ignored.

Role of Air Transport Association

Next in importance to the provisions for the choice of arbitrators is the place of the Air Transport Association, and therefore of all the carriers as a group, in the arbitration procedure.

One of the generally accepted functions of any trade association is that of facilitating the clearing up of misunderstandings among its members. This is accomplished in a variety of ways—through the dissemination of information, through the provision of a forum for discussion and consultation, and even through active mediation when disputes arise. But when a trade association steps beyond such functions of enlightenment or of conciliation or of mediation —in other words, beyond the function of pure "talk"—and assumes the function of defining rights and duties in inter-member relationships it is treading on dangerous ground. Sometimes this can be done successfully. Often it can be done, no doubt, with respect to special categories of relationships.[5] But generally a trade association invites trouble when it steps astride an inter-member dispute and assumes to find the right of the issue.

Consequently the air carriers have very wisely provided that the Air Transport Association shall perform purely clerical functions in the arbitration procedure. All papers are to be filed with the Transport Association which in turn transmits them to the Arbitration Association and to all parties to the particular agreement involved in the proceeding. The Transport Association likewise is to see to it that all such parties receive notices of the dates of hearings and copies of the arbitrators' decisions.

Thus the Transport Association has nothing to do with the settlement of a dispute, save to act as filing clerk and clearing house. But the manner in which this function is to be discharged is itself of significance. For *every* party to an agreement involved in a proceeding is to be kept fully informed of the nature and progress of the proceeding at each of its stages. Not only does this protect the interests of the various parties to an agreement, but it likewise provides the basic information for the mobilization of the force of industry opinion wherever that would be apposite.

The Rules likewise provide that when a complaint or request for an opinion is filed with the Transport Association, its transmittal to the Arbitration Association, which sets the machinery in motion, may be delayed by the Transport Association with the consent of

5. For instance: In the case of air carriers rights and duties under certain joint tariffs can logically and practically be defined through an association organ because of the need for uniformity of practice and the relative absence of extreme conflict of interest. The air carriers have already evolved, to a modest degree, one such instance of centralized definition of rights and duties.

the person filing the paper. This gives to the Transport Association the opportunity of invoking informal influences of conciliation or mediation if the parties are agreeable.

Conduct of Hearings

After the filing of the complaint or request, and any answers or amendments, and after the naming of the arbitrators and the fixing of a date and place for the hearing, convenient to the parties, the conduct of the hearing itself is in the hands of the arbitrators. The Rules contain certain provisions as to the order of proceeding and certain guarantees as to right of examination, cross-examination, argument, keeping of a record, etc., but the hearing is very informal and subject to large discretion upon the part of the arbitrators. The hearing is held in private, as is customary in the case of the Arbitration Association's procedure, unless the parties otherwise agree. The parties may waive an oral hearing and submit the matter in writing. The clerical work in connection with a hearing is handled by a clerk appointed by the Arbitration Association. In these provisions there is nothing unusual.

Decision of Arbitrators

The arbitrators are to act by majority vote. Their decision is to be rendered within thirty days after the close of the proceedings unless the parties agree to a longer time. The decision must be made in writing, and executed and delivered in accordance to the prevailing arbitration law. In a proceeding upon a complaint the arbitrators may either require the payment of money,[6] or may require one or more parties to do certain acts or to refrain from or cease doing certain acts. The arbitrators may also provide for the payment of money in case the parties refuse to abide by a requirement that certain acts be done, refrained from, or ceased. Moreover in any case where payments of money are required the arbitrators are not confined to providing only for compensatory damages. In specifying the payments to be made the arbitrators may take into account the disruptive effect of proved violations of duty upon traffic and upon the relations between the carriers, the wilful nature of the breach of duty, the likelihood of recurrence of the breach either upon the part of the person found at fault or upon the part of others, any facts in mitigation of the breach of duty, "and any similar considerations". Sums so determined may be required to be divided

6. Both in the proceeding upon complaint and in that upon a request for an opinion there is provision for the assessment of costs.

among all or any of the parties to the agreement in question as the arbitrators deem appropriate.

Thus the carriers have endeavored to empower the arbitrators not only to interpret agreements, but also to award compensatory damages, to enforce specific performance, and to assess what would amount to fines dictated by punitive and preventive considerations. Power so broad is not usual in commercial arbitration. But where, as here, arbitration is contemplated as a means of enforcing self-imposed rules of conduct any power less extensive would seem almost to be futile.

The broad power thus conferred can, however, be limited by the parties. The Rules contain another provision, applicable to all the powers to be exercised by the arbitrators, which states that the powers granted the arbitrators may be either expanded or limited by any agreement to which the parties to the proceeding are parties.

Thus, in an agreement for the lease of equipment, for instance, the parties might provide that the arbitrators should have no power to make any award save for compensatory damages. Or, in the case of an Air Traffic Conference resolution, certain maximum limitations on the amount of any punitive damages might be imposed, scaled, perhaps, according to the number of times an offense is committed. In brief, the carriers have provided an extraordinary adjustable scheme, which can be suited to any case.

Enforceability of Decisions

The Rules themselves provide no particular procedure for the enforcement or interpretation of a decision of arbitrators, although the members of the Air Traffic Conference have provided for the posting of a bond to secure adherence to decisions upon Conference resolutions.

The Rules might very well have included a special provision at least for determining whether a decision of arbitrators had been complied with, particularly in view of the fact that in some cases the arbitrators might decree specific performance. It may be that the failure to include such a provision will prove a defect. Of course a fresh proceeding under the Rules is always available. In any case the defect, if it proves to be such, can readily be corrected.

As to the broad question of the legal enforceability of a decision of arbitrators, an entire treatise could be written. State and federal statutes upon the subject vary. There has also been a history of antipathy on the part of the common law toward efforts to set up an extra-State judicial process. Further complicating the problem

in this instance is the frank provision in the Rules that payments of money may be required whether or not measurable damages have been proved—thus the courts' antagonism to the enforcement of penalties is risked.[7]

Suffice it here to suggest that if the question of legal enforceability of the arbitrators' decisions is significant, the effort to provide a comprehensive system of arbitration is probably doomed to failure. For even if the decisions of arbitrators were legally enforceable in every jurisdiction without question,[8] were it to prove necessary to go to court in order to secure compliance, the values of arbitration would be most seriously curtailed. In the last analysis, this system can work only if it has the support of industry opinion. And if it has that support it may be doubted whether the utter absence of legal enforceability of the arbitrators' decisions would make any difference whatever.

Attitude of Civil Aeronautics Authority

Of almost as great importance to the vitality of the arbitration procedure as the attitude of the carriers is the attitude of the Civil Aeronautics Authority.

While the Rules themselves apparently need not be submitted to the Authority for approval,[9] certain other agreements, to be subject to the Rules, will have to be filed with the Authority for its approval or disapproval. When that occurs it is possible that the Authority, in some cases, may find it necessary to take into account, in deciding whether to approve a specific agreement, the arbitration procedure which is to apply under that agreement.[10]

The recent growth of commercial arbitration, and the excellent record established by the American Arbitration Association in its work, will very likely command the confidence of the Authority. In

7. An interesting provision of the Civil Aeronautics Act states that air carriers shall file with the Authority certain types of agreements "whether enforceable by provisions for liquidated damages, *penalties, bonds or otherwise*" and when any such agreement is approved by the Authority the parties are free of the anti-trust laws "and of all other restraints or prohibitions made by, or imposed under, authority of law," insofar as necessary to enable them to do anything so approved. Sec. 412, 414.

8. Of course the parties to a particular proceeding can sign a formal submission to arbitration as provided for in the various applicable state statutes and it is very doubtful that there would be any serious question respecting the enforceability of an arbitrators' award based upon such a submission.

9. Sec. 412 of the Civil Aeronautics Act, as already mentioned, see *supra* n. 7, requires certain agreements between the carriers to be filed with the Authority. These are, in general, agreements for regulating competition and other cooperative arrangements. The carriers' agreement providing for the arbitration procedure merely sets up a machinery and in itself fixes no rights or duties. The machinery is created, to be availed of when desired. In this respect the agreement is not unlike the by-laws of the Air Traffic Conference, which also simply set up a machinery. When these by-laws were filed the Authority took the view that they did not come within the scope of sec. 412 since they amounted merely to a means to facilitate entering into agreements, and did not, in themselves, fix rights or duties.

10. The effect of Authority disapproval is not in itself to invalidate an agreement. Disapproval results only in a denial of exemption from the anti-trust laws and any other legal restraints which may be applicable. See *supra* n. 7.

any event it is difficult to see what possible reason the Authority could have for antagonism toward arbitration unless it were somehow to be subverted as an instrument of oppression against weaker carriers. Any such possibility is purely academic, and under the present Rules such a result could hardly occur even were there the desire to bring it about.

There is one question, however, which is conceivable. If the carriers were to reach an agreement to do (or to refrain from doing) some thing which is commanded (or prohibited) by the Act or by a regulation thereunder, and were to provide that the agreement would be subject to the Rules of Arbitration, would the Authority hesitate to approve the agreement because of some fear that the carriers would thereby be superseding the law enforcement provisions of the Civil Aeronautics Act?

In considering this question one is immediately reminded of the common law's antipathy to arbitration, which we mentioned a moment ago. This attitude is difficult to justify. While it may be uncharitable to say so, the attitude seems attributable to jealousy rather than to any cogent considerations of policy.

However the question with which the Authority might be faced is quite different from that with which the courts have dealt when they have entertained suits on contracts despite a failure to resort to arbitration provisions in the contracts and when they have refused to enforce arbitration awards. In the latter type of case the contract itself was the sole definition of rights and duties. In the case we are supposing there would be two definitions of rights and duties. One would be contained in the Act or what, for the sake of argument, amounts to the same thing, a regulation. The other definition would appear in the inter-carrier agreement. A particular item of conduct in violation of one definition of duty would, in the case we are supposing, also violate the other definition of duty. But the two definitions would be quite distinct and quite independent of each other. And it would seem that, despite its commitment to resort to arbitration as a means of settling disputes arising under the agreement, a carrier would be free to institute a complaint with the Authority on account of alleged violation of the statutory duty without prior resort to the arbitration procedure. And most assuredly the Authority would be free to institute proceedings questioning compliance with the statutory mandate quite without regard to the fact that a contractual mandate were also involved.

To illustrate: The Act prescribes that rates shall be reasonable. Suppose the carriers went so far as to enter into an agreement, to be

subject to the Rules of Arbitration, providing that rates shall be reasonable, and suppose the agreement were approved by the Authority. Suppose, then, that one carrier contends that another has charged unreasonable rates. If the contention is correct two duties have been violated. One, the statutory duty, is a duty owed to the public, enforceable by the Authority in proceedings instituted on its own initiative or on complaint. The other is a contractual duty which is enforceable by the civil courts, with whatever force those courts may give to the provision for arbitration. The former duty, it would appear, is enforceable by the Authority upon its own initiative or upon complaint by anyone interested (including the carrier who contends that the rate is unreasonable) entirely aside from the question whether the contractual duty has been violated or whether the corrective processes prescribed in the contract have been resorted to. And the carriers' agreement that alleged violations of the contractual duty shall be subject to arbitration would not seem susceptible of an interpretation that they should refrain from seeking enforcement, by the statutory processes, of the statutory duty.

If this be the case, and we suggest it as the reasonable view of the matter, the Authority has nothing to be concerned about. There would be no effort to tie its hands or to supersede its jurisdiction or to "boycott" the processes of the Act. Only a profound jealousy of the functioning of private agencies of correction, exceeding even the jealousy displayed by the common law toward arbitration, could, in these circumstances, explain a disapproval by the Authority of an agreement on the ground that it is subject to arbitration. While such a jealousy might be harbored in the breasts of administrators intent upon elaborating their own powers, the Authority has given ample evidence that it has no such inclinations.

Since the foregoing analysis argues that statutory and contractual duties are quite independent, and that an agreement as to the method of redress on account of an alleged violation of the latter cannot affect the processes of redress on account of an alleged violation of the former, it might be asked whether there would ever be any purpose to be served by carriers' entering into an agreement of the type indicated. Arbitration—under the foregoing analysis—could be ignored by running to the Authority. Why, then, have arbitration in such a case?

There are at least two very good reasons.

The most obvious is that an agreement on the subject would give a right to damages which could be readily determined by the convenient processes of private arbitration, which the Authority,

under the Act, has no power to award, and the right to which, were there to be reliance solely upon the Act, might be either entirely absent or so illusory as to be fruitless.

There is another reason which does concern the Authority, as a practical matter, and which should command its sympathy. There are various qualities of violations of statutory duties. Some seriously concern the public. Some—depending upon the facts—may be of no great immediate concern to the public. The Authority can, practically speaking, exercise some choice respecting those violations which it pursues promptly and vigorously. Were it forever to pursue with equal promptness and vigor every violation, without regard to relative importance to the public, it might one day find itself with a huge burden upon its hands. No administrative agency does, or can, act so blindly. It must exercise some discretion and budget its efforts. If upon certain matters the carriers have created contractual duties paralleling statutory duties, and if their contractual processes of enforcement are working reasonably well, the Authority could take that fact into account in budgeting its efforts. In short, while the Authority would at all times retain a free hand to enforce, or to entertain complaints concerning, the statutory duty, the presence of the contractual duty and of contractual processes of enforcement might well lead the Authority in appropriate cases to await the outcome of the contractual processes (and even to encourage resort thereto) before it decided whether the public interest required action upon its part. Thereby the Authority might find a help to ease its own administrative burdens and to conserve its resources. And—at the same time—the carriers might, through resort to their own organs, save themselves expense and inconvenience.[11]

In this thought there is nothing startling or unprecedented. Whatever in it is new results only from the suggestion that there be a regularly established institution, through the medium of the Rules of Arbitration, for adjusting disputes and relationships. That point

11. We have presented an analysis of an agreement to comply with a statutory duty which supposes that the statutory duty is owed to the public quite aside from the agreement. It is, however, possible that some statutory duties might be of an entirely private nature and that the Authority's role as the enforcing agency might be altogether similar to the role of a court in entertaining a suit upon a private contract. Of such a quality might be a statutory provision to the effect—for instance—that one carrier shall not entice away the services of another carrier's employees without paying damages therefor to be determined by the Authority. Were any such provision to appear in the Act, and were the carriers to agree not to entice away each other's employees, the agreement to be subject to the Rules of Arbitration, the Authority would be faced with a question quite different from the question discussed above concerning the agreement to charge reasonable rates, and might properly take the view —inconsistent with the traditional attitudes of the common law courts toward arbitration—that the contract and the remedial processes provided therein must, as a matter of law, first be exhausted before looking to any statutory remedies. There may be some duties, even under the present Civil Aeronautics Act, which would be of the quality suggested in this footnote. This speculation is, however, tangential to the more important question discussed in the text.

aside, there probably never has been and never will be an administrative agency which does not encourage, upon occasion, intra-industry and extra-State adjustments of difficulties which fall formally quite within the statutory competence of the administrative body. Even courts of law, while often feeling compelled, in the absence of statute, officially to frown on arbitration, have been known to take an active role in encouraging disputants to resolve their differences without judicial intervention.

In sum, then, there would seem to be reason for the Authority even to welcome the creation of an arbitration procedure, despite the fact that in some cases it might parallel some of the Authority's own jurisdiction. And if arbitration works well, it is not inconceivable that its importance as an instrument for industry regulation will grow in a manner comparable to the growth in the importance of commercial arbitration in the ordinary business world.