1969

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LOOKING BACK AT AIRLINE GRIEVANCE PROCEDURES AND SYSTEM BOARDS: A CRITICAL APPRAISAL

By John R. Hill†

I. INTRODUCTION

THIS SYMPOSIUM represents a milestone in the airline industry since it is the first one ever devoted solely to airline labor relations. Does this mean that the labor relations of an industry perennially described (for over two decades) as “young and growing” have reached adult status? When the sage Pogo was asked “How do you know when you’re an adult?,” he replied, “It’s largely a matter of lookin’ back and not countin’ your mistakes.” After “looking back” at airline grievance and system board procedures and “counting mistakes,” I conclude that those procedures have reached adult status and are much in need of the re-examination which this symposium has given our panel an opportunity to make.

Since labor relations in the airline industry have little in common with that in the railroad industry, there is a natural tendency to compare grievance and arbitration procedures in the airline field with those in general industry. There are, however, significant differences, particularly with respect to arbitration, and these differences need to be better understood. Unlike grievance and arbitration procedures in general industry, airline procedures have been shaped by statute. Although airline procedures may be compared to those in general industry, a fair evaluation of them, and how well they have developed, requires a “look back” at their origin and a consideration of how a statutory scheme tailored to fit the needs of rail carriers and employees, linked airline procedures to railroad procedures.

The origin of airline arbitration differs vastly from that of general industry in which the great growth and development of arbitration is a phenomenon of the post-World War II period. This trend is not surprising, for grievance arbitration presupposes the existence of collective bargaining agreements which, in turn, presuppose union organization. Moreover, the great growth in the labor movement, especially in the mass production industries, occurred in the years following passage of the Wagner Act in 1935.¹ To the contrary, grievance arbitration in the airline industry did not undergo a similar evolution. It became effective in 1936 when Congress enacted Title II of the Railway Labor Act (hereinafter RLA or Act), extending all of the provisions of Title I except section 3 to airlines.² Thus,

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¹ Derber, Growth and Expansion, in 1 LABOR AND THE NEW DEAL (Derber and Young ed. 1957).

a requirement to arbitrate grievances preceded not only collective bargaining agreements but also union organization, the single exception being airline pilots. Although airline agreements have historically treated system boards and grievance procedures separately, there is no reason why a system board could not be included in the grievance procedure. There are, however, enough differences between the two procedures to warrant discussing them separately.

II. AIRLINE GRIEVANCE PROCEDURES

A. Background

Although the RLA contemplates some method of "handling" disputes prior to a system board, it does not require any specific grievance procedure. Thus, there is no statutory requirement for airline grievance procedures to differ from those in general industry. However, railroad agreements unfortunately had a pre-natal influence on airline grievance procedures. Each airline grievance procedure is the product of collective bargaining, a fact perhaps overlooked by my colleague, Asher Schwartz, when he observed that "the airlines" either had copied or were influenced by the railroad pattern which he recognized as being devised by "railroads and railroad unions." Moreover, I cannot find support for his suggestion that the form of airline grievance procedures has usually been the product of "management preference." In any event, we do agree on the influence of railroad agreements, and since he has discussed that influence on the structure of and the number of steps in airline grievance procedures, my observations will be confined to how railroad agreements influenced the procedures for handling disciplinary grievances in the airline industry.

The requirements in many airline agreements for an "investigation and hearing" in disciplinary grievances and the requirement that such proceedings be "fair and impartial," are directly traceable to railroad agreements with technical requirements which have produced disputes in such abundance that an entire study has been devoted to the problem of due process on railroads in disciplinary grievances. Numerous railroad agreements "explicitly provide for a 'fair and impartial hearing' and contain specific procedural requirements pertaining to notice, right of representa-

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2 The first airline system board was established by a separate agreement which started a practice still followed, particularly in agreements of the Air Line Pilots Association (ALPA). Today, system boards are included in the majority of collective bargaining agreements which also include the grievance procedure; however, these procedures are established by separate sections.

4 Brooks v. Chicago R.I. & P.R. Co., 177 F.2d 385, 391 (8th Cir. 1949).

6 Although members of the air transport industry are frequently referred to as "the airlines," that term does not have monolithic implications because the highly competitive airlines often are unable even to agree on anything in the field of labor relations. Thus, I do not speak for "the airlines"—not even one airline.

7 On railroads the terms "investigation," "hearing" and even "trial" apparently are used interchangeably. No explanation could be found as to why airline agreements require both an investigation and a hearing.

tion, right to be present, right to present evidence, [and] right to cross-examine . . . .”  

The National Railroad Adjustment Board (hereinafter NRAB), First Division, in numerous awards held that such agreement requirements put into effect the “constitutional requirement of due process of law” and secures [sic] to every man his ‘day in court’ in advance of . . . any judgment against him.”  

Efforts to insure due process in railroad grievance procedures are more understandable when the fact is considered that the NRAB acts as an “appellate tribunal” which only reviews a record made in the grievance procedure and does not hold a hearing to resolve any conflicts in the record.  

Although the years spent searching for a guarantee of due process in railroad grievance procedures had a laudable objective, the effort was ultimately fruitless since two courts held that parties in railroad grievances are “entitled to a completely impartial hearing only when the case reached the referee designated to sit with the (NRAB). As long as the final hearing officer was impartial the requirements of due process were satisfied.”  

In view of the difference between the NRAB and airline system boards which hold de novo hearings, there is no reason to attempt attainment of a comparable guarantee of due process in airline grievance procedures. I suggest that this quest would be illusory. While it is in the best interest of both airlines and employees that the carrier’s representative hear the grievance of a discharged employee in a fair and objective manner, that representative is compensated by the party discharging the grievant, and therefore could not be in the “neutral” position required to discharge the legal obligations imposed by a constitutional guarantee of due process. Also it is unrealistic to expect laymen hearing grievances to be acquainted with, let alone follow, the subtleties of “due process.” Finally, a guarantee of due process is unnecessary because, when a discharged employee obtains a satisfactory decision in the grievance procedure, the question of due process becomes academic. On the other hand, if he feels unfairly treated in the grievance procedure, the remedy is appeal to the system board where he is guaranteed due process and a decision by a neutral.  

Airline grievance procedures would be even less desirable if they had  

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9 Id. at 7.  

10 Id. at 10.  

11 After one party files a “notice of intent” to file a submission with the NRAB, each party simultaneously files written submissions, which include statements of fact, copies of correspondence, etc.; however, matters not previously handled by the parties in the grievance procedure may not be included. Evidentiary hearings are not held by the NRAB with or without a referee. Hearings before the NRAB without a referee are perfunctory and are usually waived by the parties. For many years the hearings before a referee consisted almost entirely of parties reading “oral argument.” Northrup & Kahn, Railroad Grievance Machinery: A Critical Analysis—I, 5 IND. & LAD. REL. REV. 365, 371-76 (1952). However, the First Division, alone among the four Divisions of the NRAB, has not permitted the parties to present oral argument to the referee for over 33 years, a practice that was successfully challenged as being contrary to the requirement of section 3 of the Act that “parties may be heard” and constitutional requirements of due process. Brotherhood of R.R. Trainmen v. Central of Ga. Ry., 69 L.R.R.M. 2490, 58 L.C. par. 12,951 (M.D. Ga. 1967). In appellant unions’ brief on appeal to the Fifth Circuit, they contend that neither the Act nor the Constitution accords the carrier the right to such oral argument, stating that “[I]t is now established that ordinary rules relating to due process have no application to the NRAB . . . .”  

copied railroad practices as well as language. However, even the continued use of railroad language can give rise to litigation, as shown by a recent lawsuit filed by two discharged airline flight attendants who filed suit claiming a denial of due process after their discharges were upheld by a system board. Much of that dispute revolved around the meaning of “investigation and hearing.” The United States District Court for the Southern District of Florida, in an unreported decision, held that courts can reverse the system board only where there is a denial of due process before the board, not during the grievance procedure. That decision was affirmed by the Court of Appeals for the Fifth Circuit which stated that the “remedy for mistreatment” in the grievance procedure is “in the hands of the system board. . . .” Thus, a grievant is not entitled to due process and a completely impartial hearing in an airline grievance procedure. Rather, he receives this guarantee at the system board level.

Airline grievance procedures were written in confusing and often archaic terminology which the parties have often neglected to change. For example, in order to appeal to the third step, one of the first mechanics’ agreements required that a “notice of appeal” be filed in ten days and the “actual appeal” “perfected” in 30 days. Although this legalistic ritualism defies understanding, it has been perpetuated by the parties over the years and is still there in 1969.

B. Survey Of Grievance Procedures

In preparing for this symposium, I discovered the unavailability of comparative information about airline procedures, apparently due to lack of interest in or exchange of information concerning airline grievance and system board procedures. Accordingly, I prepared questionnaires in two parts: Part One concerns grievance procedures; and Part Two concerns system boards. The Air Transport Association agreed to circulate these questions among trunk, regional local service and air freight carriers without identifying either carriers or unions. Data has been collated from the replies to Part One by seven trunk carriers, ranging in size from the small-
est to the largest. Some highlights of this data will be revealed. Only one of the seven trunk carriers considers that the nature of the air transport industry justifies grievance procedures different from those used in general industry. Although individual grievants are not always represented by their collective bargaining representative, this practice does not appear to be as extensive as in the railroad industry because data revealed it occurs "rarely" or "only occasionally" on four carriers but "frequently" on two. The majority of representation appears to be equally divided between the individuals themselves and attorneys. Only one carrier reported representation by a different union.

A majority of grievance procedures distinguish between disciplinary grievances and other grievances such as contract interpretation or seniority problems. A four-step procedure for non-disciplinary grievances is used in a majority of agreements reported. In other agreements, the number of steps ranges from two to six steps. For disciplinary grievances, the majority requires either three or four steps. Only one agreement was reported with a single step in discharge cases and appeal directly to the system board. The number of grievance steps has remained relatively static. A change was made on only three carriers where in each instance one step was omitted from one agreement. Furthermore, five of the seven trunk carriers considered the present number of grievance steps to be desirable.

An average of 83 percent of all grievances are disposed of in the grievance procedure, while for grievances disposed of by bargaining unit, the average runs from a high of 100 percent to a low of 42 percent. The bargaining unit generating the greatest number of grievances is the mechanics and related employees, including ramp and store employees, for they account for over three-fourths of all grievances reported. The percentage disposed of in those units ranges from a high of 98 percent to a low of 58 percent; for all of those units combined, the weighted average is 88 percent. Stewardesses appear to be the next most prolific source of grievances. From 41 to 93 percent of their grievances are disposed of in the grievance procedure.

Carriers were asked if union representatives can effectively investigate grievances and assess their merits. A majority believe union representatives have that ability but do not exercise it at lower steps; however, they generally perform effectively at higher steps. Carriers unanimously consider that some grievances are not investigated or assessed effectively at any step. Although the disposition of grievances on a non-precedental basis is a practice on a majority of carriers, it is provided for by agreement on only two carriers.

Transcripts of grievance hearings are permitted; yet they are rarely used. Only one carrier reported the regular use of transcripts and these were confined to disciplinary hearings. The term "hearing officer" is used on several carriers yet there is no explicable reason for doing so.

A majority of airlines reported that grievance procedures are neither easily understood, nor always correctly followed by supervisors and em-
ployees, and that use of the phrase "investigation and hearing" has produced confusion. Yet no significant or novel changes have been made in grievance procedures on the majority of airlines. One carrier reported shortening the procedure and providing an automatic appeal for failure to observe time limits. A second reported elimination of suspension as a form of disciplinary penalty. The majority appear to be satisfied with the operation of the grievance procedures; however, a minority believes that the agreement language should be simplified and the number of grievance steps reduced.

C. Grievance Procedures Need Major Overhaul

While airlines and unions periodically engage in negotiations to amend their agreements, they have neglected to update their grievance procedures. The complacency of the carriers, as indicated by the data collected so far, is unwarranted. This panel attempted to draft a "model" procedure which would hopefully perform a useful service for this symposium. After three or four drafts and several conversations, we decided that there is no single procedure that fits the needs of all bargaining units on all carriers. However, the members of this panel agree that airline grievance procedures are due for a major overhaul. The primary need is to: (1) Simplify the language and (2) place greater emphasis on speed by reducing the number of steps.

As to the number of steps, I do not think any magical formula exists. However, I am unable to see the need for more than three steps for non-disciplinary grievances: One step at the local level, the second at a departmental level for settlement on a non-precedental basis, and the last step being a system-wide review by both parties in order to insure uniformity in the interpretation of system-wide agreements. This would seem to correspond to general industry. Moreover, the settlement of grievances on a non-precedential basis should be encouraged by express provisions in the agreement. I agree with Mark Kahn's suggestion that grievances should be filed on a standard form which, as I understand, would include such basic information as "who, what, when, why," and space for the grievant to affirmatively authorize a representative for all stages of the grievance procedure. The criticism that the above form is a "return to common law pleading," intended to ensnare the working man, is a shopworn argument that leaves me unimpressed. On the contrary, such information collected at the outset when memories are fresh should have several benefits, one of which would be assistance to union representatives at later steps. Also, copies of all grievances and decisions should be sent to the union which should have the right to attend all grievance hearings and have a voice in the grievance settlement, whether it represents the individual grievant or not.

The parties should eliminate the confusion about the status of a grievance which may not have been answered within prescribed time limits. Some union representatives fear such a grievance has been "killed" while
others exultantly claim that it has been “won.” The correct view is that
the failure to answer is to be treated as a denial at that step. A provision
that if no decision is rendered within the time limit, the grievance is con-
sidered as appealed automatically to the next step is suggested; if later
the system board decides in favor of the grievant, the company pays
all the referee’s expenses. While this provision may be objectionable to
airlines, it eliminates the now existing confusion of a carrier’s failure to
answer a grievance within the time limits, while at the same time it dis-
courages a carrier’s representative from failing to make a timely answer.

Discharge cases require speedier determination than other grievances.
In contract interpretation grievances an employee is still working and can
be paid if the carrier is found wrong. There may be no way, however, in
which a discharged employee can be paid for the impact that discharge
has on him, his family and prospective employers. One way to expedite
discharge cases is to minimize the number of steps as few discharge deci-
sions are changed in the grievance procedure; however, there should be one
system-wide review before going to the system board. Ordinarily, two
steps should be enough in discharge cases.

On railroads, generally it is necessary that a hearing (or investigation)
be held prior to the administration of discipline. Some airline agreements
have the same requirement that was probably included at the request of
union representatives with railroad backgrounds. While this requirement
adds a burden to the carrier, it is sometimes beneficial. An employee may
be afforded added protection by the requirement that he be given a pre-
cise charge in writing sufficiently in advance of the hearing to obtain repre-
sentation and witnesses. This procedure requires management to “cool it”
pending the hearing; also, reducing the offense to writing has a disciplinary
effect on the supervisor writing it. Thus it prevents rash disciplinary action
and permits an employee to prove a mistake, or bring in extenuating evi-
dence in a hearing held by a more detached person, before a decision is
made and positions become hardened.

III. AIRLINE SYSTEM BOARDS

A. Background

Since “board of adjustment” implies bargaining rather than arbitration,
the term is a misnomer. Because of the ambiguity the courts defined the
term as “compulsory arbitration.” This form of compulsory arbitration
is similar to voluntary arbitration in general industry, yet there is a differ-

\[18\] In 1947, the pilots of United Airlines insisted on amending their agreement by eliminating
the grievance procedure because of their concern that Flight Managers would fail or refuse to an-
swer grievances within specified time limits. A strike was threatened when the carrier, which was
in an anomalous position for an employer, was equally adamant that a grievance procedure be in
the agreement. A strike was avoided only when the parties agreed to accept a suggestion permitting
pilots to grieve either the carrier’s “action or inaction.” That obtuse language has been continued
without change. This example, while extreme, does illustrate how confused and upset employees
can become about the status of a grievance which is not answered within the time limits.

\[19\] This innovative provision appears in at least one agreement on one airline covering mechanics.

ence. Airline system boards are an important part of a statutory scheme for the settlement of airline disputes. They are established under statutory command as a "public agency," "not a private go-between," for the peaceful and orderly resolution of grievances without interruption of transportation service vital to the public. 21

The statutory link between airlines and railroads has a greater legal effect on airline system boards than on grievance procedures. For example, as a result of the parallelism of the powers and functions of both airline system boards and the National Railroad Adjustment Board, 22 we look for guidance to judicial decisions involving either one. Airline system boards have exclusive, primary jurisdiction to determine contract disputes. Neither federal nor state courts can invade this jurisdiction, 23 although an exception as to discharged employees was created in the Moore case 24 and later narrowed 25 by the Supreme Court. It has now been overruled in all but name. 26 The importance of speed in handling grievances is illustrated by the Supreme Court's decision in the Walker case 27 which gives what is probably Moore's last reprieve because of dissatisfaction with the speed of the NRAB's procedures.

Submission of minor disputes to airline system boards is not permissive


22 See, for example, T.W.A. v. Koppal, 345 U.S. 653 (1953), where the procedures of the two were described as "comparable" and judicial decisions defining the scope of jurisdiction of the NRAB were applied to an airline system board established for mechanics.

23 Slocum v. D.L. & W. R.R. Co., 339 U.S. 239, 242-44 (1950), held that any dispute which involves the interpretation of a collective bargaining agreement and which will affect the future relations between the parties (thereby distinguishing a discharge case where relations are terminated) is within the exclusive jurisdiction of the adjustment boards and such disputes cannot be first submitted to state or federal courts. In T.W.A. v. Koppal, 345 U.S. at 659, the Supreme Court held that airline system boards had the same type of exclusive jurisdiction over contract grievances and minor disputes as did the NRAB in the railroad industry.


25 In T.W.A. v. Koppal, 345 U.S. at 661, the Supreme Court narrowed the Moore exception by announcing that a court action for a wrongful discharge would be allowed only where the applicable state law "permits...recovery of damages without showing...prior exhaustion of...administrative remedies." In Pennsylvania R.R. Co. v. Day, 360 U.S. 148 (1959), the Supreme Court narrowed the Moore exception even further, finding that exception inapplicable to a dispute by a retired railroad employee for extra compensation under his collective bargaining contract. Holding that the dispute in question was governed by the Slocum rule of Board exclusivity, the Court limited Moore to its precise facts.

26 The Moore exception was dealt its severest blow in Republic Steel Corp. v. Maddox, 379 U.S. 650 (1966). While declining expressly to overrule Moore "within the field of the Railway Labor Act" [Id. at 657 n.14], the Court stated that "a major underpinning for the continued validity of the Moore case in the field of the Railway Labor Act...has been removed." Id. at 653. Justice Black, who dissented in Maddox, viewed the majority opinion as constituting the final demise of Moore within the field of the Railway Labor Act. This, he stated, was "just about as certain as the changing of the seasons" [Id. at 667]. This view has been confirmed in a number of subsequent lower court holdings. Walker v. Southern Ry. Co., 354 F.2d 950 (C.A. 4, 1965) rev'd, 385 U.S. 196 (1966); Wade v. Southern Pacific Co., 243 F. Supp. 307, 312 (S.D. Tex. 1965); Buchanan v. St. Louis S.W.R.R. Co., 400 S.W.2d 362, 364 (Tex. 1966); Beebe v. Union R.R. Co., 205 Pa. Super. 146, 208 A.2d 16, 20 (Pa. 1965).

27 While the Supreme Court's decision in Walker v. Southern Ry. Co., 385 U.S. 196 had the effect of keeping Moore alive for the moment, the Court's reasoning indicated that this was Moore's last reprieve. As noted by the three dissenting justices, "the Court's only rationale for refusing to take the final step of formally overruling Moore at this time, a step to which current precedent, logic, and policy all so persuasively point, is that there has apparently been some dissatisfaction with [1] the speed of the board's procedures and [2] with the statute's scope of appeal." 385 U.S. at 201. Since the 1966 Amendments to the Act (80 Stat. 208, 209) were designed to "remedy these defects," however, they have eliminated the entire foundation for the Court's rationale in Walker.
because in the *Chicago River* case, the Supreme Court held submission of such disputes to be mandatory and a strike concerning them to violate the RLA. It is important that the parties know the boundaries of what the Court referred to as this "limited field" of compulsory arbitration. The language of section 3 of the Act defining the jurisdiction of the NRAB is unfortunately ambiguous. Since the same language is used elsewhere in Title II, it is sometimes referred to as "statutory language" with the implication that its use is compulsory on airlines. However, the only statutory obligation on airlines and unions is to establish a board with jurisdiction "not exceeding" the "jurisdiction which may be lawfully exercised by [railroad] system, group, or regional boards of adjustment, under the authority of Section 3." However, in writing early airline system board agreements, the parties copied the "statutory language," and at the urging of mediators—among others—it's use has generally continued over the years.

The use of "statutory language" has produced some skirmishes. The first president of ALPA claimed any dispute which an employee might have with a carrier was subject to compulsory arbitration. When the pilots system board on one airline went outside the agreement and ruled the airline had violated the Civil Air Regulations, an action was instituted to set aside the award; however, it was later withdrawn as part of a contract settlement. As a result, some carriers negotiated changes to provide for substantially the same jurisdiction in more precise terms than the "statutory language." A dispute over jurisdiction on one airline prevented the parties from creating a system board. This dispute is the only known instance where a first agreement was negotiated without a system board. These skirmishes may have been unnecessary in view of later court definitions of the "statutory language" in disputes as to adjustment boards' exclusive jurisdiction under the Act. In determining which of two mutually exclusive procedures must be followed for settling disputes under the Act, courts must distinguish between "major" and "minor" disputes. "Minor" disputes are defined by the courts as those involving the interpretation and

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58 Section 3(i) of the RLA describes the disputes over which the NRAB has jurisdiction as "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." *Railway Labor Act* § 3, 44 Stat. 578 (1926), as amended, 48 Stat. 1189, 45 U.S.C. 153 (1964).


60 Some agreements establish system boards with jurisdiction over "disputes between any employee covered by this Agreement and the Company and between the Company and the Union, growing out of grievances concerning disciplinary action, rules, rates of pay or working conditions covered by this Agreement, or any amendment or supplement thereto, or out of the interpretation or application of any terms of this Agreement or any amendment or supplement thereto."

61 The terms "major dispute" and "minor dispute" appear nowhere in the Act. These terms are purely the creation of the judiciary and, more particularly, the Supreme Court in *Elgin J. & E. Ry. Co. v. Burley*, 321 U.S. 711, 722 (1944). "Major disputes" encompass those differences arising out of proposals for new contracts or of changes in existing contracts. They arise where there is no collective bargaining agreement covering the subject or where it is sought to change the terms of one. In such a case, an issue cannot be resolved by reference to an existing agreement. For an excellent exploration of the problems of classifying disputes as "major" or "minor," and disputes which are neither major nor minor, see McGuinn, *Injunctive Powers of the Federal Courts In Cases Involving Disputes Under The Railway Labor Act*, 50 Geo. L.J. 46 (1961).
application of existing contracts. Incidentally, this definition, which includes discharges, is ordinarily used in grievance arbitration in general industry. The jurisdiction of airline system boards, even if described in statutory language, is not broader than grievances involving the interpretation and application of existing collective bargaining agreements in a particular fact situation.

The Act does not explicitly require awards of airline system boards to be "final and binding," but all airline agreements provide that they will be. Although compliance with and enforcement of awards became a major source of dissatisfaction on railroads and thus led to the 1966 amendments of section 3 of the Act, they neither were, nor are, a problem on airlines. For this reason the 1966 amendments do not apply to airlines. Adverse awards are accepted by both parties. If an airline should refuse to comply with an award, the award may be enforced in court; however, suits for enforcement are rare.

In establishing the NRAB Congress intended, according to the Supreme Court in Slocum, that "Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway system. . . ." Thus, the object of the NRAB was to give uniform interpretations of agreements on railroads. That is understandable in view of the national movements and industry-wide bargaining in the railroad industry. Unlike the railroads, autonomous airline system boards may look at grievances on the basis of the particular circumstances on an individual carrier. The absence of uniform industry-wide precedents has been helpful to growing and changing airlines. Again in contrast with railroads, airlines and unions are permitted flexibility in their contracts establishing system boards. Indeed, the Supreme Court has held that "[t]here may be any number of [contractual] provisions . . . that would satisfy the requirements of § 204. . . ." While the court was speaking specifically of the finality of airline system board awards, its reasoning also should apply to other agreement provisions. If this is so, then when the parties agree that a particular board is established in compliance with section 204 of the Act, the requirements of the Act have been met provided the board's jurisdiction does not exceed that specified in section 204. Thus, an airline board consisting of only one member—an arbitrator as recommended by Asher Schwartz—would meet those requirements.


34 In contrast with section 3, which makes awards of the NRAB "final and binding," section 204 does not expressly so provide. However, the Supreme Court held that an airline board is "intended . . . to be and to act as a public agency," its awards to have "legal effect," and to "the extent that the contract imposes a duty consistent with the Act to comply with the awards, that duty is a federal requirement." I.A.M. v. Central Airlines, 372 U.S. at 691.

35 In Rosen v. Eastern Air Lines, 400 F.2d at 464, the Fifth Circuit said that "it is not now necessary for us to consider the contention made by [the carrier] that appellants' complaint fails to state a cause of action under the 1966 amendments to § 3 First' of the Railway Labor Act, 45 U.S.C. § 153, except to say that it is novel since this section is not applicable to airlines."


B. Survey Of System Boards

Have airlines and unions exercised their option of flexibility? For that question, I refer to the replies of nine trunk carriers to Part Two of the questionnaire. System boards vary in structure and operation both between and within airlines, because the carriers believe that the needs of the parties vary from one bargaining unit to another and that freedom to experiment with system boards should be continued.

A significant change in the structure of system boards has taken place. For years, there were four-man boards with a referee only in event of deadlock. Then a few five-man and three-man boards were created. Today, the number of three-man boards almost equals the number of four-man boards; however, two-thirds of the three-man boards are concentrated on one airline. On most carriers four-man boards still predominate. No carrier reported a one-man board consisting only of an arbitrator, although such boards do exist. In addition to the area and divisional boards in American Airlines, which Mark Kahn has discussed, other experiments include written procedures which result in a form of pre-hearing stipulation, permanent referees and expedited procedures without evidentiary hearings. There is an evenly divided opinion as to whether four-man boards are generally effective. If tripartite boards could be eliminated, however, the majority would prefer to see four-man boards continued.

More carriers consider it important to define the disputes over which a system board has jurisdiction. The jurisdictional boundaries were important on several boards which refused to consider disputes thought to be outside their jurisdiction. A majority reported that some grievances are appealed to the system boards by individuals not represented by the bargaining representative. Most carriers have some agreements which expressly state a dispute can be submitted by an individual; however, all agreements on four of the carriers expressly required submissions to be filed or signed by the union. No individual was represented by a different union. On one board an individual grievant was required to pay half the costs. On two airlines litigation has resulted when individual grievants claimed a denial of due process because board members represented interests hostile to them.

All boards hold a de novo hearing at which both parties can present evidence not presented in the grievance procedure. A transcript is not made of hearings by four-man boards on the majority of airlines. In event of deadlock by four-man boards, most boards hold a completely new hearing. Transcripts are generally made of hearings by boards sitting with referees.

A majority prefer the parties to establish their own rules of procedure regardless of what referee is selected. One airline thinks referees should provide more direction in guiding the parties. Several boards have written rules of procedure; on one carrier the rules are reported to be similar to the American Arbitration Association (hereinafter AAA) rules. Most boards (except area boards) are required to meet in the city in which the carrier's general offices are located, unless the parties agree otherwise. Time and cost required to attend a hearing, wherever located, are substantial factors al-
though carriers can and do furnish free transportation except to persons with no employee relationship.

The parties seem to be reaching agreement on referees more often than previously with several selecting referees from a panel previously agreed upon. Two carriers report that they each have a permanent referee for one of their boards. The parties also select referees on an ad hoc basis, and if they cannot agree, most referees are named by the National Mediation Board (hereinafter NMB); however, in two instances they are appointed by AAA. Where an outside agency is asked to appoint a referee, the carriers prefer to be given a list of referees with the parties having the right to veto all but one.

The one qualification that all airlines think an arbitrator must possess is familiarity with airline operations and economics. Some referees use approaches applicable to other industries, and most carriers think these approaches are in conflict with the flexibility of operations required by the airline industry. If a referee concludes that a decision will not solve the problem, most carriers would prefer that the referee decide the case and leave the problem to be resolved by the parties. All carriers are opposed to a National Air Transport Adjustment Board, and would like to see the provision giving discretionary authority to the NMB to establish that board removed from the Act.

Over two-thirds of the airlines reported that judicial review of awards is generally not needed. There is evenly divided opinion as to whether there should be the right of judicial review. If this right existed, three carriers thought it would rarely be used while one thought arbitration might be only the first step in a trail of litigation. The carriers are generally satisfied with the way system boards work; however, they believe that cases appealed to the board could be more carefully selected.

C. Promptness — The Critical Ingredient

I have kept the figures on the time required for system boards to act because they relate to the critical ingredient of airline procedures—promptness. There is a wide variation in the times; the average for all system boards on each carrier ranges from three to fifteen months, resulting in an average for all nine carriers of 7.7 months. Most boards give priority to discharge cases.

How does the performance of airline system boards compare with the record of the NRAB? Such a comparison was made in the Congressional hearings preceding the enactment of the 1966 amendments to section 3 of the Act. Congress found that among other causes for dissatisfaction, "railroad employees who have grievances sometimes have to wait as long as ten years or more before a decision is rendered [by the Board] on their claim"; for example, "the First Division . . . has never been current in its work, [and has] a backlog of approximately 7½ years." The Congress also found that "if an employee receives an award in his favor

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from the Board, the railroad affected may obtain judicial review of that award by declining to comply with it. If, however, an employee fails to receive an award in his favor, there is no means by which judicial review may be obtained.\(^2\)

Representative Harley O. Staggers, chairman of the House subcommittee which considered H.R. 706, invited a representative from the Air Transport Association to testify before the subcommittee; accordingly, Mr. Joseph L. O’Brien, Vice President of the Air Transport Association, responded. As to the time required to process grievances in the airline industry, Mr. O’Brien testified that “most cases are concluded within four to twelve months.” Mr. O’Brien also stated that “[w]ith reference to the airline industry’s experience in the settlement of grievances under existing collective bargaining agreements, the existing system boards of adjustment procedures, or variations thereof, have proved and are proving to be satisfactory in achieving the Railway Labor Act’s legislative goal of prompt and orderly disposition of such disputes.”\(^2\) Following this testimony, Mr. O’Brien engaged in the following colloquy with Representative Williams:

Mr. Williams: . . . Mr. O’Brien, judging from your statement, the methods employed by the airlines in resolving these disputes have apparently been very successful. While I did not notice in your statement whether you indicated there had been a backlog or not, apparently there is very little backlog.

Mr. O’Brien: There is none.

Mr. Williams: It would appear to me on listening to your statement and in looking over these bills, that to some extent, at least, the enactment of these three bills would bring into action virtually the same type of procedures that are presently being followed by the airlines. . . .

That it is desirable that the NRAB experience did not happen to airlines and their employees was confirmed by these Congressional hearings—if such confirmation was needed.\(^4\) Figures on the performance of the “special boards of adjustment” provided by the 1966 amendments are not available yet. Obviously they will be better than that of the NRAB and perhaps better than airline system boards. In any event, with passage of those amendments, the time will come when airline system boards can no longer enjoy the comfort of looking good simply by comparison with the bad record of the NRAB.

The average time of three to fifteen months, when compared with Mr. O’Brien’s statement in 1965 that most cases are decided in four to twelve months, indicates that in the interim the average time of three months for all boards on one airline has improved on the low of four months he reported. On the other hand, the average time of fifteen months on another

\(^{2\text{a}}}H. R. REP. No. 1114 at 15; S. REP. No. 1201 at 3.

\(^{2\text{b}}}\)Hearings on H.R. 706 before Subcomm. on Transportation and Economics of the House Comm. on Interstate and Foreign Commerce. 89th Cong., 1st Sess., at 101-02 (1965).

\(^{4\text{a}}}\)Id. at 102.

airline represents an increase. Since that figure of fifteen is an average, that means decisions in some cases on some airline boards required more than fifteen months. Those airline system boards that decided cases from three to 7.7 months were acting with promptness ranging from reasonable to excellent. Obviously, substantial improvement is needed at the opposite end of the spectrum. A comparison of the time required by airline system boards with that required for arbitration in general industry is not necessarily valid, particularly where in general industry the parties and their representatives are all located at or in reasonable proximity to the arbitration hearing. Since airline system boards generally hold hearings at only one central location, the dispersal of employees over an entire airline system requires more time. Wherever held, however, travel is still necessary for some if not all of those required to attend.

The remedy for simplifying and expediting the handling of grievances rests with the parties, not the court. I disagree that unions are champing at the bit but are somewhat timid about pressing for changes in system boards. Where unions and carriers have neglected these procedures neither party has a monopoly on the blame. To attribute delay by airline system boards to the Chicago River case is erroneous. When the Supreme Court concluded that the Norris-LaGuardia Act was no bar to the granting of injunctive relief in minor disputes, the Court stated:

Such controversies, therefore, are not the same as those in which the injunction strips labor of its primary weapon without substituting any reasonable alternative [Emphasis added.].

Given the Supreme Court’s conclusion that adjustment boards provide a “reasonable alternative” to strikes for the settlement of minor disputes, Chicago River should encourage the prompt handling of grievances, because in order to be able to obtain relief under that case, system boards must continue to be a “reasonable alternative” to strikes over minor disputes. Therefore, rather than wait for unions to make proposals, I suggest that airlines take the initiative and urge procedures that will insure prompt handling by system boards. If Chicago River were the “bonanza” for airlines that my colleague has pictured, the airlines should obtain prompt handling out of self-interest.

How prompt is prompt? I suggest parties agree on a maximum of four months for a grievance to be decided by a system board, but try to do it in less time. Some boards that receive a high volume of cases yearly are regularly scheduling hearings once a month in order to remain current. When a grievance is filed with such a board, it may be too late to be heard at the next session; however, it will be scheduled for the following month’s session. Circumstances may vary but when hearings are regularly scheduled, the parties ordinarily should be able to have a grievance heard within two months. The time required for a decision after hearing depends on the structure of the board. A goal of one month is desirable, but probably cannot be accomplished in all cases.

Although valid causes for delay exist there can also be foot dragging.
I know of one system board with a large backlog of cases in which one of the parties consistently avoids scheduling hearings, and then finds excuses to postpone scheduled hearings. In order to prevent such dilatory tactics, an expedited procedure designed to guarantee a hearing within a specified period of time at the request of any part is suggested. If, for example, one party requested a hearing but the other party declined to cooperate in agreeing upon a hearing date or a referee or both, one party might, upon notification to the other party, request an outside agency such as the AAA to appoint a referee and schedule a hearing within a reasonable period of time. No continuance should be allowed without consent of the requesting party, and absence from or non-participation at the hearing by any party should not prevent the issuance of an award. The mere presence of such a provision could be a stimulus to "footdraggers," but the procedure would be available for those occasions when its use was actually required.

The same union representatives who inveigh against delay often cause delay; there are countless ways to do so. The best way is to fail to supply such essential information as the question at issue in advance of the hearing. Instead, they take the oversimplified and irresponsible approach that all a grievant should be required to do is simply say he has a grievance and wants it arbitrated. I have witnessed hearings where a union either could not or would not advise the company or the board at the start of the hearing what provisions of the agreement the company allegedly violated. Aside from the fact that having to defend without such essential information may be a denial of due process, it will surely prolong or postpone the hearing. If after going through the grievance procedure, a union or a grievant is unable or unwilling to supply essential information in advance of the hearing, the grievance should be neither ready for nor entitled to a hearing. Probably the most effective single step to avoid delays would be to require certain minimum information to be supplied in a submission to the system board before a hearing is scheduled.

Although *Chicago River* has its critics, Mr. Schwartz's description of it as "almost revolutionizing" labor relations on airlines is somewhat hyperbolic. After railroad employees obtained the unique legislative remedy of compulsory grievance arbitration, they chose for themselves whether to arbitrate or strike over grievances. If the NRAB had been as effective as airline system boards are today, the problem of railroad employees striking

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48 Expedited arbitration procedures with comparable features, though calling for hearings within hours, have been negotiated by employers in general industry as the most efficacious albeit circuitous way to enforce a union's promise not to strike during the duration of the collective bargaining agreement. How the Supreme Court's decision in *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195 (1962), gave rise to the problem of enforcement of no-strike clauses and the resulting need for expedited arbitration procedures in general industry are discussed in a timely article by Bakaly & Pepe, *And After AVCO*, 20 LAB. L.J. 67, 77-78 (1969). *Arbitration News*, Jan. 1969 at 4 (American Arbitration Association) also reported that a recent arbitration development in general industry "is the increased interest among companies and unions in expedited procedures to bring disputes to arbitration within a matter of hours." Since these expedited procedures deal with a problem that fortunately does not exist on airlines, they have no value in the airline context, particularly in the requirement for a hearing within hours. However, their structure provides a useful guide for an expedited procedure in airline system boards.

49 See, for example, *Kroner*, *supra* note 41, at 64-65.
over grievances might never have occurred. In any event, since, prior to 1957, the year of Chicago River, there was no practice of airline employees striking over grievances, that decision took away from airline employees nothing which they had previously enjoyed.

Chicago River produced the same result that several commentators believed should prevail in general industry: They contended that since injunctions can be used to compel arbitration under the Taft-Hartley Act, fairness required their employment to enforce the no-strike clause. However, a majority of the Supreme Court was unpersuaded, and in Sinclair the Norris-LaGuardia Act was held to prohibit federal courts from enforcing no-strike clauses via a restraining order. The dissent in Sinclair urged that the Court accommodate Norris-LaGuardia to section 301 of the Taft-Hartley Act in the manner it had accommodated the anti-injunction act to the Railway Labor Act in the Chicago River case.

Critics contend that the Supreme Court in Chicago River judicially legislated away the provisions of Norris-LaGuardia. While Chicago River was the first case in which the Supreme Court laid down the “accommodation” principle for the federal courts in railway labor disputes, the Court had already foreshadowed this result in cases authorizing the use of injunctive relief to uphold the Act’s processes. In Virginian Ry. v. Sys. Fed’n No. 40, the Court affirmed the grant of an injunction at the union’s request to compel the railroad to bargain with it as the certified representative of the employees. The Court summarily disposed of the argument that Norris-LaGuardia precluded issuance of an injunction, and held that its “earlier and more general provisions” had to yield to those of section 2, Ninth of the Railway Labor Act requiring carriers to bargain with the representatives of their employees certified by the NMB.

As I understand Asher Schwartz’s comments, while the public, Congress, the courts and airlines are happy with the results flowing from Chicago River, employees are plainly discriminated against because unlike the carriers the employees are not free to engage in self-help. That argument has several fallacies: One, it assumes that both parties occupy identical roles and, therefore, the Act must product symmetrical results for both; second, it erroneously characterizes the affirmative action which an airline necessarily must take in applying and interpreting the terms of the union agreement in order to manage the business, as “self-help”—the counterpart of a strike; third, if such action is, in a union’s opinion, contrary to the agreement, the airline’s action, whether willful or not, is automatically labelled “illegal self-help;” and finally, in order to vindicate the Act, it is argued that carrying out such business decisions in this fast moving industry should be enjoined until the grievance is decided by a system board. I say this is “no way to run a railroad.”

I disagree with Mr. Schwartz’s contention that the courts can and will require carriers to maintain the status quo ante in a minor dispute without

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46 Id. at 216-18.
48 300 U.S. 515 (1937).
a strike or threatened strike. The Court in Chicago River did not require injunctive relief against a carrier to maintain the status quo pending resolution of a minor dispute by the board. Moreover, that case has never been regarded as authority for the issuance of injunctive relief in that situation.

Chicago River does not mean that an airline is free to unilaterally change rates of pay, rules and working conditions because the status quo provisions of section 6 of the Act protect against that. The case only means that when an airline’s action gives rise to conflicting contractual interpretations, the will of Congress, as evidenced by the absence of a status quo provision for minor disputes, requires that such action stand until the system board decides otherwise. Only then may the courts intervene on the independent motion of a union or its members.

In 1960 the Supreme Court in the M-K-T Case[^7] did uphold an injunction against a strike where the district court, in the exercise of its equitable powers, attached certain conditions requiring the carrier to maintain the status quo. But the Supreme Court further stated that its decision in Chicago River was not intended to govern cases where a request for injunctive relief against a carrier is made independently of any suit by the carrier for equitable relief. That question is yet to be decided by the Supreme Court; in the meantime there is a conflict in the decisions of the circuit courts.

The Court of Appeals for the Seventh Circuit in Hilbert v. Penn. R.R. Co.,[^4] held that a status quo injunction was not proper in a minor dispute in the absence of a corresponding petition for injunctive relief by the carrier against the union. The Court denied the applicability of M-K-T, pointing out that in that case the Supreme Court expressly declared its holding inapplicable to suits brought by employees “independently of any suit by the railroad for equitable relief.”[^5] The Court of Appeals for the Fifth Circuit reached the same result in Switchmen's Union v. Central of Georgia Ry. Co.[^6] and in St. Louis Ry. v. Railroad Yardmasters.[^7] It is apparent from these cases that unlike major disputes where the carrier is required by statute to maintain the status quo pending exhaustion of the statutory procedures, the carrier involved in a minor dispute is under no such duty. Absent the carrier’s invocation of the court’s jurisdiction to enjoin a strike over a minor dispute, the courts are without power to intervene until the system board has acted.

The only case cited by my colleague, Westchester Lodge 2186 v. Railway Express Agency,[^8] is also the only circuit court decision in conflict with the previously cited decisions of the Fifth and Seventh Circuits.[^9] The Court in Westchester relied at least in part on the fact that the NRAB

[^6]: 290 F.2d at 884-85.
[^7]: 341 F.2d 213 (5th Cir. 1965).
[^8]: 121 F.2d 749 (5th Cir. 1964), cert. denied, 377 U.S. 980 (1964).
[^10]: See 290 F.2d 213; 341 F.2d 213; 321 F.2d 749.
"normally requires several years to render a decision." It is doubtful that the Court in *Westchester* would have ruled as it did had the experience on railroads in the processing of employee grievances been comparable to that in the airline industry. In addition, the Court in *Westchester* suggested that the hardship upon the carrier resulting from the issuance of a status quo injunction might be alleviated by requiring the union, as a condition of an injunction, to guarantee "to indemnify the carrier if the carrier prevails before the Board." I note that approach has not been recommended here today, however.

The Court's reliance in *Westchester* on delay is significant in our context because of the marked difference in speed between the experience of the NRAB in the railroad industry and airline system boards—a difference which led to passage of the 1966 amendments permitting the mandatory establishment of special adjustment boards for railroads comparable to airline system boards. The 1966 amendments also removed the previous inequality which, as Asher has pointed out, denied a losing grievant the right of court review but gave it to a railroad. Since most of Schwartz's argument against *Chicago River* seems to be based on that inequality—which never applied to airline system boards and has been eliminated on railroads—his criticism may not be as much with the decision as with the delay by system boards. To that extent, we are in agreement. Another critic of *Chicago River* is of the opinion that if a "quick determination" were available (on railroads) of the "union's contention as to the alleged contract breach, the issue [of injunctive relief] would rarely arise."

Another reason exists for speeding up system board decisions that should appeal to the self-interest of both unions and carriers: Both parties are subject to suits by grievants for denial of due process because of delay, particularly where grievances are appealed to the system board by an individual. It is in the best interest of both airlines and unions to keep minor disputes in the system board and out of court.

**D. Some Recommended Changes**

I agree for reasons already covered by Asher Schwartz that the authority of the collective bargaining representative should be the same under both the Railway Labor Act and the Taft-Hartley Act. In short, the certified representative should be the employees' exclusive representative for both grievances and collective bargaining. Until that change can be accomplished, however, the right of the individual grievant must be protected. Thus, I do not agree that an individual grievant should be required to pay half the costs of the system board if his appeal is denied. Such a requirement chills the right of the grievant and invites a lawsuit.

To avoid the possibility of unfairness to an individual who appeals to the system board, I suggest that at his request the company and union

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54 Westchester Lodge 2813 v. Railway Express Agency, 329 F.2d at 753.
55 Id. at 753.
members of the board should not participate in hearings or meetings with the referee, and the latter should be the only voting member of the board. Despite the absence of such a provision, the four partisan members of the United Air Lines Pilots System Board deadlocked in order to have a neutral referee as some individual grievants had requested. Further, the four partisan board members agreed to accept the referee's decision as the decision of the five-man board. Thereafter, when the grievants sued to set aside the board's unfavorable award, the fact that the neutral referee alone decided the case precluded judicial review in *Arnold v. United Air Lines.*

My suggestion would require the parties to go one step further so that partisan members would not participate in the hearing or meetings with the referee.

Obviously unions and carriers have made more changes in the structure and operation of system boards than in their grievance procedures. I think they should engage in more experimentation, and include the grievance procedures. Changing both procedures is a slow, tedious and not a very esoteric task, which is too easily ignored in the usual contract negotiations. I offer the suggestion that carriers and unions work on improvements in their procedures in a calmer atmosphere.

Generally speaking, the four-man board is an anachronism, and its elimination usually brings an improvement in the total time required for a hearing and decision. Some four-man boards function effectively and so long as they perform a useful service in a manner satisfactory to the carrier and union, they should be continued. I think tripartite boards serve a valuable purpose and should be continued, but with three rather than five members. My own experience does not give me the same apprehension as Asher Schwartz's experience gives him. At a panel discussion of airline system boards at the National Academy of Arbitrators in 1968, arbitrators with airline experience expressed the opinion that partisan board members generally make an effective contribution, often helping to keep the referee from going off the deep end. Again, however, the parties are the judges of their own effectiveness and if they conclude that a tripartite board is not worth the expense or if the parties are unable to furnish competent and interested members, the parties are free to replace the tripartite board with a single arbitrator.

Another suggestion I offer is that the parties consider some alternative to the present method of reviewing discharges of flight deck crew members for alleged lack of competency or proficiency. Hearings in such cases by a board of laymen often resemble trial by combat. Perhaps a review by detached professionals comparable to that afforded pilots grounded for medical reasons would be suitable.

Since due process attaches at the system board level, I suggest that parties agree upon their own procedures and include them in their agreements. If the procedures are left to referees there may be none, as many referees, particularly ad hoc referees, dislike telling parties what to do and often

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57 296 F.2d 191 (7th Cir. 1961).
are not very proficient at it. Also, when each referee brings different ideas, little continuity and stability are developed.

In closing, I stress the need to at least experiment with different procedures for different cases. Part of the problem of airline system boards, as in arbitration generally, may be that while cases range in varying levels of importance and complexity from the "small claims court" genre all the way to the "supreme court" category, the same procedures are used for all cases. Transcripts could be omitted except in significant disputes. In some cases, particularly disciplinary ones, awards could be made immediately after the close of the hearing followed by the opinion at a later date, or the opinion could be omitted or confined to one page by agreement of the parties. The parties may decide that neither witnesses nor attorneys should be present in certain disputes. They might experiment with pre-hearing discussions or written procedures in order to define the issues and to narrow the facts in dispute.