AIRLINE AND RAILROAD LABOR AND EMPLOYMENT LAW

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"A Neutral's Perspective on Presidential Emergency Boards"
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Voluntary collective bargaining agreements reached by the parties themselves is the best dispute resolution process because and the parties, which know their interests best, are best able to make the accommodations necessary to reach agreements. In addition, the parties must work with each other after a resolution. A voluntary agreement, for which the parties take responsibility, is more likely to be accepted and applied constructively. Emergency board recommendations, even though they are not binding on the parties, are often foisted on the parties through public pressure or congressional mandate. An imposed agreement is usually resented by the parties and makes the next round of bargaining more difficult because the parties do not expect to resolve their disputes independently.

I. Process

A. Purpose

1. Since an emergency board's recommendations are not binding, they do not automatically end a collective bargaining dispute. Its purpose is to assist and move the parties to reach a voluntary resolution of their dispute. The emergency board recommendations are meant to provide a basis for the parties' further negotiations and settlement.

2. To be effective, the emergency board recommendations must be reasonable and persuasive. They should reflect what the parties are most likely to accept to resolve their dispute. The recommendations thus should reflect the comparative weight each party gives to the issues in order to facilitate their subsequent collective bargaining.

B. **Authority**

Although an emergency board issues recommendations and not binding decisions, there are several factors which add considerable weight to the recommendations of an emergency board:

1. *Public Pressure*: Since emergency boards are involved in high visibility cases, the media focuses the attention of the public at large, shippers and passengers, politicians, labor and management communities and others affected by a potential shutdown. Great pressure is built up to settle.

2. *Face Saving*: Unions and managements, being committed to their positions in collective bargaining, have a difficult time compromising. This is particularly true for unions which, unlike hierarchal companies, are democratic organizations. Thus, members have been led to count on certain results, which may turn out not to be achievable. An emergency board finding can set forth for union or corporate constituencies a practical, achievable and realistic resolution.

3. *Congressional Action*: Behind every emergency board is the potential or implicit threat of congressional action. Congress has historically imposed the findings of emergency boards on the parties. By law, Congress converts the emergency board recommendations into binding terms of a new collective bargaining agreement. This has occurred several times in the railroad industry. After Emergency Board 219 issued its recommendations and certain unions accepted those recommendations but others did not, Congress appointed a "Special Board" and named as chairman of the Special Board, the same chairman who presided over Emergency Board 219. The legislation provided that the parties were required to show why Emergency Board 219's recommendations should not be applied, a heavy burden for a challenger.

C. **Composition**

1. *Neutrals*: Usually, the members in an emergency board are certified neutrals with experience in the industry (railroads or airlines). Eminent and well regarded neutrals are appointed because, for their recommendations to carry weight, the authors must be credible to the parties. Also, the public perception must be that the Board is acting in a neutral manner so that the public, based on a belief in the honesty and integrity of the Board, will be justified in exerting pressure.

   Neutrals are generally selected from the National Mediation Boards' (NMB) roster of arbitrators, composed of about 750 certified neutrals. The White House often makes its selections of emergency board members based on the NMB's specific recommendations, but not always.

2. *Repeaters*: Many members tend to be people who have been on emergency boards previously – repeaters. The reason for this is that they have already undergone rigorous executive branch security clearances, thus overcoming a significant hurdle. Given the short time frame between the White House notification of the need for an emergency board and its creation, potential members who have been previously cleared have a major advantage in being chosen over new individuals.

3. *"Political boards"*: The mere threat of an emergency board has led to settlements in the past. There may even be a perverse advantage to emergency boards composed of "political" as distinguished from traditional neutral members. Unions and companies which believe that an emergency board may be composed of partisans from the party in power have greater incentive to settle. Thus, unions may decide to settle even if there is only a threat of an emergency board in a Republican administration, because they anticipate that an emergency board would make recommendations which are worse than what they can voluntarily settle for with management. The opposite holds true in Democratic administrations. Whether true or not, the anticipation of an adverse emergency board probably has a salutary effect on leading the parties to settlement. It is a face-saving justification for voluntary settlements. Nonetheless the settlement reached may be thought of as being coerced,

rather than voluntary, affecting interim relations and the level of contentiousness in the following round of bargaining.

Section 10 might have placed the decision to create an emergency board and to appoint its members with the NMB rather than the President. The fact that those powers were placed in the hands of the President, suggests both an intention to elevate the dispute to a higher level and recognition that the choice to intrude on the parties' dispute is a political one.

4. *Unanimity*: Members of an emergency board must work together. Coordination and trust is important in reaching a consensus decision. If all three members do not sign onto the recommendations, their persuasiveness would be significantly reduced.

D. **Timing**

1. Eminent arbitrators are busy people. The time period for emergency boards, 30 days, is very short. Thus, a great deal of coordination is needed to set hearings, hold meetings, evaluate the evidence and write the report.

2. The NMB provides support staff to help arrange meetings and hearings and to draft the report's "boilerplate." This assistance is extremely helpful to the emergency board.

3. The number of issues is limited by this time pressure. Only pivotal issues can be dealt with in the time allotted. Therefore, the parties must prioritize the issues and submit only the most important issues. Some emergency boards have dealt with additional or subsidiary issues by recommending that they be resolved after the life of the emergency board through other dispute resolution processes, such as arbitration.

II. **Considerations**

A. **Minimalism**

1. Neutrals like to avoid legislating new terms of an agreement for the parties. Neutrals are more comfortable providing guidance to the parties rather than imposing new terms on unwilling parties. Therefore, emergency boards tend to use a light touch. They recognize and encourage voluntary resolution through collective bargaining and defer to the parties' power and interests. The neutrals look for logical outcomes: What would have been agreed to if an emergency board had not been created? As Harry Rissetto, an eminent RLA practitioner, the "mantra" of the emergency board is, "If you can't get it in bargaining, you won't get it before an emergency board." Like doctors, the first principal of emergency board members is to "do no harm." Thus avoiding major change and the imposition of "innovative" solutions minimizes the neutrals' intrusive role and maximizes the parties' bargaining roles.

B. **Bargaining History**

1. *Bargaining direction*: Arbitrators are comfortable with extrapolating from parties' intentions to determine what they would have done in other circumstances. They are comfortable with interpreting and applying contract language, based on methods for determining parties' intentions revealed through their collective bargaining statements and proposals. Central to the members' analysis is an examination of the give and take of the parties' bargaining history. They review the parties' bargaining positions to determine the direction of negotiations in order to capture what would be the parties' resolution were they to continue to bargain to conclusion.

2. *Comparative Importance of Issues:* A central difficulty for emergency board members is to determine what weight each party assigns to each issue. Very often, the parties' priorities are intentionally kept hidden in negotiations. In order to determine the importance of the issues to each party, sometimes, neutral chairman are authorized by their fellow members to attempt to mediate the dispute. If this does not end in a resolution, it may elucidate for the board what weight each party gives to each issue. Then, the emergency board can mix and match the issues in

order to come out with a recommendation which is more likely to be accepted.

C. **Patterns**

The use of patterns established by other labor management agreements is very useful to emergency boards because patterns are used extensively by the parties themselves in collective bargaining. The parties use them as benchmarks, guidelines and goals to try to convince the other side of what is reasonable and standard in the company or industry. In addition, patterns are useful because they show that similarly situated parties (unions and companies) have previously agreed to the pattern terms that are being proposed. Patterns assure companies that their competitive position will not be adversely affected by any given labor rates. Patterns assure union members that they are settling for at least what similarly situated employees receive elsewhere. Thus, patterns reveal terms which are within the "range of acceptability" for a given group of employees or companies.

There are several different kinds of patterns that are used by the parties, depending upon the industry and party.

1. *Internal Patterns*

(a) Railroad internal patterns are agreements that have been reached with other unions at the carrier. (Since most freight railroads engage in multi-employer bargaining, that entity stands in the shoes of the carriers and negotiates with each of the twelve (12) to fourteen (14) unions in the industry). Internal patterns are used extensively in the railroad industry. These constitute strong evidence of acceptability in the railroad industry, but this is only so where a pattern is identifiable and established. For a pattern to be identifiable, its terms must be sufficiently similar. A pattern is established where a substantial number of employees or unions have agreed to the similar terms.

In the railroad industry, there is a history of pattern bargaining used by both parties. Since pattern bargaining is used by the parties themselves, neutrals are comfortable in employing that approach.

(b) If management or a union deviates from the pattern on a railroad, it risks disrupting the pattern. If a pattern is "tweaked", changed in some minor regard, it may not necessarily undermine the pattern's applicability to other agreements, which are not yet achieved. However, an exception is made at the peril of breaking the pattern and thus its acceptability.

2. *External patterns*

(a) External patterns are agreements reached at other carriers and used to establish similar terms at the carrier involved in collective bargaining. External patterns are regularly used by the parties in the airline industry. Based on the parties' use of external patterns, they are also used by neutrals. As the airline industry has very different groups of employees with different skill levels, qualifications, educational levels and loyalty to a particular carrier. These groups are: pilots, flight attendants, mechanics, customer service agents and ramp workers. Patterns are thus established within a particular employee group. Traditionally, pilots at one major carrier expect and will hold out for an agreement comparable to that reached by pilots at the other major airlines.

The use of patterns by employee groups is so well established that there are several examples of the parties voluntarily agreeing to interest arbitration and setting forth a list of comparable airlines which the parties agree to adopt as their own. Examples include a 16-year agreement between American Eagle and the Airline Pilots' Association (ALPA), in which pay is set based on a formula using other top regional airline pilot wage rates. The 1997 US Airways agreement with ALPA identified the largest four airlines and agreed to apply their pay rates for each aircraft type plus 1 percent

("Parity Plus 1%). In addition, Alaska Airlines has had a similar interest arbitration formulation with its pilot group for several rounds of bargaining.

3. *Other industries*

The parties may also attempt to show that employees of their skill level in other in other industries or within the local geographic region are provided pay, benefits and work rules of a certain level, in an attempt to convince the other side of its acceptability. The cost of living is another kind of benchmark taken from outside the industry involved in reaching settlements.

D. Ability to Pay

1. Emergency boards are frequently presented with arguments from management asserting that their financial condition is such that they do not have the "ability to pay" what the union is seeking. Some emergency boards have rejected this argument out of hand. One such is Emergency Board No. 234. By analogy, if a carrier was instead a homeowner with a leaky toilet and hired a plumber, the plumber would be paid the going rate for plumbers, regardless of the homeowner's ability to pay a different rate. Other emergency boards have taken a carrier's finances into account including Emergency Boards 222 and 231. In addition, Emergency Board 219, cited above, allowed Southern Pacific, which was in financial trouble at the time, to make a presentation on its financial ability to pay, and eventually provided less costly pay recommendations for the Southern Pacific.

A problem with the ability to pay argument from the point of view of neutrals is that it usually contains financial technicalities and unproven assumptions about future economic circumstances. Neutrals are not financial experts, nor can they divine a company's future financial condition. Even if neutrals could analyze financial data adequately,

determining how a single cost factor, for instance, a wage change, would affect the carrier's financial situation is even more difficult. If an ability to pay argument is made by management, the union will often add other areas to the debate, namely non-labor carrier costs. Unions will attempt to show how other costs can be reduced (e.g. executive pay) and revenues of the company enable it to pay for its demands. In the airline industry, which has been undergoing concessionary agreements for the last several years, the carrier's business plan and projections are examined when determining whether labor should bear the full brunt of the carrier's financial situation.

Predicting future economic performance is obviously a challenge. The analysis is even murkier when the emergency board deals with a publicly owned passenger railroad. For passenger railroads, various governmental funding sources determine the entity's financial resources, and thus "ability to pay". These funding sources include the federal, state and local governmental subsidies, tax revenue, and fares. All of these center on political decisions. The unions argue that they have the ability to successfully lobby for funding to pay for any increased labor costs. All this makes financial information difficult to analyze and apply, particularly in a 30-day period. In contrast, it is much more reliable and manageable for arbitrators to analyze and apply "patterns" and "negotiating history."

Nonetheless, this does not mean that the ability to pay argument should be ignored. Where the ability to pay is a real question – in concessionary situations or at subsidized industries like commuter railroads – the argument should be made. It may mean that a lot of work must be done to clarify and present economic and financial information for an ability to pay argument to be made successfully.

III. **Carrier Differences**

A. The different industries that are subject to emergency boards determine how the emergency boards approach the issues. There are really three types of carriers subject to emergency boards: freight railroads, airlines and passenger or

commuter railroads. It is important for the emergency board members to be familiar with and to understand the unique industry issues and the parties involved. If not, it is essential for the parties to educate the emergency board members. Usually, different neutrals are expert in these different industries. This understanding is important because: (1) the members only have 30 days to make recommendations; (2) the report must reveal itself to be credible to be used as a basis for settlement; and (3) the issues are inevitably complicated, even in an apparently simple wage dispute.

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