**MED-ARB IN AIRLINE COLLECTIVE BARGAINING**

Joshua M. Javits

Mediator and Arbitrator

April 12, 2016

1. **Introduction**

More and more, mediation-arbitration (“med-arb”) is being used as an alternative to the traditional private-sector collective bargaining process. Increasingly, it is also being used as a way to resolve grievances during the term of the contract.

Airline consolidation has created four mega carriers carrying an average of about 300,000 passengers per day (U.S. Department of Transportation, Bureau of Transportation Statistics, 2015 U.S.-Based Airline Traffic Data) and controlling about 77 percent of passenger enplanements in the United States (id). This industry concentration will likely lead to elimination of the use of self-help—strike by employees and lockout or unilateral implementation by the carrier—because of the unacceptable consequences of a major airline shutdown.

This, in turn, will impede the efficacy of the Railway Labor Act’s traditional dispute resolution process, which is predicated on the parties’ ultimate right to resort to self-help absent their reaching a collective bargaining agreement. Moreover, without the credible threat of self-help, bargaining is likely to be even longer and more difficult than it is currently. Finally, numerous recent airline contracts have been defeated in ratification votes, which may be at least partly the result of members believing their leaders failed to achieve the best agreement they could in light of the lack of a credible self-help threat.

Med-arb starts with mediation of a dispute by a neutral and, if no voluntary agreement is reached, then final and binding interest arbitration by the same neutral. This paper addresses:

* The traditional Railway Labor Act (RLA) process;
* What med-arb is and how it works;
* How med-arb worked for Compass Airlines and ALPA;
* Advantages of med-arb, compared with the traditional RLA bargaining process; and, very briefly,
* Arbitration then mediation or “arb-med.”

1. **Railway Labor Act Process**

The traditional RLA process involves the exchange of Section 6 notices,[[1]](#footnote-1) generally informing the other party of contract changes sought; direct negotiations,[[2]](#footnote-2) which can last until one party requests mediation;[[3]](#footnote-3) mediation by the National Mediation Board, a potentially multi-year process; arbitration, if both parties agree;[[4]](#footnote-4) and possible Presidential Emergency Boards.[[5]](#footnote-5)

In light of the size and impact of a potential major airline shutdown, the National Mediation Board (NMB) will be more reluctant to release the parties from mediation. Yet, it is the credible threat of such a release that is the central mechanism the NMB has at its disposal to resolve airline disputes. This is because the NMB has the exclusive authority to determine when to “release” the parties from mediation and uses that power to cajole, threaten or manipulate the parties into settling their dispute. Most of the time, the parties reach an agreement before the release, but sometimes the Board releases the parties, usually if it has confidence that they will reach an agreement during the 30-day countdown to a release. In either case, the NMB’s authority is used to push the parties to agreement. If such a threat is transparently hollow, the NMB’s power is significantly diminished.

In light of the enormous disruption that would result from a major airline shutdown, the Board will naturally be reluctant to release the parties to use self-help. A major airline shutdown would primarily impact the average of 300,000 daily business and leisure travelers (Id). The personal and economic impact of a shutdown has a direct effect on travelers whose vacations are ruined and whose business meetings are cancelled. Of course, a secondary impact exists on the economy of the cities and regions they intended to visit, including hotels, restaurants and convention halls.

Taken for granted in collective bargaining negotiations is that a date certain on which the parties may resort to self-help enables them to prioritize issues and make the accommodations necessary to reach a full agreement. The RLA process makes it nearly impossible to determine a date certain for self-help. This is because the NMB maintains control over the timing of bargaining. It uses the threat of release and its opposite, the threat of maintaining or freezing negotiations, to try to move the parties toward agreement.

Yet without a credible threat to release the parties to self-help, the Board’s power to affect collective bargaining is diminished. The parties’ use of leverage in negotiations, which stems from self-help, is also diminished. Most often, unions seek the threat or use of self-help to advantage them while carriers resist it. In a concentrated major airline market, however, unions’ expectations will rise while management delays a showdown, leading to potentially explosive situations.

Absent a Board release to self-help or a credible threat of release, employees presented with a tentative agreement reached by their union leaders may believe that these leaders did not get all they could have obtained in negotiations because there was no real threat of a work stoppage. The recent string of ratification failures at major airlines suggests this may be a cause. The effective use of social media by critics of the tentative agreements may also be a cause of the ratification failures, but the perceived lack of leverage enhances the strength of the dissidents’ message.

The statutory process itself undermines speedy and efficient negotiations. Of course, it must be kept in mind that the RLA’s central purpose is to avoid interruptions to interstate commerce. Although the “promotion of collective bargaining” is the second listed purpose of the act, efficient and effective bargaining is chronically sacrificed on the altar of that central purpose. The Board does what it can to make bargaining work, but it is constrained by the avoidance of shutdowns. The irony is that while reaching a collective bargaining agreement (CBA) avoids the need for self-help, the employment of self-help—or its credible threat—is the most direct way to achieve a CBA.

1. Presidential Emergency Boards

If the NMB nonetheless decides to release the parties from mediation, the option to use self-help—and the concomitant likelihood of a deal being made because of the dire consequences of self-help to both sides —will be undermined by the near certainty that a Presidential Emergency Board (PEB) will be created. The creation of a PEB maintains the status quo (i.e., no self-help) for an additional 60 days, and its recommendations often provide a basis for settlement. The parties then have a statutory right to self-help at the end of the 60-day period.

However, Congress may then on its own volition become involved in resolving the dispute, as it has numerous times to stop railroad strikes, by passing a law to extend the status quo period, impose the PEB report as the parties’ new collective bargaining agreement or create a congressionally imposed board whose decision is final.

On the railroad side, PEBs and congressional involvement are common. This is because railroad Class I carriers all bargain together in a multi-employer group, and the seven Class I carriers together originate 84 percent of the freight in the United States (Surface Transportation Board, Economic Data, 2015). A shutdown of service would have an incalculable impact on the economy. The RLA process thus becomes a static administrative process of moving the parties through stages in a carefully calculated time frame, rather than a dynamic process of negotiations involving risks and leverage.

Airline consolidation means the major airlines are in a situation comparable to that of the railroads. The impact of a shutdown of any single major airline would have a significant adverse impact on vast numbers of people, the relevant regional economies and the national economy. Thus the National Mediation Board, the White House and Congress are likely to treat major airline shutdowns the same way railroad labor management disputes have been treated for at least the past 50 years.

1. Interest Arbitration

Interest arbitration is a viable alternative “end game” to the RLA process. Under the act, immediately prior to a release, the NMB offers the parties the option to arbitrate their dispute. Unless both parties accept the offer of interest arbitration, it is rejected (45 USC §157, 158,159). The RLA provides a detailed process for interest arbitration, however, the parties can also negotiate for their own process, including timing, selection of the arbitrator(s), standards for decision and subjects to be decided.

Emergency Boards allow for self-help at the end of the process, but interest arbitration is “final and binding” and precludes the use of self-help. Thus the NMB would be more likely to offer interest arbitration, because an Emergency Board still allows for self-help and the possibility of a major airline shutdown. Also, unlike the establishment of an Emergency Board, which may be created by the President upon notice by the National Mediation Board, the creation of an interest arbitration process is solely within the control of the parties so long as it is mutually agreed to.

1. **ABC’s of Med-Arb**

Med-arb is a unique approach to interest arbitration. It integrates the two processes of mediation and arbitration, affording the parties maximum control over bargaining but resulting- in a timely final and binding agreement without a shutdown. Under the med-arb process, a single neutral serves a dual role as both mediator and arbitrator. The neutral starts out as a mediator and, absent achieving a full agreement, takes on the role of an arbitrator who is empowered to render a final and binding resolution of all issues. Med-arb is thus a hybrid process, employing the two established dispute resolution processes of mediation and arbitration.

1. Goal of Med-Arb

The goal of med-arb is to seek and find a binding and final result that the parties themselves would have reached had they achieved an agreement without intervention by a third party. The third party is not an independent decision-maker for the parties; the neutral reflects the parties’ interests to the maximum extent possible (John Kagel, “Med-Arb After 40,” National Academy of Arbitrator Proceedings, P. 241, 2013).

Med-arb enables the parties to resolve their collective bargaining dispute in a set period and at a reduced cost. It also affords flexibility to reach consensual resolutions prior to or during binding arbitration. The parties must voluntarily agree to such a process, otherwise the traditional RLA bargaining process applies.

“Grievance” med-arb is used by unions and management to resolve individual or group grievances. “Collective bargaining” med-arb aims to achieve a full collective bargaining agreement. The focus here is on collective bargaining med-arb, though the concepts behind both kinds of med-arb are similar.

1. Mediation Phase

The neutral’s role in mediation is to facilitate negotiations. It is left to the parties to determine how to resolve the substantive issues. The mediator acts as a facilitator and catalyst, enabling better communications, encouraging problem-solving and helping the parties overcome obstacles to agreements. When acting as a mediator, the neutral has in reserve the authority of an arbitrator. This gives the neutral power, which is usually unavailable to a mediator alone. The clout of the neutral when acting as the mediator stems, at least partly, from his or her role as the ultimate decider of any open issues.

This first stage is fairly typical of mediation generally. It involves separate communications between the mediator and each party alone as well as discussions between the parties in joint session. The mediator clarifies the facts and issues; he or she then questions and probes the parties separately as well as together to determine their real interests and their thoughts on how to resolve the issues. Next, the mediator tries to develop common concepts and explore options. Finally, the mediator secures a final agreement in writing.

It is not a good idea for the mediator to suggest resolutions to the parties too quickly. The mediator should not say, “This is what I would do.” His or her role is not to pass down wisdom from on high. The real goal is to determine what the parties need and want, not what the neutral would do on his or her own. In the mediation phase, the neutral should be reluctant to use the power he or she has as an arbitrator. The neutral is tasked with helping steer the parties to resolution.

1. “Muscular” Mediation

However, if the parties are stuck in discussions and negotiations are not progressing, then the mediator could use his or her clout and begin to discuss how he or she thinks the issue could be resolved. Thus, where the parties are flailing, drifting or stuck on a seemingly irresolvable issue, some use of the neutral’s authority as an interest arbitrator is useful.

This is one of two areas where the roles of mediator and arbitrator become enmeshed. To move the process along in mediation, the mediator may exert some of his or her authority as an arbitrator. However, the mediator should be sensitive to the line between appropriate pressure to settle and inappropriate coercion based on his or her power as an arbitrator.

1. Arbitration Phase

What about the arbitration phase? Arbitration is an adjudicative process. It involves presenting evidence, hearing witnesses and examining relevant standards and principles. The arbitrator makes the final decision, not the parties, except to the extent that the parties have limited the arbitrator’s authority. The arbitrator does not address the underlying issues of each side.

In arbitration, because the mediator has become familiar with the issues and the direction of negotiations on those issues, the real issues can be narrowed and handled in a much more expedited fashion than in the usual interest arbitration. Even where the parties want the arbitrator to base his or her decision solely on the record and not on the confidences learned in mediation, the arbitrator will at least be familiar with the issues and positions of the parties. Thus short briefs instead of long briefs, or oral arguments rather than extensive hearings, can be used because many of the underlying facts and parties’ interests have already been developed in the mediation phase and are understood by the neutral.

An abbreviated arbitration process is another advantage of med-arb. A completely separate arbitration process is expensive and time consuming, and it invites focus and pressures from outside the bargaining room. Also, many more issues can be resolved in the interest arbitration phase because the neutral is familiar with the details and impact of complex issues, which would be much harder if he or she had not been introduced to them in mediation.

1. Arbitrator Use of Information Learned in Mediation

A major concern about med-arb is whether the neutral can—or should—ignore confidences entrusted to him or her in mediation if he or she becomes the interest arbitrator. The neutral will hear things in mediation that would not ordinarily be revealed in arbitration. The parties may be concerned that the neutral will use these considerations in arbitration, including each party’s usually hidden motivations and willingness to make concessions. Might these perceptions influence the arbitrator and taint the arbitration?

Could it also undermine the mediation process, because the parties may be reluctant to share their real interests with the mediator, knowing that he or she may assume the mantle of an arbitrator later on in the process? If the parties want the mediator to be effective in helping them reach a voluntary agreement, the mediator needs to know this kind of candid information.

Can—or should—the mediator put these things out of his or her mind upon becoming an arbitrator? Do the parties want the mediator to use or put this “confidential” information aside in the interest arbitration phase?

There are two ways of looking at the potential for bias by an arbitrator who also mediated the dispute. First, it may be perceived that the arbitrator can ignore confidences given to him or her in mediation. Arbitration is based on a record brought by the parties, and the arbitrator decides the case on the basis of that record. In any formal hearing, where irrelevant or objectionable evidence is heard but ultimately excluded as evidence, the arbitrator must ignore it and decide the case only on the record. While the parties may believe the neutral will be influenced by behind-the-scenes confidences, skilled arbitrators can ignore these confidences, just as a judge or an arbitrator can ignore excluded evidence.

On the other hand, can the arbitrator totally forget significant concessions admitted by one party? Or, if he or she can put aside such confidences, will the parties believe he or she can and did so in their case? Does this open up enough doubt by the parties or their constituents to undermine their faith in the process?

This scenario may also pose an ethical problem for the neutral. The neutral must grapple with the question of whether he or she can put aside information learned in mediation if the parties expect him or her to rule based solely on the available interest arbitration record.

1. Advantages of Using Information Learned in Mediation

The parties may want the neutral to use in the arbitration phase the priorities and real concerns they expressed during mediation. This approach cuts through much of the stilted and carefully crafted advocacy in arbitration and instead addresses the parties’ real underlying interests. It also enhances the central benefits of med-arb—finding the result the parties themselves would have reached had they been able to do so on their own. In addition, the combined med-arb process using all the information available provides the benefits of speed, informality and lower cost.

The bottom line is that it is important to clarify whether and to what extent the arbitrator is expected to use the confidential information he or she learned in mediation. Otherwise, he or she may run afoul of the ethical dilemma related to the improper use of confidential information.

1. Use of a Separate Arbitrator

Of course, if the parties are concerned enough about the mediator using such confidential information, at arbitration, they can use a different neutral as the interest arbitrator. The parties would still have the incentive to voluntarily resolve their dispute in mediation, rather than moving to arbitration where they lose control over the outcome.

The downside of a separate interest arbitrator is that the mediator will no longer have the influence he or she would have had if he or she played both roles. Also, the new arbitrator will need a full evidentiary hearing on the myriad of issues remaining because he or she will not be familiar with the issues. This would add time and expense to the process. Moreover, the arbitrator will not have the benefit of an intimate understanding of the parties’ real underlying concerns learned in mediation, which could lead to a “better” resolution.

1. Selection of the Med-Arb

Selecting the right med-arb is of paramount importance. The med-arb should be knowledgeable about contract issues in the airline industry and trusted as a neutral by both sides. He or she not only should be reluctant to impose his or her own contractual prescriptions on the parties, but also willing to use his or her authority to bring the negotiations along. This is the second ethical concern for the neutral in the process: Might the mediator use excessive influence in the mediation phase, intentionally or not, based on his or her perceived power as the interest arbitrator?

# IV. Model: Compass/ALPA Use of Med-Arb

Compass and ALPA used med-arb effectively in the past two rounds of bargaining. In addition, the parties agreed to med-arb again for the 2018 round of bargaining.

The 2006 Northwest/ALPA letter of agreement (LOA) allowed for the creation of Compass Airlines, which arose out of the Northwest bankruptcy in 2005. Compass is a regional carrier that feeds Delta in Minneapolis and Detroit.

The Northwest/ALPA LOA established the med-arb process in 2006. The first round of med-arb involved four months of direct negotiations, one month of mediation and then arbitration of only up to 10 issues. The total time to reach agreement in the first round was six months. At the end of that round, the parties voluntarily agreed to med-arb in the next round of negotiations in 2012–2013.

I was chosen as the med-arb for the second round. The schedule agreed to by the parties was six months of direct negotiations, three months of mediation and two months to prepare and present the interest arbitration case. This was 11 months total—a very short period, compared with the traditional airline flight crew negotiations process. Each party had a limit of 20 issues that could be submitted to interest arbitration. Significantly, the parties created a regional carrier standard for the med-arb process.

So what happened? The parties only met 18 days during the six months set aside for direct negotiations. Very few issues were discussed or resolved. Then, during the subsequent 90 days of mediation, virtually all the issues were resolved. In fact, the parties extended the mediation into part of the two-month period set for interest arbitration to resolve additional issues. Only seven issues remained for interest arbitration but, by the end, the parties were also extremely close on those issues.

The problem with direct negotiations was there was too little prioritization of the issues. The parties did not know which sections to negotiate and which to save for interest arbitration. This obstacle was alleviated at the start of mediation.

A. Mediation Phase

When mediation began, it was clear we needed to jumpstart the negotiations. Two parameters were introduced to provide a look at where the process might end up. First, we identified exact comparators in the regional industry to define the standard to be used in mediation and interest arbitration. Second, we also generally defined the scope of an “issue,” so the parties understood what kinds of disputed provisions could be submitted to the arbitrator.

For example, was the entire health insurance section an issue or was a narrower provision within the section an issue (e.g., individual versus family premium rates, co-pays, out-of-pocket maximums, etc.)? An issue was found to be somewhere in between. It was not a whole section; nor was it necessarily a single isolated provision. Rather, it was found to be an item or items with a strong interrelationship. A more precise description depended on the subject matter—something akin to “I will know it when I see it.” By addressing the scope of an issue, however, the parties had a more realistic expectation of where the negotiations might end up.

Interestingly, during mediation, once the parties became engaged in problem-solving they frequently got away from looking simply at what the comparator airlines did. Rather, they looked at their own carrier and pilot needs based on their unique circumstances. Similarly, the breadth of an issue, once it was generally understood to be neither extreme, only became relevant during the interest arbitration stage.

We generally met twice a month. Between sessions, the parties worked on new sections, developed proposals and crafted “what if”-style contingent proposals. I would regularly send detailed summaries on what had been accomplished and agreed to at the last session and on what issues the parties were still apart. My communications also included specific assignments for the next scheduled sessions. A joint labor-management drafting committee worked to reach agreement on contract language for issues previously agreed to. Subject matter experts (SMEs) would work in joint committee on technical areas such as retirement and insurance and would not exchange ideas between negotiating sessions.

B. Arbitration Phase

## 

During the arbitration, both parties put up their 20 issues on a screen in joint session and subsequently worked out numerous trade-offs. Only seven issues were left for actual arbitration. Yet, even on those issues, the parties gave me a clear idea of their priorities, so I was assisted in how to deal with them to achieve at least their tacit agreement.

This approach met the “goal” I mentioned at the outset, which is to seek and find a binding and final result that the parties themselves would have reached had they made an agreement without the necessity for intervention by a third party. Both sides agreed to med-arb for the following round of bargaining in 2018, indicating their satisfaction with the process.

# How to Speed Up Bargaining

At Compass, identifying comparator airlines gave the parties an understanding of the economic contours of a prospective agreement. Limiting the number of issues that could go to interest arbitration forced the parties to prioritize their issues. The parties defined these at the outset of the mediation process, but they might have done this prior to direct bargaining. Defining these parameters at the outset of bargaining, rather than at the tail end of the bargaining process when economic issues are usually addressed, significantly speeded up the resolution of all issues and the achievement of an agreement in a timely fashion.

Even without med-arb, reversing the order of subjects addressed—to put economics first—enables the parties to make progress on numerous issues much faster. The reason is that both sides know the economic basis of a deal first and are then better able to fill in the details in negotiations. This is how nearly all commercial transactions are accomplished. The parties are able to address the feasibility of resolving lesser issues because they have a sense of approximate overall costs and benefits of the agreement.

By speeding up the process, the parties also avoid the problem of the airline market and general economy changing during the period of negotiations. Market and competitive changes are inevitable in a dynamic economy. During the three years typical of traditional negotiations, the airline market goes through unpredictable economic cycles and the airline market itself changes in unpredictable ways. These changes naturally work to change the parties’ assumptions and positions at the bargaining table. As a result, the parties are buffeted by this dynamic environment to shift their positions, which undermines progress.

Substantive and efficient negotiations provide stability and predictability to the process. The playing field is not constantly shifting. The players—members of negotiating committees, officials on Master Executive Councils (MECs) and even management representatives—regularly change, compounding the causes of delay. New players are unfamiliar with the subtle trade-offs that have occurred previously in the bargaining process, and it takes time to build up the trust necessary for deals to be made or for real problem-solving to happen.

In addition, constituent expectations change over time. Union members get frustrated with the lack of progress. Management becomes frustrated as a result of its devotion of resources to the process without real progress and its lessened ability to make decisions based on projected costs. These obstacles are kept in check if major issues are addressed early and negotiations last only a year or less.

Ratification defeats are an increasing feature of airline collective bargaining and may, in no small measure, be attributable to the inordinate duration of the process. Ratification defeats are highly detrimental to the trust and predictability essential to successful collective bargaining. A change in approach may be worth the avoidance of the devastating impact to the parties and to the process of ratification defeats.

**VI.** **Comparison of Med-Arb and Traditional Bargaining**

The advantages of **med-arb**, relative to the traditional bargaining process, are many.

First, collective bargaining med-arb is quick (one year), compared with the traditional process (three years on average). This approach avoids:

* The buildup of resentments and frustration due to delay;
* The elevated expectations of the employees, which leads to ratification defeats and political instability in the union;
* The lack of prioritization of issues due to a lack of focus and economic parameters;
* An unwieldy bargaining process in terms of overburdened agendas, difficult meeting schedules and changes in the composition of negotiating committees and MECs;
* The impact of changes over time in the economy and airline market and for the carrier involved; and
* The parties’ inability to see the contract as a whole and their lessened ability to evaluate contract costs, improvements and the relationships among sections.

Second, there is definite resolution of the issues through med-arb. The parties end up with a final binding agreement without a strike, lockout or other uncertainty.

Third, there is generally no ratification. As a result, management is less inclined to hold back something for fear of a ratification defeat. Also, because no agreement is sent out and so cannot be voted down, union negotiators are not undermined by having members reject their agreement. The process is not endlessly extended by the need to renegotiate an agreement that was not ratified.

Of course, the initial agreement to engage in med-arb may be subject to membership ratification, depending on the constitution and bylaws of the labor organization.[[6]](#footnote-6) The agreement to use med-arb may be part of a prior collective bargaining agreement, which was already ratified, or a letter of agreement or memorandum of understanding. In some cases, a mediated agreement that is voluntarily entered into may be subject to ratification. By contrast, the end result of an interest arbitration decision resolving the parties’ disputes is contractually final and binding, eliminating any reason for ratification.

Fourth, no sure finality and great uncertainty exist in traditional bargaining, so considerable speculation swirls around the traditional process. By contrast, in med-arb, the parties develop and agree to the process themselves, and it ends in a final agreement within an agreed-upon time frame.

Fifth, there is lower cost because mediation and arbitration take a shorter time, reducing expenses for planning, negotiating, travel, etc.

Sixth, the parties have a very strong influence on the outcome. Because they can only put a limited number of issues to interest arbitration, the parties recognize it is up to them to resolve the vast bulk of the issues.

Seventh, there is greater informality and a stronger focus on the parties’ real concerns. The process is more concentrated and productive and is less likely to drift. While it is a stretch to claim the process results in a “better” agreement, improved communications and effective problem-solving methods create the potential for maximizing both parties’ goals. Hopefully, the experience will build up trust and respect between the parties that will carry over to a more constructive relationship during the contract period.

The advantages of the **traditional bargaining process**, compared with med-arb, are twofold:

First, both unions and management sometimes may prefer to go down the traditional Railway Labor Act bargaining path to resolve their collective bargaining dispute, because there is at least a threat of self-help at the end of the process. The parties or their constituents might believe they can use this leverage in negotiations and might not want to relinquish this “ace up their sleeve.”

Second, both unions and management are reluctant to cede final authority over a deal to any individual, perhaps especially to a neutral third party who does not have any “skin in the game.” Management does not want to cede its control over major financial and operational decisions, and unions do not want to give up the leverage they may have in self-help (i.e., strike or lockout).

# Arb-Med

The arb-med approach is rarely used. Arb-med is where an arbitrator (or panel of arbitrators) holds a full hearing and writes up a decision and then tries to mediate a voluntary resolution based on the alternative of the written decision. With the arbitration decision in hand—whether it is one line or a long decision—the neutral arbitrator mediates between the parties. The intention is to reach a resolution based on an alternate outcome to the arbitration decision, one that is a voluntary settlement of the parties’ own making.

**VIII. Med-Arb of Grievances**

At the end of the bargaining process, the parties in the Compass Airlines/ALPA dispute agreed to appoint me the arbitrator for contract grievances. The parties did so because they believed I understood the contract terms (present at creation) and could apply this knowledge to disputes over the application and interpretation of contract terms. In addition, because I knew the parties and the overall trade-offs of the agreement, I would not need extensive formal presentations of evidence to understand the contract disputes that might arise.

Since the agreement was implemented, I have acted as a med arb several times a year, at the behest of the parties. I generally act as a mediator to facilitate resolution of a variety of grievances. This has led to constructive dialogue and relatively quick resolutions by the parties. If the parties cannot work out an agreement with my facilitation, I have indicated what I am likely to find in arbitration and this has helped engender agreement. I have issued arbitration decisions, but these have often been written awards reflecting the consent of the parties.

The process has the advantage of informed and efficient decision-making in contract disputes. In addition, the process affords the parties the opportunity to respond to a neutral evaluation of the dispute and to reach a resolution that meets the parties’ needs. It has the further advantage of avoiding a “win-lose” result of arbitration, which can harm the parties’ relationship and lessen their ability to work together to resolve future conflicts. Moreover, it is a lot less expensive, contentious and time consuming than a series of arbitrations.

I do not believe this process undermines the enforcement of contract terms; rather, it gives the parties an opportunity to resolve a conflict with less cost, delay and formality. It also gives the parties the opportunity to creatively address the issue in a way that best meets both sides’ needs. At times, the process allows for resolution of a dispute that is not purely contract interpretation, but which leads to something new, typical of the subject matter of a Letter of Agreement or Memorandum of Understanding.

The process is not intended to be a vehicle for continual renegotiation of the contract terms. Continual renegotiation of contract terms can be destabilizing. Ultimately, if the parties want a formal arbitration hearing with the presentation of evidence and a formal decision and award, that can be had. I am prepared to interpret and apply the contract based on evidentiary presentations. However, if the contract is not an adequate guide to resolving an issue and “gap-filling” is required, I would have the knowledge to evaluate where the parties would have ended up had they addressed the issue in their negotiations. Moreover, in a dynamic industry facing continual changes in technology, competition and the economy, a static contract of three to six years duration may be an obstacle to needed changes that could otherwise benefit both parties.

Union officials and members of the negotiating committees on both sides have changed significantly over the two years since the contract was agreed to, so I am one of the only constants from the bargaining. I think this lends credibility to my suggestions, which may be more important than the power I wield as an arbitrator with final and binding authority.

Based on my experience, a med-arb’s familiarity with the issues, the contract and the parties as well as the multiplicity of procedural tools available to the med-arb enable a neutral to resolve conflicts fairly, quickly, consistently and realistically. In a dynamic airline industry environment, the ability to quickly address conflicts and new challenges, and to resolve them in a fair and credible way, enables both parties to maximize their interests.

Med-arb may also lessen the number of problems and grievances that must be sorted out in formal and expensive arbitrations. It certainly lessens the number of issues that accumulate during the contract term for resolution in the next collective bargaining round, because an effective avenue to address them exists between contract negotiation rounds.

**IX. Conclusions**

Med-arb is useful if it meets the parties’ goals. If the goal is constructive and more direct communications, speed, lower cost and greater informality, it can work. If the parties do not see self-help or its threat as useful or likely, it can work.

However, if the goal is to keep the other side off balance and to use self-help as leverage or retain the threat of using self-help as leverage, med-arb is probably not going to meet that goal. If there is little trust of third-party neutrals and the parties prefer to hard bargain—or act like they are hard bargaining for their corporate or union constituents—again, med-arb may not work effectively.

For the appropriate parties and disputes, med-arb provides a viable alternative. Each negotiation is unique, and the end product—the parties’ collective bargaining agreement—also is unique. No one size fits all. Yet med-arb provides a useful tool in the right circumstances.

As with everything, the context of the particular dispute should determine the best dispute resolution approach. Various factors should be examined when looking at the alternative processes, including the financial condition of the carrier, the point in the business cycle, union cohesiveness, carrier and union leadership and experience, major issues, carrier culture, personalities, negotiations history and expectations.

If the parties choose to use med-arb, they should consider several issues in agreeing to the details of the process, including the identity of comparators; the period for direct negotiations versus mediation; the use of a system board for the interest arbitration; the final offer or discretionary arbitration decision; the definition of an issue; and ratification obligations.

Overall, med-arb can enhance collective bargaining. It does so by focusing the parties on problem-solving, not posturing; creating the conditions for constructive bargaining, not avoiding decision-making; recognizing that self-help is unlikely anyhow; and resolving the disputes in less time than traditional negotiations.

1. 45 USC §156. [↑](#footnote-ref-1)
2. Id. [↑](#footnote-ref-2)
3. Id. [↑](#footnote-ref-3)
4. 45 USC §157, 158,159. [↑](#footnote-ref-4)
5. 45 USC §160. [↑](#footnote-ref-5)
6. See Transport Workers Union v. Hawaiian Airlines, 2009 U.S. Dist. LEXIS 29729, 186 LRRM 2384 (D. Haw.), aff’d, 2009 U.S. App. LEXIS 19529, 186 LRRM 3440, 344 Fed. App’x 351 (9th Cir. 2009). [↑](#footnote-ref-6)