AIRLINE MEDIATION: BECALMING BREWING BATTLES

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Major airline negotiations in the next few years – the post-bankruptcy era – are likely to be extremely difficult. Our panel will look at how mediation can be most effectively employed to help the parties through this period.

The airline industry is, after ten (10) carrier bankruptcies and the loss of $40 billion dollars over the past five-year period, finally earning profits. Airline unions, battered and bruised after losing over 155,000 jobs to furloughs and outsourcing, huge compensation and benefit loses and wholesale work rule concessions, are seeking to begin to recoup their enormous sacrifices. Management, not wanting to repeat the sins of the past, will no doubt utter the mantra: "sustainable costs must be maintained." Airline unions will utter their own mantra: "Employees sacrificed so that the carriers could survive; now we are entitled to share in the benefits." The parties will be in negotiations over the next three years, including pilots, flight attendants and mechanics at American Airlines, Continental, U.S. Airways, United, Southwest, and Hawaiian. The experience has been bitter for both labor and management, but how each side perceives the lessons of the last six (6) years will determine their strategies going forward. Unless the parties and the National Mediation Board (NMB) take actions to alter the way they negotiate, breakdowns will almost certainly lead to disruptions, shutdowns or outside intervention in the parties' collective bargaining.

Differing Perceptions

How the parties look at the last several years will deeply affect how they bargain in the next round. The perceptions of the parties are not settled or one dimensional. One view is negative and portends a bitter clash. The other is more positive and encouraging.

From the union's vantage point, generally, management took advantage of its financial problems by invoking "force majeure" clauses to lay off thousands of employees, bypassing contractual benefits and protections. Management then succeeded in avoiding its pension and other contractual obligations by entering bankruptcy. Management overreached and used the leverage of the bankruptcy court process to cram down enormous concessions on its employees. Huge changes were made, reversing decades of collective bargaining protections that unions had secured and management had agreed to. Through bankruptcy, management avoided its RLA obligations to bargain at arm's length with its employees' representative and to reach mutually acceptable agreements.

Management's view, on the other hand, was that bankruptcy was essential to the carrier's survival and that it had no choice but to reduce costs through furloughs and radical reductions in compensation, benefits and work rule changes.

But there is also a more encouraging mutual understanding of the past, which the parties experienced together in a common, unwanted and distasteful experience. That is the recognition that they are both in the same boat, as it were, one that was severely leaking and required bailing out. Massive repairs were essential for the survival of both the carrier and its employees. The unions and management worked together, with open books, in creditors committees in forging agreements, albeit under the gun. The long-term interests of both parties were preserved by the extreme measures taken.

The starting point for negotiations over the next three years will be the lessons learned by management and labor unions, and how they use these lessons to forge new agreements. While the past is instructive, we live in the present and march ineluctably into the future. Therefore, it is appropriate for the future to be the focus of negotiations.

Bankruptcy Court and Emergency Boards

During the past five years, the National Mediation Board (NMB) has essentially been forced to the sidelines of airline negotiations. The parties' negotiations essentially took place under the auspices of the bankruptcy courts. The Board thus did not have a presence or a role in the historic and traumatic labor management dispute resolution process over the past five years at most of the major legacy carriers.

The last noteworthy actions of the federal government generally with respect to airline negotiations outside of bankruptcy, occurred in the late nineties and before 9/11, 2001, when President Clinton and then President George W. Bush, became actively involved in airline disputes at the bargaining table at Northwest Airlines and by threatening and creating emergency boards. Altogether, three (3) airline emergency boards have been created since 1997, after 31 years without any emergency boards in the airline industry. It is against this background of intrusion by the Presidents and bankruptcy courts that the Board and the parties move into this new era.

Current Circumstances and Strategies

The carriers, for their part, continue to maintain high debt loads and see their new lower cost structure, post bankruptcy, as an essential protection against the risks of fuel spikes, recession, terrorist attacks, and continued loss of market share to low cost carriers, which have more than doubled their capacity to 46 million seats in the last four (4) years. The carriers see other sources of competition as well, like the new very light jet market and foreign carrier growth. Management is thus loathe to return to what it considers to be a regime of high labor costs. They are committed to avoiding the precipice of the past, where any adverse wind could blow them over.

The unions, on the other hand, see an industry that reported earnings of $2 to $3 billion for 2006 and is expected to earn $4 billion in 2007. The unions see carriers of enormous size and dominance with huge revenues, full planes, increasing yields, low costs and every reason to be positioned for profitability and expansion. They see estimates of the airline industry doubling in size world wide in the next twenty (20) years vastly increasing the demand for skilled employees, especially pilots. Moreover, the view that employees made the sacrifices that enabled the carriers to survive justifies the

unions seeking to recoup what they lost in the last several years. Management's recent bonus and stock option bonanzas due to the run up in airline stock prices over the past few years, provide the unions with an additional rallying cry.

Pattern Bargaining and Timing of Bargaining

The two central hallmarks of airline bargaining in the past are the use of patterns and the long and drawn-out timing of collective bargaining. But these approaches may not be as acceptable in the future. With regard to patterns, both parties have used external airline industry patterns as benchmarks or guidelines for what is acceptable for a particular employee group. It has been perceived as reasonable to set rates for pilots or flight attendants or mechanics, based on what they earn at comparably-sized carriers. Adopting patterns was acceptable to carriers since their competitors would be facing the same costs.

But post bankruptcy, carriers may well perceive that the pattern approach will lead to escalating compensation, benefits and rules and to such high costs that any significant adverse event could drive them to financial extremis or bankruptcy. Moreover, the carriers see that they are in a more competitive situation today, with low-cost carriers like AirTran, Jet Blue, Frontier, and regional carriers controlling 25 percent of the market and expanding rapidly.

The union's perspective is that the use of patterns helped achieve labor peace prior to the bankruptcy by lessening worker compensation as an element of competition. Furthermore, the carriers were not heard to complain when they followed the pattern downwards to the lowest common denominator during their bankruptcy. Carriers also put up with elongated negotiations in the belief that time passage deflated union expectations. Nonetheless, many union leaders do not want to blindly follow precepts of the past which could repeat the recent disasters.

Second, long, drawn out negotiations have allowed unions to make rules gains prior to triggering the "end game" of the RLA process to put pressure on carriers, when money was at stake. Management tolerated a slow pace to delay increased costs and

to wear down union demands. But, in the current environment, years of negotiations, with the parties at polar opposite stances, will lead to frustration, anger and unproductive bargaining. The parties' differing perceptions of the current situation will almost inevitably produce great contentiousness, less progress and an endless bargaining process.

Thus patterns and timing may not wend the parties towards resolution as much as it has in the past. What is essential, in order to re-establish credible, successful and independent collective bargaining in the airline industry is that the process work and that political and legal entities outside of collective bargaining do not intervene.

Role of National Mediation Board

Into this breach must come the National Mediation Board, and it should play an energetic role. The Board should become actively involved in the parties' negotiations, early and intensively.

It has been the traditional notion of the Board to allow and even encourage the parties to engage in direct negotiations and collective bargaining for as long as possible, in order to only use the services of the Board when the parties really need it and are at loggerheads towards the end of the process.

There are several reasons for this. First, the Board has recognized that the parties must, in the end, reach agreement between themselves and direct negotiations encourage and instruct the parties to bargain and achieve resolutions.

Second, the Board does not have the resources to enable it to be fully involved in collective bargaining in the large number of negotiations in the airline and railroad industries, because its staff is relatively small, including only 12 mediators in a total staff of about 52 FTEs. The Board's budget has been virtually flat-lined for the past five (5) years, forcing the Board to absorb increased compensation and other costs at the same budget level. This should be of concern to this Committee and I urge it to work to assure that the Board receives adequate funding to pay for its vital role, including the resources to hire the best mediators.

Third, and probably most importantly, the Board's approach shows its institutional belief that when the parties approach the Board, they are not merely looking for mediation assistance, but rather they are beginning to strategize obtaining a release from mediation and to use the mediation process only because it is a necessary stop on the road to self help, rather than digging in on substance and reaching agreements.

Control of Bargaining Process

I believe that the NMB should be involved every step along the way in the parties' negotiations as we go forward into these very difficult times. There are three key aspects of collective bargaining that the mediators and Board members should focus on assuring: (1) openness: (2) looking at the contract and process as a whole and developing a strategy towards full resolution; (3) controlling the substantive progress of negotiations rather than letting the process control the timing and preventing the misuse of its process to undermine substantive bargaining.

With regard to openness, the NMB and its mediators need to instill openness and trust in the parties in setting the table for collective bargaining. At every stage of bargaining, the more that is commonly understood by the parties about each other's financial and internal circumstances and expectations, the more likely they are to be able to accommodate those concerns and make progress. This was the common positive experience of the bankruptcies. Only mistrust and suspicion can ensue from the denial of such information. The exchange of information can also relieve some of the pressure on union negotiators from dissidents and carping from outside, exacerbated by the internet.

Second, with regard to developing an overall strategy, both the parties and the Mediation Board should to keep in mind that when one section or article of an agreement is completed, a whole new negotiation does not take place on the next section, rather there is carryover between one section and another. Sections are related to each other in contract negotiations, in terms of costs, mechanics and good will. Compromises must be made for the parties to reach agreement in virtually any area.

These concessions or compromises are chits that each party remembers, holds in its pocket, for future section/article negotiations. In addition, one section builds upon another as the parties acquire the habit of coming to agreement; they learn how their initial proposals change and develop through reasoned discussion and examination of options and through willingness to compromise. Only through this process can full and complete agreements be reached. This is really the underlying dynamic of constructive negotiations, what goes on between the individuals at the table, which is reflected in successful bargaining.

Third, with regard to the "process" overtaking the substance of negotiations, the Board should be on its guard and focus on the public and parties' interest in avoiding shutdowns or intervention, and in reaching settlements. The process is often seen as the point of leverage, when each side attempts to move or manipulate the process to use its leverage against the other side. But, as noted earlier, focus on the process takes the parties' focus off of its substantive negotiations.

Nonetheless, one of the beauties of the Railway Labor Act process is that it is designed to induce the parties to come closer to agreement by allowing some use of leverage by moving through the locks and channels of the process. But the NMB must control this process with a fine hand. This is especially so where the end of the process may be a non Railway Labor Act process, namely, bankruptcy, or presidential emergency boards or congressional action. As we know, these are not unlikely. Free collective bargaining is undermined through the use of such outside forces. So the negotiating process, which is designed to dissuade the parties from an ultimate showdown under the Railway Labor Act, may actually be merely engaging in an initial stage prior to outside intervention.

However, the involvement of the Mediation Board does not necessarily mean that substantive collective bargaining ends. Nor should it mean that the parties have a license to play the process and posture so that they can be released to use their leverage in a cooling off period or in self help. The parties recognize that the use of

self help is a dagger directed both at themselves and the carrier. The carriers are still quite vulnerable and neither side wishes to invite a showdown.

Likelihood of Intervention

The creation of emergency boards before 9/11 combined with the increased federal involvement in airline safety, the threat of terrorism and the increasing dependency of the public on air travel (over two (2) million passengers per day) makes it likely that such intervention will take place. However, it should also be kept in mind that a two week strike at Northwest by its mechanics did not prompt an emergency board, nor did a pilot strike at Comair, lasting months. The ability of the carrier to keep flying and the availability of alternative capacity to provide substitute transportation, apparently are still factors in determining not to establish emergency boards.

The ambiguity of whether there will be an emergency board created is at least better than the certainty that emergency boards will be created. Certainty leads the parties to alter their bargaining behavior towards not making the concessions necessary for agreement, and, rather, to posture in bargaining and preserve initial positions in order to present what they anticipate to be its strongest demands to an emergency board. Not only is collective bargaining hampered by the anticipation of emergency boards, but the suitability of emergency boards to solving major airline disputes is limited. As Bob Harris, the former Chairman of the NMB and the leading and most experienced neutral in the area, has noted, the enormous numbers and complexity of issues and proposals in major airline disputes do not lend themselves to the time frames or practical capacities of emergency boards.

Thus the NMB's involvement should be used to enhance collective bargaining and discourage the parties from playing the card of using the NMB to get to self help, or, for that matter, to get to a long recess from mediation. This should be communicated to the parties as ineffective and counterproductive.

How then should the NMB act in these circumstances?

1. Involvement

First, I believe that it should assert its role by informal involvement at the earliest point in negotiations. This does not mean that it should invoke mediation itself nor does it mean that it should wait until one party or the other invokes mediation. Rather, the Board should be in contact with the parties, meet with the unions, management officials and negotiating committees early on in the process to discuss the process and negotiations. This would enable the Board to keep track of the process so it is not surprised if and when a party invokes mediation.

2. Training and Sharing Information

Second, it should offer training in the RLA process, in interest-based bargaining as well as traditional bargaining. It should insist on training when the parties invoke mediation and before, if it can persuade the parties. The Board should aggressively offer to work with and train both sides, labor and management, in order to make bargaining truly productive. This kind of aggressive early intervention reflects the strong public interest at stake and sets the right tone for negotiations.

As noted earlier, the Board should also encourage the parties at the earliest stages in negotiations to share information, including financial information, planning for the future, acquisitions, growth, as well as, from the union side, a sense of its priorities and needs. These pre-negotiation discussions of substance, planning and priorities are vitally important to getting both sides to understand each other's needs and to have an appreciation for the reasons for each others' positions. The combination of training and the exchange of information should produce a greater understanding of the process, the NMB's role and greater trust between the parties. To this end, the Board should encourage the exchange of confidential information and facilitate agreements for such exchange. It is recognized that when the time for ratification arrives, such information should generally be available to the members if it is a basis for the bargain. But it is perfectly appropriate to maintain confidentiality while bargaining is ongoing.

3. Mediators

Third, the Board can assign mediators to monitor "direct negotiations" on an intermittent basis so long as agreed to by the parties. This would keep the Board informed of progress, and would send a message to the parties to encourage productive negotiations.

4. Board Member Monitoring

Fourth, NMB members themselves, not only the mediators, should be informed and involved in monitoring and assisting major negotiations. They can be involved at a high level with officials of both parties as well as getting a flavor for negotiations themselves by sitting in on them at appropriate times.

5. Board Member Involvement

Fifth, during the mediation process itself, after the invocation of mediation, the NMB members should make every effort to push the parties in negotiations. Often in the past, NMB members' involvement in negotiations signaled to the parties that the end was nigh and almost encouraged posturing by both sides to either obtain a release or to show that a release was not warranted. Moreover, NMB members' involvement was seen by many as undermining mediators' effectiveness.

However, the NMB members and their mediators can make clear to the parties that this not the case. They can become facilitators for substantive negotiations rather than cardboard representatives of a hollow process to be misused by the parties, who are seeking to exert leverage. With the advent of airline emergency boards, the NMB has even more power than before to influence the parties towards settlement. This is because only the Board can arm the President with the authority to create an emergency board by notification to the President, and can impact the composition of the emergency board.

6. Interest Arbitration/Recommendations

Sixth, the NMB should work with the parties to find innovative ways to help them reach settlement. One approach is to offer new processes for resolving intractable issues. For example, in pilot and flight attendant contract negotiations there are a few sections, such as “hours of service” or “scheduling,” which are immensely time consuming and contentious. These often lead to months and even years of negotiations. Similarly, some petty issues take exceedingly long to resolve, way beyond their actual impact. These subjects frustrate the parties and lead to constant repetition of positions, miniscule movements, hostility resulting from a lack of movement, and time consumption that destroys goodwill and effective communications. The elongation of the process itself leads to changes in negotiating committees’ composition thereby losing momentum that may have been achieved previously.

The Board could offer to have either a neutral Board mediator (or private mediator or arbitrator to avoid concerns of government neutrality) more actively mediate these “intractable” issues and, if successful, other issues. If active mediation did not produce a positive result, then the Board could invite the parties to agree to a form of interest arbitration on agreed to issues. The parties could agree in advance to submit to a neutral the issues that they are unable to resolve. That resolution could be binding or it could constitute a neutral’s recommendation, depending on the parties’ preference. In any event, it would facilitate movement.

7. Time Frame

Seventh, the Board could also, set firm timelines for discussion and resolution so that the process is not contorted and lengthened to an inordinate degree by the negotiation of these complex issues – or the less significant issues that take inordinate amounts of time.

Conclusion

In conclusion, I believe that the role of the NMB should be one of active involvement in negotiations, and it should control the process to avoid calamities and to avoid the involvement of external institutions. Above all, the Board must develop the

necessary expertise about the parties' relationships and problems to propose solutions at appropriate times. Only in this way can the Board bring the parties back to free, open, and successful collective bargaining negotiations over the next several years, in what may well be very turbulent and contentious times.

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