Conant #1

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

I. NATURE OF PROCEEDINGS

This labor arbitration matter was heard by the System Board of Adjustment on July 8 and 9, 1993. The matter was scheduled to be heard pursuant to terms of the labor agreement between the Union and the Employer.

At issue in this matter is the jurisdiction of the System Board over the instant grievance, and Employer assignment of dispatch duties to non-Union represented employees based in City 1. At the hearing the parties were provided every opportunity to present their evidence and contentions. They stipulated that the matter is properly before the System Board according to the procedural requirements of the collective bargaining agreement. The Employer raised objections to the Board's assumption of jurisdiction over the grievance.

The following pages of this document identify the issues associated with this dispute, provide discussion of background facts of the case, identify the central contentions of the Union and the Employer and contract terms in dispute, and record the neutral member's discussion of the jurisdictional issue and the award of the Board.

II. THE ISSUES

(1.) Does the System Board of Adjustment have jurisdiction over the grievance?

(2.) Did the Employer violate Section I, Paragraph B, of the 1986-89 Dispatchers' Agreement by assigning dispatch duties with respect to intra-European flights to non-Union represented employees based in City 1?

(3.) If so, what is the appropriate remedy?

III. MORE PERTINENT CONTRACT TERMS

At the time the grievance originated, the applicable agreement between the parties was the 1986-89 Dispatchers' Agreement. The relevant agreement provisions are the same in the 1989-94 current agreement:

> Section I, Paragraph B: It is understood that the subject matter of this Agreement is the performance of the Flight Dispatcher function and the rendering of the customary Flight Dispatcher services to the Employer as of March 27, 1975. It is further understood that except in an emergency, the Employer will not assign to employees other than those whose work is covered by this Agreement any work which is the subject matter of this Agreement, except in a clerical capacity supportive of the Dispatchers' functions, including employees classified as General Dispatch Clerks. The provisions of this paragraph notwithstanding, the Employer may change present methods and procedures, or may implement such new or improved technology as it considers appropriate.
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> Section II, Paragraph A: The term "Flight Dispatcher" as used herein shall mean an employee who holds a currently effective Aircraft Dispatcher's Certificate and who is assigned at a Dispatch Center to be in charge of and responsible for the dispatching activities within a prescribed area or on assigned routes during his tour of duty. Such dispatching activities include, but are not limited to, the responsibilities and duties of an Aircraft Dispatcher as required by Federal Air Regulations #121. An employee shall have served at least six (6) months in a Dispatch Center of the Employer prior to becoming eligible for assignment as a Flight Dispatcher.
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> Section 13, Paragraph D: (Management Rights)
> Unless it is otherwise expressly provided in this Agreement it is understood and agreed that the Employer retains final authority over hiring, resignation, promotion to positions not covered by this Agreement, discharge, discipline, and efficiency of employees,

provided that employees will not be discriminated against because of their Union membership or activities. It is further understood and agreed that the routes to be flown; the equipment to be used; the location of the plants, hangars, facilities, stations, and offices; the scheduling of airplanes, the scheduling of overhaul, repair and servicing of equipment, the methods to be followed in the overhaul, repair and servicing of equipment, are the sole and exclusive responsibility of the Employer.

IV. BACKGROUND FACT SUMMARY

The Employer operates flights to and from approximately 165 places in its national and international route system. Dispatchers employed by the Employer have Union representation. The Union was certified to represent Dispatchers by the National Mediation Board on February 16, 1972.

In negotiations that produced the first agreement between the parties, signed in March, 1975, the parties negotiated the "scope provision," Section I, Paragraph B of the Agreement. This provision is printed in its entirety at page 3 of this document. As terms of the provision make clear, the terms provide that the Employer will not assign work of Dispatchers to employees who are not represented by the Union and are not covered by the agreement, except in emergencies. The terms of Section I, Paragraph B have remained unchanged in the labor agreements since 1975.

In the decade of the 1980's the Employer began to expand international operations and this expansion continued into the present decade. In early April, 1991 the Employer acquired the City 1 routes of Airline 1, including approximately seventeen different flights that service exclusively intra-European destinations.

In addition to the Airline 1 routes, the Employer also elected to hire and retain a large number of former Airline 1 employees who were City 1 based. Included among these persons were some six persons who had been flight dispatchers for Airline 1 for City 1 routes of that air line. When

the Employer began intra-European service in April, 1991, operational control of those flights was assigned to the City 1-based dispatchers, the once Airline 1 employees, who now worked for the Employer and were represented by another union that the Employer was required to recognize and negotiate with under terms of British Law.

Shortly after the Employer activated the City 1 Dispatch Center utilizing dispatchers not covered by the Agreement, the Union filed a grievance. The essential contention of the grievance was that the Employer violated Section I, Paragraph B of the Agreement when it assigned dispatch authority and work of intra-European operations to and from City 1 to employees not covered by the Agreement. The grievance was processed through all grievance steps required by the labor agreement. Discussions did not resolve the dispute. The matter was then referred to this System Board of Adjustment for hearing and determination.

V. POSITION OF THE UNION

The principal contentions of the Union can be summarized as follows:

The Employer has violated the Agreement because it has assigned dispatcher work to employees who are not covered by terms of the Agreement. Section I, Paragraph B clearly states that such assignment is prohibited. The language does not allow for or permit exceptions, except for emergencies.

The Board should dismiss the Employer's contentions about lack of Board jurisdiction and move on to determine the merits of the case. The Board has jurisdiction over contract interpretation disputes such as this dispute. The Employer position regarding jurisdiction would have the System Board determine legal issues which are not within the authority of the Board. The Employer contends that the Union is asking to be assigned City 1 work but this is not the Union

position. And the Union does not seek to represent City 1 employees. The Union only seeks a Board determination that the Employer comply with the terms of the Agreement. The result would be that the work in question would be done from the Employer's central dispatch center in City 2.

Dispatchers in City 2 can and have performed the work of dispatching for flights all over the world. The technology of communications permits this. The Employer confirms that the work can be done from City 2 and does not deny this fact. This is not a case where technological necessity compels that dispatcher work be done outside the country. The Employer case focuses on the location where the work is performed and not on the work itself. This approach is not in keeping with the terms of the unambiguous agreement.

The Union also contends that Employer arguments linked to bargaining history and operational history do not favor the Employer case. The Employer argues that because the routes in Europe were not operated when the scope clause was negotiated in 1975, then the clause can have no contemporary effect on foreign operations. A similar argument is that because Union personnel allegedly have not dispatched overseas flights consistently, then Union personnel are not required for those tasks for contemporary intra-European flights. The Union believes that when the System Board reviews the relevant evidence, then the Board will determine that evidence does not support these assertions of the Employer. Agreement covered dispatchers have dispatched flights to other countries since even before the 1974-75 Agreement. Also, according to the Union, bargaining and Board history show that there have been almost no flights dispatched in the past without use of dispatchers covered by the Agreement. The Union has consistently grieved offending instances and in not one instance has a grievance been denied before current disputes developed.

Because the Union believes the Board must exert case jurisdiction; because the Union has the contractual merits; and because the work is not itself foreign necessarily as the Employer concedes, the Union asks that the Board find for the Union on all issues.

The result should be that the System Board of Adjustment would direct that the work in question be performed by Agreement covered employees and grant a compensatory wage claim. That claim would make Agreement covered employees whole for the wage value of the time spent by non-Agreement covered employees performing dispatch duties.

VI. POSITION OF THE EMPLOYER

The position of the Employer is defined in these principal points:

The Employer contends, first, that the System Board has no jurisdiction or authority to hear and determine this case because the case involves only employees and their work that is performed entirely within Europe. The City 1 based Employer dispatchers are foreign employees that dispatch flights from City 1 to European cities. The Union Dispatchers' Agreement does not cover flight dispatch work performed outside the United States. The Agreement has its sources in the labor relations legal framework established by the Railway Labor Act. The System Board of Adjustment is created by the labor Agreement. The Railway Labor Act does not apply to work done by foreign employees of a carrier for flights that are entirely intra-European in nature. The Board should, accordingly, rule that it has no jurisdiction and authority over the instant grievance. In doing so, the Board would deny the grievance and acknowledge the consistent rulings of the courts: that the Railway Labor Act does not apply to entirely intra-European flights and operations of an air carrier.

If the System Board should reach the merits this is the Employer position: The bargaining history of the scope provision indicates that it was not and could not have been intended to cover foreign work and operations. Evidence shows that the Union negotiator asked for and did not obtain foreign coverage; the clause was only to cover dispatcher work up to March, 1975 as the clause indicates; no foreign flights operated at that time; the Union has attempted to negotiate foreign work into the scope clause in subsequent negotiations without success. The consequence is that the Board must conclude from the evidence that the parties never included foreign, intra-Europe work in Agreement coverage.

Additionally, the Employer stresses that the focus of this case is not dispatcher work for flights from the United States to overseas nations. The focus is entirely upon intra-continental work in a foreign continent to and from foreign nations. None of the flights involved depart or return to the United States. The work was never done in the United States by Union dispatchers. It has always been done by foreign nationals operating with entirely foreign destination aircraft. Because of these relationships the Employer contends that the Union has no contractual rationale for claiming the work. The work was formerly the work of British dispatchers employed by Airline 1. They continue to do the work now in the employ of the Employer. These dispatchers do not work "in commerce" as that term is defined in the Railway Labor Act for domestic labor relations.

The Employer states that there are genuine reasons for business effectiveness for employing the dispatchers in Britain. It is true that City 2 dispatchers could perform the-work from the standpoint of technical feasibility. But, according to the Employer, safety, reliability and worker experience factors dictate a choice to employ on-site dispatchers in City 1. The area weather conditions require more coordination between crews and dispatchers. European air traffic control

is complex and boundaries change quickly. City 1 dispatchers are familiar with these features and are experienced in the environment. The Employer also points out that the Agreement provides the management with rights to make choices of operations assignments for the effectiveness of the mission.

For these principal reasons the Employer asks that the System Board, if it gets to the merits of the case, deny the grievance because merits of the contract interpretation case so much favor the employer.

VII. DISCUSSION OF NEUTRAL BOARD MEMBER

The threshold issue regarding System Board jurisdiction must be considered first.

The neutral Board member understands fully the Union's well explained position in this matter. A central premise of that position is that the disputed work is not foreign work of necessity. Modern communications technology would permit that the work be done in the United States. Accordingly, the Union urges that the Board rule that the Board has jurisdiction over this matter principally for this reason.

The Employer, however, has made a convincing case for the proposition that the Board has no jurisdiction because the disputed operations are foreign, and the Railway Labor Act does not extend to cover entirely foreign operations of a United States air carrier. Related propositions are that the Railway Labor Act (RLA) coverage is for labor relations and bargaining of parties engaged in inter-state commerce. Authorities, including the courts in other air lines cases, have determined that the definition of "commerce" does not extend to purely foreign operations of an airline when those operations originate and take place entirely in foreign territories. The

Employer cites detailed provisions of RLA and cites court decisions relevant at pp. 17-19 of its document, "Statement of Position" presented to this Board.

In the case before the Board the facts are that the Employer employs foreign employees at a City 1 base. They perform dispatching work for aircraft that operate within Europe. The work has always before been done by these foreign employees without important exception. The work has not been done by Union employees to a significant extent.

The nature of these facts leads directly to a conclusion that the disputed work and employment of this case is not covered by the United States RLA for domestic labor relations. The work involved would not appear to fit under any definition of "commerce" as authorities have defined "inter-state commerce" including extensions of definition to "foreign commerce."

Because of this, this System Board can have no jurisdiction over this grievance dispute that has origins in foreign work. The parties, who bargain under the legal framework created for the RLA, cannot bargain an agreement that has the effect of extending jurisdiction of the Act to foreign commerce as we have described it.

The contractual grievance procedure bargained by the parties can not have the same effect of assuming extension of the jurisdiction of RLA to such foreign matters. And the System Board, which is established by the Agreement and the grievance procedure, also has no authority and jurisdiction to hear and decide a grievance that has origins in foreign operations not in "commerce."

VIII. AWARD

The System Board of Adjustment does not have jurisdiction over the grievance. The merits will not be determined for that reason.

DISSENTING OPINION

Rarely does the Union enter into the record a dissenting opinion of an Award made by the System Board of Adjustment. The reason for that is that the Union has placed its faith in the System Board to resolve contract disputes between Employer and our organization. Unfortunately, this System Board has chosen to ignore its responsibility to our contract and claims a lack of jurisdiction over the issue. This ill-conceived majority opinion affects not only the instant case, but future dealings with the Board as well.

The Board erred in its ruling when it refused to interpret the collective bargaining agreement and instead purported to interpret the law. In the spirit of "render unto Caesar the things that are Caesar's", the Board should leave to the courts those issues belonging to the courts. To do otherwise allows the Board to assume authority not granted it by either the courts or our Agreement. This is most glaring when one recognizes that not one person sitting on this System Board is schooled or practiced in the discipline of law.

A pivotal feature of the appeal to the System Board was the Agreement language adopted by the parties. That language is what extended coverage to all employees. The System Board failed to consider what the parties had agreed to. Indeed, the Board failed to list anywhere in its decision the Union's question at issue. A reading of that question would identify the essence of the case: did the Employer agree with the Union that it would not assign Dispatch work to other Employer employees? Yet, the Award refuses to address the merits of the grievance. It speaks only to the Board's interpretation of federal law; an interpretation it is not qualified or authorized to make.

The question of Arbitrators' authority has been discussed in the past, usually by Arbitrators themselves. Arbitrator Bernard D. Meltzer spoke of this issue before a meeting of the National Academy of Arbitrators in 1967. He noted that arbitrators should respect "the agreement that is

the source of their authority and should leave to the courts or other official tribunals the determination of whether the agreement contravenes a higher court.[i]"

This opinion is shared by others in the field. Arbitrator Richard Mittenthal wrote that since arbitration is a private forum for dispute resolution, arbitrators "should not be asked to assume public responsibilities and to do the work of public agencies.[ii]" Others have raised the concern of eroding the purpose of a private process by Boards becoming interpreters of law.

While it is inappropriate for the Board to interpret the law instead of the contract, it is even clearly unlawful for the Board to refuse to interpret the Agreement. The Railway Labor Act requires carriers and labor organizations to establish System Boards to resolve "minor disputes." 45 U.S.C. §184. If this Board does not have the jurisdiction to resolve this minor dispute, the parties have failed to meet their statutory mandate. If, on the other hand, the Employer contends that this is not a minor dispute, then presumably the Employer will not object if the Union enforces its contract in federal court.

Compounding the problem is the fact that the Board reached its opinion on faulty facts. The premise the Neutral used to explain his decision was that all the flights originated and terminated outside the borders of the United States of America. That is incorrect and was testified to by both Union and Employer witnesses. He further states that "The parties, who bargain under the legal framework created for the RLA, cannot bargain an agreement that has the effect of extending jurisdiction of the Act to foreign commerce as we have described it." There is no basis in fact for that position. Even the court cases submitted by the Employer did not reach the conclusion that the parties could not bargain over the issue of foreign work.

1. Air Line Stewards & Stewardesses Ass'n Intl' v. Trans World Airways, 272 F. 2d 69 (2nd Cir. 1959). This case did not involve the interpretation or application of existing agreement language between the parties. The court refused to force TWA to bargain over foreign nationals since there was no previous agreement calling for such bargaining.

2. Air Line Stewards & Stewardesses Ass'n Int'l v. Northwest

Airlines, Inc. 267 F. 2d 170 (8th Cir. 1959). In this case the parties had submitted a grievance to the System Board of Adjustment concerning foreign employees. No argument was raised that the Board lacked jurisdiction. In fact, the Board found in favor of the Union and determined a contract violation. The parties then requested the Board to determine how foreign nationals could be employed by the Employer. The Board's Award in fact amended the existing agreement. It was that Award that was challenged in court and upheld.

3. Air Line Dispatchers Ass'n v. NMB, 189 F.2 685 (D.C. Cir. 1951). This case did not address existing agreement language. Rather, it was a representation petition.

4. IUFA v. Airline 1, 132 LRRM 2520 (N.D. Cal. 1989). The court, in ruling that it could not compel the arbitration of the issue of foreign work, noted "the RLA does not prohibit recognition of a union representing employees in foreign operations."

These, and other court decisions, agree that indeed parties can bargain an agreement that covers employees in foreign countries, even if the Employer had no obligation under the RLA to bargain with the Union about such work.

It is left up to the System Board of Adjustment to determine whether such an agreement exists. Unfortunately, this Board has shirked that responsibility.

The misapplication of legal issues in this case gives the Union concern for the future. Are we now to be at the mercy of the advocate carrying the greatest number of 'court cases into the hearing room? Must we turn over our System Board to lawyers and legal eagles and forget about contract language and the intent of the parties in reaching agreements?

The Board has not assisted the parties in resolving this dispute. Rather, it has set the stage for even more problems between the parties in the future.

Respectfully submitted,

The Union

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[i] 1. Meltzer, "Ruminations About Ideology, Law, and Labor Arbitration", The Arbitrator, the NLRB, and the Courts (The Bureau of National Affairs, Inc., 1967).

[ii] 2. Mittenthal, "The Role of Law in Arbitration", Developments in American and Foreign Arbitration (The Bureau of National Affairs, Inc., 1968).