

Grievances 101: The Legal Foundation

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Editor's note: For many years, ALPA has held an annual Grievance Training Seminar for members who serve on their MEC's Grievance Committee or System Board. The most recent Seminar, held Nov. 7-8, 2007, in ALPA's Herndon, Va., Conference Center, which 46 pilots from 18 ALPA pilot groups attended, included presentations by several of the most experienced attorneys from ALPA's Representation and Legal Departments.

This year, the "Strength in Unity" column will feature those presentations as a primer on what every pilot should know about the grievance process.

The first in this series of columns looks at the legal foundation of the grievance process that applies to airline pilots.

The fundamental role of a labor union is to represent the collective interests and rights of its members. The union brings the "strength in unity" of its members to the bargaining table to negotiate a collective bargaining agreement (CBA, the agreement, or the contract), a legally binding document that sets out the rates of pay, rules, and working conditions for employees represented by the union. The role of ALPA, however, does not end with the signing of the new CBA. An equally significant aspect of ALPA representation of its members is policing, monitoring, and enforcing the agreement. Ultimately, the contract is only as good as the union's willingness and ability to defend and enforce it.

Enforcement of ALPA contracts is the responsibility of each

MEC with the assistance of the contract administrators and attorneys in ALPA's Representation and Legal Departments.

ALPA has always placed a high priority on contract enforcement and has devoted substantial staff and other resources to it. The importance of this function appears, however, to have become even more important in recent years. As a result of bankruptcies, concessionary contracts, and the restructuring of the airline industry generally, airline managements are now, more than ever, attempting to squeeze as many dollars as they can from pilot contracts, and will sharpshoot provisions in an ALPA contract wherever they can.

Airline managements love to sharpshoot every provision in the contract; ALPA's job is to stop them from doing so.

The vehicle for enforcing CBAs in the airline industry is the grievance process. A grievance is a formal method for either the Association or an individual pilot to contest *an action taken by or an omission on the part of management.*

Railway Labor Act

Labor-management relations in the U.S. airline industry have been governed since 1936 by the Railway Labor Act. Section 204 of the RLA provides, in part, "disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions...shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred...to an appropriate adjustment board." Language similar to this section of the RLA appears in most ALPA agreements.

Similarly, Section 57 of the Canada Labour Code provides, in part, "(1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or employees bound by the collective agreement, concerning its interpretation, application, administration, or alleged contravention."

Thus both the Railway Labor Act and the Canada Labour Code require that disputes between airline employees and management

ment arising out of “interpretation or application” or “administration” of *agreements* be resolved through the grievance process. Both U.S. and Canadian federal law mandate this process as the *exclusive* legal manner for handling disputes involving application or interpretation of the CBA. Neither unions nor managements may go to the courts to resolve disputes concerning the application or interpretation of CBAs.”

Major vs. minor disputes

Federal case law under the RLA draws a distinction between disputes over the formation of CBAs and disputes over the interpretation or application of existing agreements. The courts thus distinguish between what have been labeled “major” and “minor” disputes.

“Major” vs. “minor” has nothing to do with, and should *not* be confused with, the importance or significance of the case. The terms have to do with the legal jurisdiction of the case. A *major* dispute is a dispute over the formation of the CBA, i.e., a dispute involving efforts to establish or change rates of pay, rules, and working conditions. Such disputes are governed by RLA bargaining procedures. A *minor* dispute, on the other hand, occurs when a CBA already exists and a dispute has arisen out of interpretation or application of the contract.

The U.S. Supreme Court has ruled, in *Consolidated Rail Corporation v. Railway Labor Executives Association*, that when management asserts a right to take an action contested by the union, the dispute is “minor” if the action is “arguably justified” by the terms of the collective bargaining agreement. On the other hand, if management’s contractual justification for its action is “frivolous or obviously insubstantial,” it is a major dispute—really an attempt to change the terms of the contract. The Supreme Court confirmed in this case that the exclusive legal avenue for deciding minor disputes is the grievance process. The Court also found that managements have a “relatively light” burden to meet this “arguably justified” test.

One important lesson from this case

is that the federal courts are predisposed to view cases involving pilot contract issues as minor disputes that must be heard in the contractual grievance process rather than in the federal courts.

Because minor disputes or grievances involve disputes over interpretation or application of a term of the CBA, it follows that grievances under the RLA can arise only when a collective bargaining agreement is in place. Employees without a union and without a CBA have no right to file a grievance. No in-



Bill Roberts, assistant director of ALPA's Representation Department, addresses the annual Grievance Training Seminar.

dependent legal right to file a grievance exists. Grievances under the RLA cannot exist without a contract because a grievance is a dispute over a provision of a contract. A grievance therefore must always be based on some express or implied term of the contract. Even in disciplinary cases, the “just cause” standard is expressed or implied in the contract.

A management action that is *not* subject to the grievance procedure *may*, however, be the subject of other legal action. Examples would include violations of federal or state law regarding civil rights or pension rights. In those cases, the dispute is over a violation or compliance with the federal or state law and not over the terms of the collective bargaining agreement. In such cases, the employee or the union is not required to resolve the case through the grievance procedure, but

either may have a right to proceed in the appropriate federal or state court.

Discipline vs. contract violation

Grievances fall into two main categories—disciplinary and contract violations.

A disciplinary grievance is a grievance that contests disciplinary action that management has taken against an employee. The discipline may take the form of an oral or written warning or reprimand, demotion, suspension, discharge, or deprivation of some benefit (e.g., loss of pass privileges).

A contract grievance is a grievance that alleges a contract violation based on a management act or omission. It involves interpretation, application, or implementation of a term of the contract. If a group of pilots is affected by management’s action, a group grievance covering all affected pilots may be filed.

Components of a grievance

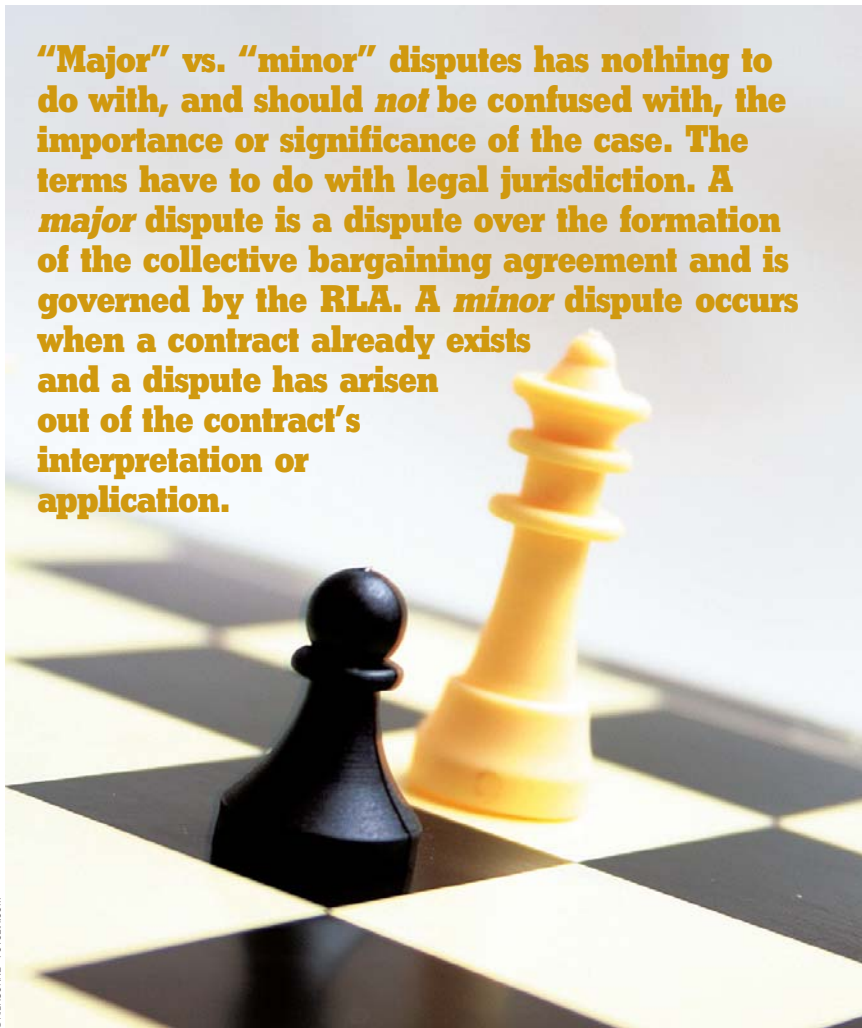
In analyzing and evaluating grievances, there are three components to examine—the merits of the case, the procedural aspects of the case, and the remedy to be sought.

The “merits” refer to the underlying dispute between the parties—i.e., did management violate the contract or have just cause for discipline? Can the union establish that management violated the contract?

Procedural issues have to do with whether the case was processed in accordance with the requirements of the contract. Procedural issues can determine the outcome of the grievance even before getting to the merits. For example, was the grievance filed by the deadline for doing so? Was the pilot provided with charges as required by the contract in a disciplinary case? Did management issue a grievance decision in a timely fashion? Did management use material that should have been removed from the pilot’s file?

The remedy involves the appropriate remedial or corrective action if the violation of the contract is proven. A significant issue regarding the remedy is whether the remedy be applied retro-

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actively, or will it be applied only in the future?

If the pilot(s) or ALPA suffered a loss or identifiable damages in a contract violation or disciplinary case, retroactive application of the remedy is appropriate. An example of a retroactive remedy would be back pay in a case involving the suspension of a pilot or additional pay when the company has not properly compensated a pilot in, for example, a premium pay situation. This is often referred to as a “make whole” remedy because the pilot is being made whole or put in the position he or she would have been in had management not violated the pilot’s rights under the contract. In other cases, the most appropriate remedy is prospective or looking forward. A prospective remedy often is sought when management has violated the contract but identifying specific damages or loss to the employee is difficult or impossible. A typical prospective rem-

edy would be a “cease and desist” order in which an arbitrator directs management to cease and desist from a specific action in the future. For example, if a management fails to issue monthly schedules by the contractual deadline, identifying specific damages suffered by anyone might be difficult. The remedy in such a case might be an arbitrator’s order to management to meet the deadline in the future. In some cases, both a retroactive and a prospective remedy are appropriate.

The union must establish what the specific damages are and who is affected by the violation—specific individuals, a group, and/or the union. The remedy is normally compensatory damages, or “make whole.” Arbitrators normally will not grant punitive damages or interest on a monetary award unless the arbitrator is convinced that management repeatedly or intentionally violated the union’s contract.

Burden of proof

Another concept that is useful to understand in evaluating and considering grievances is the concept of burden of proof. Burden of proof refers to which party has the risk of losing if it cannot successfully prove its case. Who has the legal obligation to prove its case? Think about the iconic image of blindfolded Lady Justice holding the scales. If the scales (evidence) are perfectly balanced at the end of the case, the party with “the burden of proof” loses, so that party must “carry its burden” to prevail.

The burden of proof is different in different types of grievance cases:

In a *disciplinary* case, *management* has the burden of proof, and must establish that discipline imposed was for “just cause.” Management must establish two elements to carry its burden of proof in a discipline case: First, it must show that the pilot committed the act or omission that he/she has been charged with and that such action violated a rule or policy. Second, management must establish that the discipline imposed was appropriate to the misconduct.

In a *contract violation* case, *ALPA* has the burden of proof. ALPA must prove that management’s action violated or failed to conform to the contract. The union must establish the damages and/or an appropriate remedy.

And what is the “standard of proof”? How much proof is *required*? The standard of proof is *not* “proof beyond reasonable doubt.” That familiar phrase is applicable only in criminal cases.

In a contract violation grievance, ALPA must prove its case by “preponderance of evidence” or establishing that the Association’s claim is “more probable than not.”

In disciplinary cases, a greater amount of proof or a higher standard of proof is usually required: Management must prove its case, that it had “just cause” to discipline the employee by “clear and convincing” evidence. 🗳️

Next month: *Inside the grievance process.*