BEFORE THE PRESIDENT'S COMMISSION ON THE UNITED STATES POSTAL SERVICE

Testimony of

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Chairs Pearce and Johnson and Members of the Commission:

I have been teaching and writing about labor relations, as well as involved in the resolution of labor disputes since 1961.[1] I appreciate the invitation to appear before you, and am pleased to share with you my thoughts as you seek to aid the Postal Service to function more efficiently in the face of the massive technological and competitive challenges it faces in the 21st century.

I begin by declaring my categorical opposition to all proposals to substitute either a Railway Labor Act approach or a National Labor Relations Act approach for the existing interest arbitration approach for the resolution of collective bargaining disputes. I understand, appreciate, and agree with what I take to be the philosophy underlying the suggestions for change - that issues dividing union and management should be resolved by them, not by a third party who is ultimately accountable only to his own professional conscience for the content of his decisions.

Both the Railway Labor Act and the NLRA free union and management to engage in strikes and lockouts to resolve their disputes, rather than turn those disputes

[1] See Attachment A - Resume of Prof. Stephen B. Goldberg.

over to a third-party arbitrator, and that model has, in general, worked well to achieve a measure of economic justice for both workers and their employers. If that model could realistically be applied to the Postal Service, I would support it.

As a practical matter, however, neither the Railway Labor Act model nor the NLRA model can be applied to the Postal Service because neither Congress nor the American public would long tolerate a strike or lockout that shut down mail delivery. Thus, collective bargaining disputes in the Postal Service will inevitably be resolved by third-party intervention, and the real question before this Commission is whether the nature of that intervention should be determined on a case-by-case basis, as is the case when nation-wide disputes fall under the Railway Labor Act or the NLRA, or whether the nature of the third-party intervention for Postal Service collective bargaining disputes should be tailor-made for this unique organization.

Congress chose a tailor-made approach in the Postal Reorganization Act of 1970, and I think that was a wise choice. Hence, I would retain the essence of the current interest arbitration procedure, while at the same time maximizing the responsibility of the Postal Service and its unions for their collective bargaining agreements, and minimizing the likelihood and the extent of arbitral influence.

I would accomplish these goals by making two, perhaps three, modifications to the existing statutory scheme. Initially, as others have suggested, I would replace voluntary fact-finding with mandatory mediation. Fact-finding is based on the theory that either the parties need assistance in determining the facts surrounding their dispute, which is almost never true, or that the finding and publication of "facts" by the neutral will bring pressure on one side or the other to settle in accordance with those "facts".

The latter may be true in some situations, but I suggest to you that the published views of one expert or another that are inconsistent with the deeply held views of the U.S. Postal Service or any of its large unions are unlikely to lead either to abandon its position and settle as the fact-finder suggests. In the context of the U.S Postal Service, I suggest that fact-finding is likely to be useful in resolving collective-bargaining disputes only when the fact-finder serves as a mediator - and if the fact-finder is to be a mediator, let's call him that. And, since mediation is a useful means of encouraging the Postal Service and its unions to take the responsibility of resolving their own disputes, rather than sending those disputes to an arbitrator, let's make mediation required, rather than optional.

The next question is whether, in the event mediation is not successful in resolving all issues, and the matter must go on to arbitration, the same neutral should serve as both mediator and arbitrator. The advantages of having the same neutral serve in both roles - often referred to as "med-arb" - are two: (1) The neutral, because of his

ultimate decisional authority, can, by hinting how he would exercise that authority, bring pressure on the parties to resolve many issues at the mediation stage; (2) Because the neutral will know the parties' ultimate positions on those issues that are not resolved in mediation, the parties cannot retreat to their pre-mediation positions in arbitration, as they can when a different person serves as arbitrator. The result of this change should be to reduce the number of issues that go to arbitration, and to lessen the diffference between the parties on those issues. This, too, would reduce the breadth of the arbitrator's discretion.

While I tend to be favorable towards this proposal, because of its promise of increasing the role of the parties in determining the terms of the collective bargaining contract, I must acknowledge one nagging concern. If the same neutral is to serve as both mediator and arbitrator, the parties may be less willing, at the mediation stage, to reveal what their high, medium, and low priorities are for fear that if they don't get a deal in mediation, the mediator turned arbitrator will use that information against them. Since one of the keys to successful mediation is the parties' willingness to be candid with the mediator, a diminution in that candor could have negative consequences for the success of mediation.

If mediation does not lead to a negotiated agreement, and the parties must proceed to arbitration, I would provide them with one final opportunity - after the arbitrator has issued a tentative award - to negotiate in whole or in part a substitute for that award. No substitution would be valid unless both parties agreed to it - which makes this "no risk" negotiations for both - but it would provide each with one final opportunity, against the background of a known alternative, to substitute mutual agreement for the arbitrator's decision. Negotiators often turn down a proposed compromise in the misguided hope that they will do better in front of the arbitrator, but under the scheme I suggest there would no longer be room for false hope. The parties would be negotiating against a known alternative, and each would have one last chance, in the face of that alternative, to negotiate an agreed-upon deal in lieu of the arbitrator's award.[2]

In sum, then, I would retain the core of the existing Postal Reorganization Act procedure for the resolution of collective bargaining disputes, but would modify that procedure so as to maximize the likelihood that the Postal Service and its unions would negotiate their own terms and conditions of employment, and to minimize the likelihood and extent of arbitral intervention.

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[2] See Attachment B - Goldberg, A Modest Proposal for Better Integrating Collective Bargaining and Interest Arbitration , The Labor Lawyer, Vol. 18, No. 2 (Winter/Spring 2003).