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Discussion - Session One

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DISCUSSION — SESSION ONE

The comments made by the speakers are their own personal remarks and do not necessarily represent the official view of any organization or agency they represent.

MR. MARK KAHN: Regarding the problem of jurisdiction in Professor Kroner's paper, so ably summarized just now, I would like to mention that I recently had a most interesting experience serving as a referee on an ad hoc seven-man board of adjustment: Two people named by the Air Line Pilots Association, two people named by the Flight Engineers International Association and two people appointed by Pan American. All three parties joined in giving jurisdiction to this "special board of adjustment" under a three-way agreement among them. After being unable to figure out any other method for casting votes, given the composition of the board, they decided (perhaps reluctantly) that the referee would have the sole vote. Now, this board did function as a board, and in this extremely complex case I benefited greatly from our two executive sessions. This benefit reflected the high quality of the partisan appointees to this board. I have no opinion on whether the award is immune to challenge. I will leave that to my attorney colleagues. But there is here, I think, an example of a situation where all three parties recognized the desirability of one final disposition of the problem. Just one other comment at this time. John Hill misunderstood me if he thought I said that most airline grievance cases go to arbitration. I did not mean that at all. I simply meant that there has been a tendency for more cases to go to arbitration than ought to go to arbitration. The data I have seen indicate this. About 250 arbitrations took place in the airline industry, according to an Air Transport Association estimate for the year 1963. Do we have later data, John?

MR. JOHN HILL: No.

MR. KAHN: At GM, which is an extreme case, one one-hundredth of one percent of the written grievances initiated in 1968 went to the GM-UAW umpire. The parties are really the only ones who can determine to what extent the grievance procedure can be reshaped to keep us "outsiders" as much as possible from messing up your affairs.

MR. ASHER SCHWARTZ: Mark Kahn asked for the use of standard forms, and I really think that is completely unnecessary. I have seen it at work in the airlines and I find that the result is that the use of the forms in the hands of laymen makes the proceedings far more technical than the old English common law procedures. They get all tied up in technicalities, which is just silly and wastes a lot of time. Ultimately an arbitrator forgets about these technicalities and decides the issue on its merits, but I think it is diverting the attention of the parties when we use forms like that. My own experience in non-airline disputes and non-railroad disputes is that we get along beautifully simply by sending a simple letter stating in a couple of sentences that we have a grievance concerning such and such, and we would like to have a hearing before an arbitrator. Then we go about selecting an arbitrator. When we get to the arbitrator, we tell him in more detail just what the dispute is about. It is more expeditious, it is less costly and I think it results in a fairer disposition. Mark talked about the cost of the board. I did not mention it because I think that it is something that has to be borne. But the fact is that from a union point of view, boards of adjustment cost an awful lot of money. There is lost-time payment to the members of the board and to witnesses as well as the cost of counsel. There is travel for counsel and some of the non-employee participants. And it means travel to a central point where the board sits. So many of these cases do not warrant, from an economic point of view, the submission to that kind of cost which is, of course, unjust to the

grievant if he has a legitimate grievance. John Hill touched on a point which I might have elaborated on before if I had had the time. He believed that the attributes of the *Chicago River* case to which I pointed were broader than is true. The *Chicago River* case does not preclude a union from making demands which amount to demands for changes as to which dispute would be a major dispute, subject to the procedures of the Railway Labor Act. The fact is that the distinction between a major dispute and a minor dispute is a very difficult one to make. I have not seen it made constructively in any decision. I know what the words of the judges are, but when you apply them you find, at least from where I sit, that if the employer causes, or to put it the other way, if the union proposes something that is different from what the agreement says or if there's nothing in the agreement about it, then the carrier's refusal to comply with the union's request constitutes a major dispute. The status quo must be maintained without any change until a "section 6 notice" is served and the various procedures of mediation under the Railroad Labor Act have been followed, which can take months or even years. In the meantime, there is no change. On the other hand, if the carrier makes a change in the same connection and the union says, "That isn't what the contract says" or "there isn't anything in the contract about it," the carrier's reply is: "We have the right to do it if it's not in the contract, management's prerogative gives us that right." "If you say that the contract says that we can't do it then you're posing a question of the interpretation of the contract, and that's a minor dispute. So you've got to present a grievance." In the meantime the change which the carrier makes goes into effect. And it remains in effect pending the grievance procedure which also can take a year or two. I don't know precisely what the answer is and maybe there is not any. John Hill suggests management does have to make some decisions. But I did suggest toward the end of my remarks that if the result creates a real and honest inequity and the delay is costly to the employees, I think that either by voluntary action between the parties, or, if it cannot happen voluntarily, at the request of counsel equitable treatment would require that the court determine whether or not the status quo should be maintained. It may well be that in many cases it should not be maintained. But as John Hill points out, some of the courts have said that in no case will they maintain the status quo—except for the Second Circuit in the *Westchester Lodge* case which I think is a correct one. Some day, of course, the Supreme Court will have to rule on that. Professor Kroner talked about jurisdictional disputes. I did not think that was going to be a subject, but I just have to make this remark. He talked about the *Telegrapher's* decision and then referred to the disputes between ALPA and FEIA concerning flight engineers. I just want to bring to your attention that the *Telegrapher's* decision was a question of work jurisdiction; that is, the employees of the railroad represented by one union wanted to take work or have work assigned to them which was being performed by other employees of the same railroad represented by another union. Furthermore, the *Telegrapher's* case was within the jurisdiction of the National Railroad Adjustment Board which, as you know, has members on it who are designated by all the unions concerned. In the *ALPA-FEIA* case you do not have a National Railroad Adjustment Board; you have separate system boards appointed by the carriers and the unions separately. Furthermore, it was really a question as to who would represent the flight engineers' position. That is what it ultimately came down to because while the pilots (ALPA) did contend initially that the flight engineer's job ought to be performed by a pilot, they soon agreed that what they really wanted was pilot qualifications and therefore, if the flight engineers who were then working for the airline had pilot qualifications they would be satisfied that they were qualified to sit in the seat. When a settlement was reached whereby the flight engineers did obtain pilot qualifications, there was no question of work jurisdiction. The only question that was left was one of representation, which was decided in an entirely different forum altogether.

MR. KAHN: I have one short comment on this business of the standard form. As an arbitrator, I could not care less, at the time the case comes to me, whether the original grievance was on a standard form. I like to have a clear submission so that I know what the issues are that have to be decided, but even this is not necessary because they can be identified at the hearing. If I understood Asher correctly, the letter he described was the one he writes when he asks for arbitration after the prior grievance procedure has been exhausted. I think the standard form is an educational device in which the grievant explains: "On a particular date, when I was doing my job in this classification and the foreman assigned me to do something rather specific, I claim that he was asking me to perform an assignment outside the scope of my job and I want this cleared up." Now that kind of specific statement of what happened—where, when, who did what to the grievant—helps to get the grievance procedure off to a good start and makes it more likely that the matter will be settled in the lower steps. That's the point I had in mind.

MR. ARTHUR WISEHART: I would like to make a general comment to the panel members at large. It seems to me, after hearing a number of very excellent papers, that one aspect may have been over-simplified. And that is the question of delay in adjustment board proceedings. As John Hill correctly pointed out, the extent of delay varies from carrier to carrier and depends upon the particular procedures that may be followed in individual cases. But I feel that the so-called problem that has been alluded to by most of the panel members has been exaggerated. Of course, justice delayed may be justice denied. However, in assessing responsibility, it is important to recognize that in the typical grievance case it is the union that is the moving party and has almost complete control over the speed with which that case progresses through the procedure. This is exemplified by the provisions in a couple of contracts American Airlines has. One is with the Stewardesses Union and the other is with the Transport Workers Union. In them the question of expedited hearings is directly referred to, and it's indicated in the contracts that in a case which the union regards to be of sufficient urgency, a hearing can be brought on in fifteen days at its request. Thus, in those cases where there is a matter of great interest in expediting the hearing, it can be brought on. I happen to feel rather strongly about this point because we were in the anomalous position of having been sued by a union, recently, in a case alleging that the company had inordinately delayed the handling and processing of the grievances and that equitable relief should be granted. The fact of the matter was that the grievances were pending but the union failed to process them expeditiously. The company did not like to be sued and it did not like to be charged with an inordinate delay, and it was doing everything possible to expedite the handling of those grievances. But since the union was the moving party they could not be brought on—apparently for policy or strategy reasons—more quickly. On the one hand, the attorney involved was arguing in court that the company was delaying things, and on the other hand, he was handling the grievances and did not take the steps necessary in our view to expedite them, even though actively encouraged to do so. Finally, I simply want to say that I think the record on grievance handling in the airline industry in general will compare favorably with the record on the railroads, as has been pointed out, or in the courts or generally in administrative proceedings.

MR. KAHN: I think the airlines, of course, have some special problems and characteristics. But I do not think the speed with which grievances are handled on the airlines compares favorably with many non-transportation industry grievance procedures.

MR. SCHWARTZ: I think Art is being a little unduly defensive here. In the first place I do not deny that unions at times are as responsible for delays as management may be. My criticism is of the system and of the procedures, whether it's union or management. However, the union has a greater interest in speedier disposition than management does because so long as there is no disposition, man-

agement's decisions are being carried out. However, I do not agree with Arthur that simply because the union has the initiative and can make the moves that, therefore, it is responsible for the delays. This just is not so. While it could initiate a grievance, there are all kinds of structural reasons or obstacles toward the final outcome. Most of these obstacles arise out of the procedures of the Act. We have problems of getting the parties together, getting the members of the board, particularly in the airline industry, and getting the flight crews. They are traveling all over the country and sometimes all over the world and some time has to be allotted to getting them all together at one time. They have other commitments to keep. The union, the carrier, the carrier's counsel and the carrier's witnesses have other commitments. Neutrals have to be selected and they do not always agree right away on whom the neutrals shall be, and if the National Mediation Board is required to select a neutral, that frequently takes months. And after the neutral is selected, then the neutral has to fix a date that's convenient to him and he has other commitments. This is what causes the delay. I do not say that it is only the carrier's responsibility, but I do think that a change in this procedure, eliminating the Board and having a single neutral and having it get to him more quickly, will help alot toward resolving this problem.

MR. HILL: I think that Arthur may be right that there has been over-emphasis on the quality of the performance. Time doesn't permit the classifications and variations. We are dealing now with averages. I was careful, I thought, to point out that the record reported from nine front carriers ran from three to fifteen months. I thought I was careful to point out that those at the lower end were doing a darn good job. I said and I mean that those who are taking an average of fifteen months are doing a poor job. I do not believe you have to be sensitive about that. Remember we are dealing in averages and thus when you say fifteen months it means that there are some cases that take more than fifteen months. I believe that is inexcusable. I do agree with Asher in this respect that many of the delays are attributable to unions. Now I told this to a union representative at the recess, and he said he could not believe me. He said it is in the unions' interest to expedite them and I agree with him, but nevertheless, th unions do cause the delay. I saw a case yesterday scheduled for hearing in April of a man discharged in October, 1967. It made me ill. Now it so happens that I checked and a carrier has been trying to get the hearing scheduled but the unions have refused to do it due to the backlog of cases. But again you are dealing with one union—one bargaining union on one airline. I am familiar with that fifteen day clause that is contained in the American Stewardess Agreement. I have seen it invoked and I have yet to see a hearing held within fifteen days. There are two things wrong with it. In the first place fifteen days is unrealistic—30 or 45 days is more appropriate when you're dealing with something with an operation that is nationwide. In the second place, what if you invoke it and the stewardesses in the case Arthur mentioned, and the carrier say that they cannot be there because their members are out of town. Fifteen days is quite short. I will say this in behalf of it. I have seen the requesting party get a hearing sooner, but I do not believe that answers the one that I mentioned this morning where there has to be a provision where one party can get a hearing within a reasonable period of time no matter how much foot dragging the other party engages in—you have an outside agency do it. They are doing it in other industries with respect to disputes under the "no strike" clauses, however, in that case they are getting hearings in 12 hours. Even though that is not applicable here I do think that we have to keep it in balance. There are good examples in the airline industry and there are bad ones. For example, I think on United Air Lines there is a four-man board that I would match with any board in the country. But so long as those members are on there its fine—if they are taken off, it may turn into just another device with which the members hear a case then automatically deadlock.

MR. HERBERT LEVY: I see that the unions at this point are down two to one

on the question of who is responsible for the delay in grievance proceedings, but I am not going to deadlock that question. I would like to make reference to another subject that has, I think, been completely omitted this morning even though it falls within the program of this morning's proceedings. That issue is system boards and grievance procedures in the airline industry. But I think all the discussion thus far has been confined to system boards and grievance procedures in that segment of the airline industry which involves represented employees. I think it is appropriate to discuss for a moment, unrepresented employees and where they fit into this picture, because section 204 of the Act, as we know, provides that: "It shall be the duty of every carrier and its employees acting through their representatives to establish an adjustment board." And we all know there are many thousands of employees in this industry who have no union representation and therefore, no access to adjustment boards for the adjustment of their grievances. I have several questions to raise with respect to this problem. First of all, I would like to know whether, in the opinion of the panel, this is the situation that was contemplated by Congress when it enacted the statute; namely, that the provisions of section 204 should operate only in favor of unionized employees leaving unrepresented employees without a grievance adjustment procedure. I would also like to ask whether this void in grievance adjustment procedures has been influenced in any way by the action of the National Mediation Board in representation disputes. I am referring specifically to the results of the Board's historical "craft or class" policies that have left large numbers of employees in this industry unrepresented, and whether this has had an effect on the problem. I would like also to suggest a possibility for a constructive remedy in this area based upon section 205 of the Act. That section contains a provision for the establishment by the National Mediation Board of a National Air Transport Adjustment Board. I would like to ask whether this might offer an appropriate response to the problem faced by unrepresented employees? What I am suggesting here is this: It may well be that we in this industry who have been talking and dealing with the problems of represented employees also have an obligation to provide a structure to which unrepresented employees in this industry can take their grievances in the manner contemplated under section 204.

MR. SCHWARTZ: I think that unrepresented employees ought to get representation. I think that is the real answer. And I also think that whatever my views may be that that is what Congress intended and that is why it uses language such as Herbert just read to us. "Through representatives"; that is exactly what Congress intended when it wrote the Railway Labor Act and that is what it still intends. I agree, however, that the Act does give employees the right to bring grievances. There are employees, unfortunately, who are not represented by unions and they have rights to be considered. I think that there is no question but that they must act or they should be required to act through the boards of adjustments that are created by representatives. I think that the Act does not provide for anything else. But aside from that I think there is an opportunity for employers, that is, for carriers, to engage in what might be considered interference or anti-union activity if employees are able to go to management and get boards selected by management themselves and get better treatment than employees who have to go to representative boards. Whether that is going to happen in a particular case I cannot say, but I do think that there are opportunities of claims of discrimination and interference which ought not to exist. We now have the principle which I talked about before, and which is very firmly established, that no matter who the employee is, the union must furnish fair representation; and there is a check on a union's abuse, if there is any, for employees. One possible answer I suppose is a national board such as Herbert suggests, but certainly what we have learned from the railroad industry would not prompt us to establish a national board and I do not see why it would be any different on the airlines. I do not think that the airline personnel, either management or union personnel, are any

smarter or more efficient than the people on the railroads. I think they would run into exactly the same problems. As a matter of fact, we now have systems boards on the railroads. We have one, for example, on the Pennsylvania Railroad which I happen to be involved in, which acts just like an airline system board. And so long as we can stay away from the national board, we are in good shape. Therefore, I do not think that the establishment of a national board for the airlines is going to be of any help in this situation.

MR. KAHN: I do feel that there is a need to redefine some appropriate units for representation purposes. Perhaps some airline employee groups that might be considered appropriate units, let's say by the National Labor Relations Board under some of its criteria, cannot function in that fashion at present. More broadly, I agree with Asher Schwartz that if a group of employees do not choose to have a representative and are not covered by a collective bargaining agreement and, further, if they are not covered by individual contracts of employment, then except for the general rights guaranteed to them by other laws—such as the right not to be discriminated against because of race or because of union activity if they are trying to create a union—the employer has a lot of unilateral authority that may not be challenged. Most of the kinds of issues that can become grievances under a collective bargaining agreement involve areas in which the employer has essentially unilateral authority unless the employees have a union.

MR. JAMES HIGHSAW: I am a partner in Mulholland, Hickey and Lyman in Washington, D.C., and I'd like to direct a question either to Mr. Schwartz or Mr. Hill or perhaps both of them. It has to do with the impact on the jurisdiction of airline system boards of a case in which I was the losing attorney. The case to which I refer is the decision of the Third Circuit in *Brady v. TWA and IAM* last August. The Third Circuit held that an airline system board has no jurisdiction of a dispute arising under the union shop provisions of a collective bargaining agreement because it said that such a dispute was not a dispute between an employee and an air carrier, even though the air carrier was a party to the agreement, but rather, a dispute between a union and an employee. If this decision is read literally it means that all disputes on the interpretation and application of union shop provisions of airline collective bargaining agreements will have to be litigated in the courts. This is not a very encouraging prospect from any point of view and particularly in light of the problem that has been discussed concerning the time it takes to prosecute grievances. We have been talking here about 30 to 45 days for system board decisions on grievances. Compare this to the length of the *Brady* case. In this case the employee was discharged under the agreement on 15 May 1956. He thereafter went into federal court and his case was finally heard by the Supreme Court when it denied a petition for certiorari on 15 January 1969, almost thirteen years later. He returned to work on or about 3 March. Now I would like to ask either one of these gentlemen, or perhaps both, if they have given any thought to this and whether or not this unpleasant prospect might be avoided by the revision of these agreements so as to provide for a sole neutral arbitrator rather than the ordinary system board make-up which does seem to have disturbed the courts in this particular area. There are such provisions in all of the union shop agreements in the railroad industry and so far, to my knowledge, this problem has not been litigated in that industry. I think perhaps if the courts were confronted with this type of agreement rather than the ordinary system board agreement that they had before them in the *Brady* case they might reach a different result, but I would like to hear what Mr. Hill or Mr. Schwartz has to say about this.

MR. SCHWARTZ: I agree with what Jim said at the end that had there been an individual neutral instead of a board which was obviously hostile there might have been a different result and it might have happened much sooner. On American Airlines, in the flight engineer agreement which Arthur Wisehart and I participated in drafting, we provided for a single neutral appointed by the American

Arbitration Association in just such a situation in order to avoid this question of having a hostile board which does disturb the courts and probably rightfully so—sometimes more so than it should be. I would like to refer you to *Cunningham v. Erie* in which TWU, not TWU but the predecessor to TWU, was taken to task by the Court of Appeals in the Second Circuit because it refused to accept dues from a union member when he sent his dues in three months late, where there was some evidence in the record that the union in the past had accepted dues from other members who were late, without going into the circumstances of the other cases, because the circumstances were unknown to the union and couldn't be proved. Now in the *Brady* case, I think Brady acted foolishly in the first instance, and then the union followed it up by acting foolishly in the second instance. I imagine that is what caused the delay. I do not think the delay arose merely out of the kind of procedure that existed. They simply made it the kind of case that was not going to be settled. Jim's first point was whether the board has jurisdiction. I think that the board strained a bit to find, or rather the courts strained a bit to find, that the board had no jurisdiction because it did not like the board and decided that it was really a dispute between the employee and the union which, therefore, was not covered under section 204 of the Railway Labor Act. But the fact is, of course, that in *Glover* you had a similar situation which has been decided quite recently. The courts said the same thing, only this time they said that the employer could be brought into the suit on the basis of a charge of unfair representation if the suit was against the union. Thus the courts are brought into the picture with respect not only to disputes between unions and their members, but also between employees and employers where the union is involved on a charge of unfair representation. I think that this is necessary if there is going to be fair treatment of all claims because as I said before, if you examine the *Arnold* case, no matter what may have been done in that situation, the fact still remains that the board was a hostile board. The majority of the pilots controlled the union. They were going to decide whether or not these fellows were entitled to seniority. It was their representative that was on that board. I think that was an unfair result and the Court should have taken jurisdiction in that kind of situation. Now if the board procedure can be so revised so as to remove that hostility, then it will not be necessary for the courts to come into the picture, and I think that would make them very happy.

MR. HILL: Jim, after the act permitted union shop agreements, we had some discharge cases. And as conscious as I am about the board's jurisdiction, as should be apparent from what I said this morning, it never occurred to me to question the board's jurisdiction at all. It seems to me that it is an integral part of the agreement and should be interpreted as such. We had two agreements—one with the mechanics and one with the pilots. I think the remedy is to have, as I suggested this morning, a board where the partisan members accept the neutral's decision so that there can be no judicial attack on it. That was done in the *Arnold* case. I see no reason why disputes concerning the meaning of the agreement should get out of the board and into the courts. I think they belong in the board. Sometimes we get unhappy with boards. I testified in a case in San Francisco where a court refused to dismiss the case because of lack of jurisdiction. The court heard it on the merits and I thought I was going to be fined for contempt of court because after seeing the elaborate machinery and the mistakes that were made that would not have been made by an experienced system board, I told the judge that I thought our procedure was much better. So the protection then would shield the board from attack and, thus, avoid going to court.

MR. JOHN O'KEEFE: My question is directed to Mr. Hill and Professor Kahn in regard to grievance procedural steps before you reach the system board. Mr. Schwartz commented that he felt only one step was necessary. Some of my experience has been that because an airline is diversified geographically they have somewhat of a central decision-making process. I would like a comment from Mr.

Hill, concerning the purpose for the three steps he mentioned, and what each step would accomplish.

MR. HILL: I am happy to try to answer that. After I told Asher Schwartz last night that he started off this model business, he dropped in the hopper eight paragraphs that covered the grievance procedure and the system board. And boy we really fell for that. We went draft after draft before we abandoned it. But I am not mad at Asher. I'm grateful to him because in the process I abandoned many of my stereotyped responses that I cherished for so many, many years. Well, in trying to figure out the steps, I came to the conclusion that it really "ain't" nobody's business but the parties. There is no magical number. First, I disagree with Asher. I think he oversimplified it. But I cannot see the reason for six steps or five or even four. I just stop there. Perhaps you do not need three. The reason I could defend three is two-fold: One, there has to be both a union and carrier system-wide review because you are dealing now with system-wide agreements in which uniformity is important. That uniformity of interpretation is terribly important to airlines and unions, and that may account for the number of cases they take to the system board. Thus, I would say there is a need for, in addition to the initial grievance, the system-wide review. I am satisfied that in the majority of crafts or classes there is probably a need for an intermediate step because from my own observation at that stage, a number of grievances in some crafts or classes have been disposed of on the non-precedental basis. I think that should be encouraged. That is why I do not believe in going to two steps in non-disciplinary grievances or at least I would not recommend less than three. However, if the parties themselves think two are enough, two are fine. If they think four are needed, I think that is fine. All I am saying, John, is for Pete's sake, reexamine them. Do not just take what has been there before and continue it forever and ever. I have seen some decisions in one particular craft or class where there are four steps; there is a man who gets paid to go out and hear the third step and he writes an elaborate decision; then another man gets paid to hold another hearing and he writes an elaborate decision at the fourth step saying exactly what the man said at the third step. That makes work. I do not like to see anyone put out of a job but I think that we could use that money, that time and that energy to speed up the grievance procedure and expedite their disposition in the system board. In short, I am not saying that there is any number. I would not recommend any number as a magical number. I am not that smart and I do not think anybody ought to try.

MR. KAHN: I think that the study of any particular bargaining unit by someone who is willing to take a fresh look at it would readily determine the right number. I think it would tend to be the same or a smaller number of steps than customarily exists. But the right number for the Air Line Dispatchers Association might be smaller, because of the dispersion of its small membership and the essential centralization of decision-making for this group, than for a machinist at an over-haul base with 6,000 maintenance employees. I think there is a tendency to have more steps than are useful. I want to call attention to Northwest Airlines' 1966 pilot agreement. This airline and ALPA did revise their grievance procedure considerably in 1966, and they said that for a case where a pilot is disciplined or dismissed, his written request for "an investigation and hearing"—that is an awful phrase—goes directly to that company's vice-president for flight operations; and, if denied by this vice-president, will go to the system board. Now that is probably the right number of steps for pilot discipline and discharge cases at Northwest because they have discovered, I assume, that any earlier step has been perfunctory. Since the buck will be passed up to the vice-president anyway, let's get it there fast. On the other hand, for pilot grievances on non-disciplinary issues at Northwest, they have kept one additional step. My point is simply that they took a new look at their old practices and said: "How many steps are needed for different kinds of grievances?" And they amended their

agreement. General Motors has about 130 plants under its single, master agreement with the UAW. The top step is at the level of the corporation and the international union. Before that top step, there are only two. Step one is on the shop floor and step two is the plant. Step three is the corporation and step four is the umpire. That setup seems to meet their needs efficiently. If I am not mistaken, GM and the UAW used to have at least one if not two additional steps which, after some experience, they decided to eliminate.

MR. DANIEL KORNBLUM: I am a practicing attorney in New York. I direct my question to Mr. Hill. Am I correct in my understanding, Mr. Hill, that it is your position that "due process of law" standards should not apply at any but terminal steps in the grievance procedure? And if so, are you not ignoring established precedents under, for example, the National Labor Relations Act, as well as the trend toward extension of the "Bill of Rights" to labor relations?

MR. HILL: I might have overlooked or ignored a great number of things. I am saying that for years the National Railroad Adjustment Board said that railroad agreements guaranteed constitutional due process in a fair and impartial hearing. There were hundreds, literally hundreds of decisions saying that. So many that a study was made by Mr. Lazar published under the direction of Ben Aaron. It seems to me that to try to guarantee to me that if I get fired I will receive constitutional due process in a completely impartial hearing by the employer that fired me is asking too much. It is asking too much of that employer. But I hope that employees will be objective and fair. If I get reinstated, I could not care less whether I got constitutional due process. If I do not get reinstated, I do not think I have a right to it in the grievance procedure. I think the place that the Court of Appeals for the Fifth Circuit said I am entitled to it is in the system board. I can just go right through the grievance procedure. So I was happy to see the case of *Rosenberg v. Eastern Airlines* decided by the Fifth Circuit. The use of this line is garbage for the railroad agreements would not load or burden down the grievance procedure. It seems to me that some fellow who is not a lawyer would not know due process from a bale of hay. Lazar in his book calls the union and management representatives hearing the grievances ministers of justice. I do not think we want union representatives or carrier representatives or people hearing grievances to be called ministers of justice. As far as the Railway Labor Act is concerned, I am satisfied that they are not entitled to it and from an ethical standpoint, I do not think we should be concerned about it because the remedy is at the system board level where the employee is guaranteed due process. I would much rather have a fast procedure. Then if the employee or the union is not satisfied, give it to the system board.

MR. LEVY: I have some comments about the state of the injunction law to which Asher Schwartz referred particularly when he talked about the *Westchester Lodge* case. I think that there is an anomaly in the law right now, and I would like to see if the panel agrees. I think that the state of the law gives a distinct advantage in a minor dispute situation to a union that is willing to threaten to strike in support of its position on a grievance. As I understand the law, and I think Asher agrees, based upon the statements he made, the courts will refuse to grant a union plaintiff an injunction to preserve the status quo as in *Chicago River*. But the courts will often grant status quo relief to the union when it is a defendant in a *Chicago River* type action. And that suggests to me that the policy of the law in this area is to encourage threats by labor organizations to strike as a means of obtaining status quo relief through the courts. Now I have heard airline management counsel say from time to time that a threat to strike in this industry sometimes can be nearly as damaging as the strike itself. I would like to ask if the panel has any comment as to whether the law is moving in the wrong direction in this area. But one further comment and that is that in this same connection, I perceive that the law is moving closer to status quo preservation in all situations where a procedure for orderly settlement of a dispute is

available. I think that Judge Bryan's recent opinion in New York in the *Pan American* case may be indicative of that movement, and I think also that the logical next step in injunction law in this area will be to give a union-plaintiff status quo relief in appropriate situations on a selective basis in minor disputes. I would like to hear any comment from the panel.

CHAIRMAN CHARLES MORRIS: Asher and John both had comments in their principle papers on that subject. I suppose they still have the same views. Mark, would you want to comment or would either one of you want to add to what you have said before. We have perhaps a difference of opinion between the two, but certainly a difference between at least two circuits. You might want to direct your attention to the scope of judicial review which was discussed in the Jack Kroner paper, the possibility of a different standard of review developing under the Railway Labor Act or under Title 2 of the Railway Labor Act and the "Trilogy" cases under the National Labor Relations Act, section 301. These are interesting questions; does anyone care to explore them further?

MR. JOHN HARPER: I will make just one short comment. Most of our practice, at least in Texas, is under section 301. I am not necessarily always pleased with the standards used by the Fifth Circuit in this area under section 301. I sometimes feel the courts are dealing in judicial abdication rather than any limited form of judicial review. But be that as it may, the parties have contracted for final and binding decisions through system boards in lieu of strikes and other self-help. And in view of that, as long as there is some limited review to avoid the grossest of decisions by an arbitrator, I feel that section 301 or the standards under Title I, which amount to essentially the same thing, will, if you have really been rooked, allow you to obtain judicial relief, although I have read cases by our eminent speaker last night where the company got rooked and did not get judicial relief because there was some "arguable basis" to support the award in the contract, to wit: The contract set forth a work week and a pay week and the company changed the pay week, and the essence of the award was that the employees were entitled to two full weeks' pay for a week and two days of work. So, you know all this panacea about judicial review? Do not get carried away with it because it is not as much as it is made out to be.

MR. KAHN: In this extremely dynamic and progressive industry that we've been involved with here, it is remarkable how much inertia there can be on making changes in various kinds of procedures. This Northwest Airlines pilot contract did institute some significant changes in the grievance procedure for which I just said they ought to be congratulated. And incidentally, there is another novel feature in that contract. It says that at the election of the Association, the system board of adjustment will consist of only three members, one appointed by the company, one by the association and one by the neutral. It also goes on to say that when the company and association agree, a combination of cases may be presented to a neutral member. This can be a significant economy and, of course, makes a lot of sense for a group of related cases. But I want to read you another phrase from this Northwest agreement, one you've probably heard a thousand times: "A pilot shall not be disciplined or dismissed from the Company without notification in writing from the Company as to any such action and such pilot shall not be disciplined or dismissed without an investigation or hearing, provided that the pilot makes written request for an investigation and hearing within ten days after receiving said notification." Now I think that is poor language. I would like to see a provision which says that a pilot shall not be disciplined or dismissed by the company without just cause. And then a provision which provides the right of the pilot to contest that action through the grievance procedure. I would hope that a company has investigated the case *before* it disciplines or discharges a pilot. If it has not, that fact will become painfully aware to both parties during the grievance procedure. I asked a management man at Northwest why they did not change that old language which dates back to the first American pilot con-

tract. And the management man said: "We did not propose changing that bad language because we thought the union might be suspicious of our motives, and, since the language really has not done us any harm, and we wanted to work on other changes that were more substantive, we just let it alone." And that is one of the problems. One final comment. A grievance procedure is a system. It should be designed or revised as a system; for example, what resources would it take and what procedures and costs would be involved to get answers to most grievances within three months. If both parties went at it with the objective of rational and sensible answers within three months, they could readily design a system that would achieve it. It might, of course, cost more than they had expected. But this is what has usually not been done, and what I would now urge the parties to consider.

MR. SCHWARTZ: I made mention of the fact that the *Chicago River* case revolutionized labor relations, and I still stand by that. As a union officer, I would very much regret *Chicago River* and urge its overruling or change by statutory action so that we can go back to enforcing our contract by a threat of a strike, and a strike without fear of injunction. It was proved to be very effective in the past and I know it is very effective in other industries where they do not have the provisions of the Railway Labor Act. It could be effective with us too. As a lawyer, however, as well as a participant in the labor processing machinery, I would not urge that. I would prefer that we not go back to the technique of strikes or threatening strikes or slow-downs or other drawbacks. But I think that in order for us to justify that position to the union leaders they have got to be assured and convinced that the alternative is a reasonable one. By and large John Hill takes a rather progressive point of view. I think many others in this industry do, too. But on the other hand, I think they sometimes go overboard and resist the pressures of the union to try and make the alternative a reasonable one. Despite the pious words that are expressed about delays, the fact is there are delays and not as much is done to avoid them as could be done. A question was raised here by Professor Kroner as to whether or not the 1966 amendment of the Railway Labor Act is applicable to the airlines. Section 3 was the only section amended by Congress in 1966. And if you read section 204 which provided for the application of the machinery to the airlines, it specifically exempts section 3. This was done back in 1934. Now when Congress amended section 3, they apparently lost track of this exemption in section 204. So an argument can be made that the amendment of section 3 is inapplicable to the airlines. That argument is being made and has been made by the airlines. Now there is a decision on a grievance at Eastern Airlines—it is just a district court decision—in 1967 specifically on that point and upholding the contention that the changes in the Act made in section 3 are applicable to the airlines. There is a long rationale in it. I think some of it is sound and some of it is not sound. But the result I think is sound because it would be absurd in my judgment for us to say that the scope of judicial review of an arbitrator's award under the same machinery provided for in the Act, and for the same purposes, is different when there is a refusal to comply with the arbitrator's award in an airline dispute and one in a railroad dispute. It is the intention of Congress to make them pretty much the same and I do not think that the difference between having a national board as against a system board makes that much of a difference. As I said before, the railroads now do have system boards. I think the industry ought to forego their opposition. They ought to go back to Congress and say, "look you made a mistake; now look at it and pass another amendment so that what you intended to do will be clearly applicable to the airlines as well as to the railroads." I think if they did that, Congress would do it. I also think that it is a mistake for the carriers to press hard on the point that the board has no jurisdiction to issue an injunction to maintain the status quo in a minor dispute pending the grievance machinery. I think they ought to agree that there is such a jurisdiction on the part of the

court. What they ought to concentrate on is to persuade the court that it is not necessary or equitable that an injunction be issued. Concentrate on the merits of the dispute rather than the question of the jurisdiction of the board. I think they ought to adopt the rationale of the *Westchester Lodge* case. It is a sensible one and it is one which is consistent with the original purpose of the Act rather than that in the *Hilbert* case in the Fifth or Seventh Circuit. Now if that were done, I think that unions could reasonably be expected to accept the proposition that they do not go out on strike or threaten strike when they have a minor dispute, because in fact they have a reasonable alternative, not only to decide the merits of the disputes, but also to make sure they get justice during the course of it.

End of Thursday morning discussion.