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Discussion - Session Two

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DISCUSSION — SESSION TWO

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. JOHN HILL: I would like to ask Glen Harlan two questions: One, does he think *Switchman's Union* should be reversed; and two, what does he think about separating the function of the NMB that requires them to determine representation issues from their mediation function?

MR. GLEN HARLAN: First, John, I would have to say I had my whirl at the *Switchman's Union* case and that I lost. I have long since given it up. I thought when the Administrative Procedure Act was passed that possibly judicial review would be established for such decisions, but I was not able to convince any court of that. Frankly, I do not think it is so disastrous that you do not have judicial review on the merits in such matters. I think the NMB with its expertise can do at least as good a job as some of our courts would do and I am willing to leave it the way it is. I have not given a great deal of study to the second question. Off hand I would say I do not see too great an advantage in doing it. I think there is a lot of merit in having the Board in the position of being a mediator and also a judge. I think that was what the Mediation Board really was doing or should have done in the *Ruby* case, as I have mentioned before. I think that the Board ought to mediate up to the point where a decision has to be made and then when it cannot be made by mediation, the settlement ought to be in the hands of the Board because the Board knows about the case, about the basic problems and more about what will maintain peace and harmony in the future than any court would ever know or any other agency. I would just as soon see it stay in the Mediation Board as it is now.

MR. HERB LEVY: Glen, if I correctly understand your position, it is that jurisdictional disputes ought to be before the Mediation Board and there ought to be a right to injunctive relief from the federal court in aid of that jurisdiction of the Mediation Board. Well, frankly, the problem that I have in that regard is how do you get a jurisdictional dispute before the Mediation Board? It is my understanding that the only way you get there is under section 2, Ninth, and the only way to use section 2, Ninth is to treat the matter as a representation dispute. That means you have to have authorization cards signed by a majority of the employees in order to get to the Board with it. This suggests that if two competing unions are of disparate size, and the larger union representing the larger group of employees is perfectly happy with the solution proposed by the employer, and the smaller union is the one that has the jurisdictional dispute, it has no way of getting itself before the Mediation Board, unlike the situation as I understand it under the National Labor Relations Act. That suggests that if the federal courts do issue injunctive relief in support of a Mediation Board jurisdiction which cannot thereafter be invoked, we have another one of those upsetting vacuums under the Railway Labor Act.

MR. HARLAN: All I can say is that it is perfectly clear to me that the Mediation Board would have to change its procedures quite substantially. The only reason it cannot be brought now is because the Mediation Board will not act unless you comply with their rules as to the number of authorization cards and so forth. Once the Mediation Board recognizes that it does have the duty, as the courts have said, to resolve these disputes, then, it also has the duty to establish procedures whereby its jurisdiction can be invoked. This I think is simply a matter of working out a procedure.

MR. JAMES HIGHSAW: For further identification I am the counsel for BRAC that Mr. Goulard was referring to. The hour is getting late, and ordinarily if this were a meeting or discussion in which a record was not being kept to be ultimately reproduced in the *Journal of Air Law and Commerce*, I would not have anything to say at this point. But the statements that have been made in recent minutes involve disturbing and inaccurate implications with respect to the National Mediation Board and BRAC. I am not an apologist for the Board as everyone knows. I have fought the representation dispute on Pan American as hard as I could in the courts and out of the courts. I think there are certain things that need to be done about Board procedures and Board rules; in some areas I am in agreement with Mr. Uelmen on this point. But these are matters of principle. I think that the Board is a federal agency and it has some dignity. While I am perfectly willing to make recommendations and to criticize it in areas where I think it needs to be criticized, at the same time, I think there are a great many statements which have been the subject of litigation, and, as such, have been made about the Board with respect to matters which were litigated. But Mr. Uelmen referred to the Teamsters-BRAC representation dispute on the property of Railway Express, and I was the counsel for BRAC from the first day it started through to the end. Mr. Uelmen never made any appearance for the Teamsters in that proceeding. The information which he has been given by someone else is inaccurate. It would take me an hour to list all the inaccuracies. A few examples will suffice. The claim of the Teamsters was to split up the drivers as between various cities, a claim on which the Board had held a hearing approximately ten years before and had rejected. In spite of that the Board gave the Teamsters another hearing on that issue which was conducted in May, 1965. At the request of the Teamsters, the Board invited all of the officials of the Railway Express to testify with the opportunity for cross-examination by the Teamster's attorney on all of the issues involved. In addition, the Teamsters raised the issue that BRAC was violating a so-called "no raid" agreement with the Teamsters. The Board conducted a separate and distinct hearing on this issue in July, 1965, again followed by briefs. There was also omitted from Mr. Uelmen's statement the fact that in connection with the particular representation dispute the Teamsters filed a petition with the Interstate Commerce Commission to have that Commission declare certain of the employees of the Railway Express not covered by the Railway Labor Act which the Interstate Commerce Commission heard and denied. A suit was then filed in the United States district court by the Teamsters against BRAC on the matter of the alleged "no raid" pact which the district court dismissed, and which was affirmed by the court of appeals. The Teamsters filed a suit against the National Mediation Board in the district court which was also dismissed and affirmed by the court of appeals. Complaints were filed by the Teamsters in all of the nine regions of the National Labor Relations Board, contending that part of the employees involved were under the National Labor Relations Act, which the Board denied. A suit was instituted in the United States District Court for the Eastern District of Missouri at St. Louis which was dismissed; a suit in the United States District Court for the Southern District of New York suffered the same fate; a suit in the United States District Court for the Northern District of New Jersey also suffered the same fate. If anybody ever received a full hearing on the claims and issues which they raised both before the National Mediation Board, and Interstate Commerce Commission and the courts in a particular controversy, it was the Teamsters. Now, getting to the second registration dispute one mentioned, namely the Teamster-BRAC dispute on the property of Pan American, Mr. Goulard gave an accurate description of it although he omitted some things that did not fit in with the point he was trying to make. As he correctly states, a substantial time elapsed in the Board's handling of the dispute. However, these were valid reasons. First, the Board did not have sufficient mediators to investigate the dispute. I think this is a problem that the

Board always has. I think that some of the speakers have already commented on that. Once the Board got a mediator on the case, along about the first of January, 1966, an immediate problem arose because Pan American took the position that approximately 600 employees were officers of the company rather than employees under the Railway Labor Act, and as a consequence, it was necessary for the National Mediation Board to conduct a hearing to determine the facts of that question. Pan American brought in all of their witnesses from over their system and there was a lengthy hearing which lasted approximately a month, with briefs after that. Out of these 600 employees my recollection is that the Board ultimately determined that about 250 of them were employees subject to the Railway Labor Act, and agreed with Pan American on the rest of them. During that phase I saw no delay that was not the result of unavoidable problems. I do not quarrel with Pan American. I think they had a right to litigate that particular issue, and this was a delay which was inherent in the issues before the Board.

A mail ballot election was then held, not in 1965 as Mr. Uelmen says, but beginning in August, 1966. BRAC did stay off the ballot. They were concerned about the possibilities of fraud, and it turned out that their concern was well justified. They asked the Board in writing on 20 July to omit their name from the ballot. The Board gave everybody involved in the matter an opportunity to make any objections. Contrary to what Mr. Uelmen says, the Teamsters did not object to the Clerks' name not being on the ballot. As a matter of fact, they have not objected to this date. During the election several thousand false letters were sent out under the forged names of Mr. Meany, President of AFL-CIO, and Mr. Dennis, President of the Clerks. An investigation was begun by the Board. FBI agents were called in. BRAC promptly filed affidavits by its officers with the Board stating that the Clerks were in no way involved in this fraud. The Teamsters did not then or thereafter file similar affidavits with the Board in spite of the fact that this issue was subsequently before the District Court for the District of Columbia and the Court of Appeals for the District of Columbia. The Board then impounded the ballots as Mr. Goulard stated. However, they immediately ordered another election, but BRAC felt that the stain of the fraud had not been removed so they went to court about it. District Judge Holtzoff agreed that the Clerks were right, but, unfortunately, that he had no legal authority to intervene. The Clerks appealed to the court of appeals and the court of appeals also held that the Clerks were right but that the courts had no legal authority to intervene. A second election was held in December, 1966. Mr. Uelmen was not present before the Board or the courts in any of these proceedings. The second election resulted in further problems of fraud and other issues going to the validity of the election. This brought about further litigation only completed in the fall of 1968 so that the dispute was not finally resolved by election until February, 1969.

MR. DAVE UELMEN: I just have a few comments and then Mr. Breen who was on the other end of some of this material, will also reply to that statement. First of all, although I personally and physically did not appear before the Board or in those courts, our law firm did appear. We were associated with Mr. Thatcher; and my partner, Dave Previant, was very active in those cases, and so was I—on the office end. I also want to tell you that Mr. Thatcher, whom you referred to, read my paper before I delivered it here and write me a letter saying that he agreed with what I was saying. Secondly, although you said I was inaccurate in some respects you did not really say specifically where I was inaccurate in referring to the REA proceedings. I did not pretend or state that there was not a great deal of additional litigation involving REA, because there certainly was. Our basic complaint in REA was that the Board ordered the elections in September over our objections, but it did not tell us the date of the election until 8 October. The date it set was only one month away, and it did not give us the list of names and addresses of the voters until 15 October, although the Board probably did not have that list of names and addresses until that time.

When they finally got it, it was inaccurate. My paper also states the statistics showing the inaccuracies. That was the primary complaint of the Teamsters about that particular matter. Now if I did say in my paper that the election in Pan American started in 1965 it was erroneous. However, I thought I said that the petition was filed in 1965. That certainly was when the election procedure was invoked and when it was first started. I wanted to make those brief clarifications. Mr. Breen has asked for a chance to respond to one point.

MR. HENRY BREEN: I am going to keep my remarks pretty brief. I am not an attorney, and so I am at a disadvantage. First of all, I would like to state that a denial was given to the newspapers by me and I have signed numerous affidavits over the last three years denying any action on the part of the Teamsters as far as the forged letters were concerned. The fact of the matter is if anybody looks at the record they will find that the FBI gave us a clean bill of health. And my closing remark is that any union that spends its members' money for legal chicanery and delay and does not put it where it should be, which is serving the people, then they are going to lose their members. They (BRAC) are going to lose another \$,000 on 2 April.

MR. EVERETT M. GOULARD: I'll be very brief—no equal time. I just want to make one thing clear in Jim's remark concerning the mathematics or the dispute over whether 500 people were in fact eligible to vote. I just want to make it clear that Pan American never tries to decrease the bargaining unit. This was an attempt to increase the bargaining unit by some 600 officials of the company and that caused the problem. The only thing that made me pout a little bit is that they include everybody in their petition except me and I felt left out.

MR. ROBERT COMMERCE: I merely wanted to clear up the record on one point to which Mr. Goulard addressed himself concerning *Aeronautical Radio* and also to phrase a question to him. First of all, it was the airline dispatchers and not the pilots that were involved as the other union. Being the loser, and having no axe to grind, I feel I can speak freely about this. The Teamsters filed for representation, I believe in early January, 1965, for Aeronautical Radio employees. We got into the act somewhere about March, and the actual election did not take place until 5 October 1965, which I would hardly call a speedy procedure for employees to express themselves as to whether or not they want a union. During this period of time there were several attempts by the company, Aeronautical Radio Incorporated, to dissuade the employees from voting at all. We had evidence of this and gave it to the National Mediation Board, and if things did not turn out the way they had expected, I think that there was a certain amount of contribution on the part of Aeronautical Radio in the literature which they put out. I would like to further amplify the record, and perhaps Mr. Breen would like to correct me, that it took from early 1965 until the end of 1968 for those employees who were interested in getting a contract to get that contract. I do not believe that is what you would call freedom of choice and I wonder whether or not, that means a free and clear choice when the tactics are such that they would cause an election and a contract to be delayed that length of time. I was just wondering whether or not Mr. Goulard would agree with that.

MR. GOULARD: We are apt to agree, are we not, that the outset of all this confusion or much of it could be resolved by putting "no union" on the ballot and having a runoff election.

MR. COMMERCE: Absolutely.

MR. GOULARD: If I said Airline Pilots Association, I just misread my own notes. It is the Airline Dispatchers Association.

SPEAKER UNIDENTIFIED: Although I agree with Mr. Goulard on the point that we should not put the union on the ballot, I do not agree that that is the only change we need. And I am not anxious that that be the only change. I think that our talk here today, including the exchanges between myself and Mr. Weiss, has indicated that what we are really after and what we should be after is an

opportunity for the employees to express their will, not ours, on a secret ballot election conducted on a fair procedure similar to that which the NMB has used, and as I understand it, from the years of experience I have with the NMB, I have not known a time when they were challenged, and this mediation board has been challenged in recent years over the procedural aspects of the conduct of their elections.

MR. ASHER SCHWARTZ: I have not been involved in any of the disputes that have been discussed here in the last few minutes. What seems clear to me is that these disputes are extraordinary. They are disputes in which there were very unusual circumstances. I think it would be a clear mistake on the part of the National Mediation Board or Congress to make any changes in procedures based on these difficult situations. We have the expression that hard cases make bad law. I think this would be a typical situation. It is clear to me that despite what Ed Goulard says, the interest of the industry or rather the interest of the carriers is one of selfishness; they do not want employees to be organized if they can avoid it. They may not do anything affirmative or anything illegal to stop it, but it is in their own economic interest that employees not be organized if the employees so choose. I see no uprising, or no surge on the part of employees themselves, visible in Congress or anywhere else, where you might normally expect it, for a ballot that would have the "no union" line on it. Now I would like to ask Mr. Uelmen, if I may still ask a question, as to why he suggests that the National Mediation Board be abolished in effect by repeal of the Railway Labor Act in order to get a more orderly process in the conduct of elections. I take it that his objection to the procedures of the Board with respect to elections is that they do not get into some of the problems that arise in the course of an election, as they should as an administrative agency. But is there anything in the Railway Labor Act or in any other statute or regulation that would prevent the Board from doing just what the NLRB does with respect to the conduct of an election? Is not the Board's function, or could it not be the Board's function, properly to investigate the conduct of employers if they interfere with elections on the part of employees, and if that is so, would that not be a better remedy than to turn the matter over to the National Labor Relations Board?

MR. HILL: Well, I have something I would like to get off my chest. There is a great big hole in what Asher Schwartz said that the carriers have some motive to try to keep employees from being unionized. If you thought it over, a carrier who wants to oppose unionism has a much better chance with the rule that the NMB had, that less than a valid election does not take place with less than 50 percent of the employees participating because if there is not any interest, the one union will lose. I happen to be one of the persons who started the litigation that led to the *ABNE* case and it did not make one damn bit of difference to me whether the employees were organized or not. I have a passionate belief that employees have the freedom of choice and I think that the National Labor Relations Act does the right thing. It gives employees that chance and it is the most artificially rigged mechanism I can imagine. I am sorry to hear anyone say that carriers have some improper, illegal and anti-union motive for opposing it. I for one am not in that group and I do not know of anyone in any carrier group that has opposed it for that reason. Thank you.

End of Thursday afternoon discussion.