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Discussion - Session Four

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DISCUSSION — SESSION FOUR

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MR. DAVID UELMAN: I'd like to ask the panel members, from the employer, the union and also from the academic side, whether they feel that the proposals that have been pending in Congress now for some time have had any influence on the negotiations that have gone on in the airline industry in the past five or six years? In other words, has the fact that these proposals have been pending, had any effect on the negotiations?

MR. WILLIAM CURTIN: I will use Virgil Day's old trick and answer "No." My observation is that, except in the situation where you have ad hoc proposals going unrelated to a dispute then underway, they do not have any influence on the bargaining. There have been, to my recollection, at least two occasions in which the negotiating parties seem to be quite conscious and somewhat responsive to pending proposals in Congress over the past four or five years. It is a difficult thing to measure, but this would be my observation.

MR. HERBERT LEVY: I would like to comment on some of the proposals with respect to procedural inadequacies relating to NMB representation proceedings. I think some of these proposals may generate problems that we may not have thought about and perhaps ought to think about. I am thinking specifically now, as one good example, of the no-union slot on the ballot. When I carry that one forward to its logical conclusion, I arrive at a situation in which the Board issues a certification of no union, which would be possible under that situation and may even be possible now under a recent decision of the Court of Appeals for the District of Columbia. We may then be left with a collective bargaining agreement which was left behind by the decertified incumbent. This would likely result in a situation in which section 2, Seventh of the Act gives continuing life to that agreement and its provisions, even though there would then be no representative to administer or enforce that agreement or to participate in the grievance and system board procedures contained in that agreement. If the necessary conclusion in that situation is that the agreement automatically dies when the representative disappears, then I suggest that we are left with some fundamental questions about the rights of unrepresented employees to share equally in rights conferred by the Railway Labor Act, much like issues previously raised concerning the right of unrepresented employees to have the benefit of the statutory system board procedure. Also related to the same problem are those statements made by the National Mediation Board in the course of representation proceedings indicating that in the Board's view, the Act's representation procedures are independent of, and not necessarily relevant to the contractual arrangements between the parties. What I am suggesting here is that perhaps a note of caution is in order before we accept too readily solutions that appear on their face to be simple solutions to some of the problems that we have been talking about but which, in practice, may generate some new problems that we have not discussed, and that may create some new issues. I have one further comment and it relates to some of the remarks of Charlie Morris and Bill Curtin with respect to improvements in procedure and the possibilities of changes in the law. Thinking in terms of short range improvement, I think that there may be some means available today to start moving toward short term improvement. I refer to the proposed rule-making procedures available before the NMB. Following up on Bill Curtin's suggestion that the Mediation Board might want to hold hearings on some of the

things we have been discussing, I would like to proceed one step further to indicate that we can take the initiative on some of these matters through rule-making proposals. I do think it could be damaging to the work that has been done here in these last two days if rule-making proposals were put before the National Mediation Board on some of the procedural inadequacies that we have been discussing before there has been at least preliminary exploration into bilateral rules proposals which we can all live with, in contrast to proposals originating from one or the other of the opposing sides. As a specific suggestion, it might be profitable to consider continuing the work started here by establishing workshop and seminar situations with working drafts, leading hopefully to joint rule-making proposals issued to the National Mediation Board. I would like to conclude this diatribe by referring to a few of the items that I would propose as subject matter of such workshops, and this proposal is not intended, by any means, to be an exhaustive list. I would suggest consideration in depth of the advantages and disadvantages of the following kinds of rules: (1) A rule that specifically prescribes the consequence of an incumbent's failure to appear on the ballot; (2) a rule indicating when the Board will or will not appoint neutral referees to sit on deadlocked system boards of adjustment; (3) a rule indicating what kinds of conduct during a representation dispute would cause the board to set aside an election or refuse to hold an election on the grounds of interference; (4) a rule indicating the circumstances, if any, under which it will deal with jurisdictional disputes under section 2, Ninth where no representation dispute is present, and any necessary new procedures to implement such a provision; (5) a rule indicating the means by which the Board will resolve representation issues raised by airline mergers; (6) a rule indicating the circumstances, if any, under which it will process a representation dispute even though no authorization cards have been presented by the petitioner; (7) a rule addressed to the situation in which large groups of employees desiring representation have been left unrepresented because of the Board's "craft or class" policy; (8) a rule addressed to the form of the ballot and the presumptions that will be applied concerning persons who do not vote in the election; (9) a rule providing specific voting eligibility guidelines; (10) a rule addressed to problems raised by the displacement of an incumbent union by a rival union or indeed by a certification of "no union" during the period of an unexpired contract; (11) and finally, a rule defining the proper role of employers in representation proceedings. I for one would be delighted to participate in such an exploratory process.

MR. CHARLES MORRIS: If I might address myself to the only question that Herb raised in his discussion, I will do so. That is, what happens when the "no vote" is put on the ballot and the union is decertified? What happens under section 2, Seventh of the Act, to the existing collective bargaining agreement? I think that it is a straw man; I do not think there is any problem. I think the precedent of the National Relations Act would be used in that instance, and for all practical purposes there would be no contract.

MR. DANIEL KORNBLUM: This question is directed particularly to Ben Aaron. Am I correct in my impression that you feel that no union slot on the ballot and craft and class changes for purposes of NMB administration require legislative amendment?

MR. BENJAMIN AARON: No.

MR. KORNBLUM: Alright, I wanted to clear that up. I have another question, which is related in the sense that I think that it is pretty much agreed that the Railway Labor Act and the Labor Management Relations Act are substantively, not procedurally *in para materia*. Do you think that in certain areas the NMB can, without legislative amendment, adopted by rule making power, unfair labor practice concepts and apply them on the administrative level?

MR. AARON: No.

MR. KORNBLUM: In other words you would still stand by *Virginian v. System*

40. In other words the courts alone, under the RLA, have the only jurisdiction to enforce the Act in the area of unfair labor practices.

MR. AARON: Generally speaking that is right.

MR. JAMES HIGHSAW: I have a comment on Herb Levy's earlier question. Herb, that is, what would be the situation in the event that decertification takes place where there is a contract where the date has not expired? What may happen may very well be what Charlie Morris says will happen, but it is possible that this question is going to come up very fast, and so far the National Mediation Board has been ducking the question. It may come up on Braniff because there is a representation election involving the Teamsters and the Railway Clerks on Braniff. I am not directly participating in it, but I think there is a possibility that it may wind up in a situation in which there are not enough votes for there to be anybody certified. Then the question is what becomes of the employees' rights under the contracts. The Clerks have been trying to find out from the Board because they are interested in their responsibility, that is, whether they have any responsibility to carry on the contract. Some of the employees under the contract have been trying to find out the same thing. Thus far they have been unable to get an answer to it. This is interesting, particularly in light of the Board's statements in its publications on three or four different occasions of the concept that a collective bargaining agreement is a continuing contract in which the changes in representation do not make any difference. There may be an entirely different situation where the representative disappears from the scene, but it may come up very fast.

MR. LEVY: Jim, I was not suggesting the solution to the question I raised. I have not gone deeply enough into it yet to develop a firm view about the solution. I do not think it can be dismissed as easily as Mr. Morris has dismissed it. I think the question will arise in a very difficult situation if, for example, the employer reduces the level of benefits for employees immediately after decertification occurs when there is a contract still in existence. My only purpose in raising this issue was to suggest, by illustration, that the logical extensions of some of the proposals that have been made here might generate some problems that we ought to think about now rather than later.

MR. HIGHSAW: I think the Board might regard it as a very difficult problem which may be one of the reasons they have not answered it.

MR. MORRIS: Let me add to my reply. I did not mean to dismiss it. I think that the answer I gave is the ultimate answer. I think that answer, however, might be hard to achieve. There are, of course, many problems that could be raised, and if you raised the situation in the context of an employer's immediate reduction of benefits, query, has there been some statutory violation, has this been done for the purpose of influencing the employees or interfering with their rights? I think this just points up one of the issues I raised in my paper, and that was that there is not any single body under the RLA capable of doing what the National Labor Relations Board does with regard to unfair labor practices. In other words, there is no one judicial body, or administrative body for that matter, which can handle statutory violations. It is a cumbersome proceeding, and this is one reason why we do not have definite answers and can only speculate as to what would probably be done to protect the employees.

MR. MARK KAHN: As an unwavering, I would suggest that this kind of situation, that is, abandoning representation in favor of no representation, would be extremely unlikely to arise. I can see shifts of representation occurring from time to time, but employees who have had a union are extremely reluctant, for example, to possibly weaken the interest they have acquired in seniority rights. This may happen in very small office units and that kind of thing, but it is likely to be extremely limited.

MR. ASHER SCHWARTZ: I am not sure that I agree with Professor Kahn. We heard discussion yesterday about some of the problems on Pan American, and we know of the problems that they had on United when several unions were com-

peting with each other to represent the employees. The prospect of a no-union line on the ballot puts a third party into the picture—the company. It seems to me that there is no question, from what I have observed, that the carriers will, if they have not already decided to do so, make every effort to persuade the employees not to have a union. Now it may be that for the moment they will be content with accepting the status quo. But as the opportunity grows for persuading employees to leave their unions, they will take that opportunity. In any opinion, it will also invite questions of representation that do not already exist. It will raise questions and they may very well be raised by carriers, or carriers' representatives, supervisors and so forth. So that I think the whole problem of representation in the airline industry will become far more chaotic than it is today. And, of course, what was suggested by Professor Morris is true. We do not have an adequate procedure for testing what might be called unfair labor practices or interferences with election procedures. Even if we did, as we do under the Taft-Hartley Act, we would have stresses and strains arising out of such a proposal that we do not need in the airline industry. I would like to ask a question. Mr. Wisheart gave a lecture on strikes this morning and indicated, I gather, that he was in favor of compulsory arbitration. But the only issues he mentioned that I can recall were wage questions, money questions and inflation. I would like to know whether the industry would favor arbitration of all issues that would arise, and particularly an issue such as has been raised in the past about whether or not a carrier should continue to employ navigators when they do not need them, when they have Doppler, inertial and the black box that will eliminate them. But the navigators insist that they want to continue to fly, and say in their demands that they propose that they continue to fly for the duration of the contract, and further, that this demand should also be a subject of arbitration. Secondly, if the issue goes beyond the interests of a particular carrier and extends to all carriers, will the industry agree that the union making the demand has the right to insist on an arbitration that would bind all carriers as well as the union itself?

MR. ARTHUR WISEHART: First, I want to make it absolutely clear if I did not before, that I am not speaking as a spokesman for the industry. I am speaking for myself and I hope that my remarks will be accepted as such. They are not intended to be made in a partisan manner. With respect to my proposal, unfortunately, I think that it has been somewhat distorted by Henry Weiss and Asher Schwartz, both good friends of mine and able opponents on many occasions. Therefore, I would like to read, for those of you who do not have it, a summary of what I did propose in the Michigan Law Review. The proposal was that the responsibility for determining whether or not an airline labor dispute or any part of it would be submitted to arbitration, would be transferred from Congress to emergency boards. In deciding whether a dispute should be arbitrated, the emergency board would be guided by two important criteria: (1) The effect of the threatened strike on the public; and (2) the prospect for settlement by collective bargaining. Now if an emergency board were to determine that a dispute should be arbitrated, the parties would be given a reasonable period of time to agree upon acceptable arbitrators and procedures. If they were unable to agree, then the emergency board itself, having determined first that there should be arbitration, would prescribe the terms of the procedure to be followed. The point I wish to emphasize is that the emergency board itself, using criteria which I think all of us would have to accept as being reasonable, would determine whether or not arbitration could be a helpful tool in the resolution of the dispute. The advantages of this proposal, in my mind, are: (1) that it would restore to emergency boards the effectiveness originally intended, but it would eliminate what has been described as one-sided compulsory arbitration in which the carriers regulated by the government are virtually compelled to accept emergency board recommendations which the unions have and can ignore with impunity; (2) that it would give

collective bargaining a better chance to work, by strengthening mediation; (3) that it would relieve Congress of the necessity of reviewing the merits of labor disputes on an ad hoc basis; and (4) that it would place in the hands of disinterested experts in collective bargaining—people in whom we would all have confidence—the delicate question of whether or not the nature of the dispute and the public interest are such as to require some sort of third party procedure. I look on the emergency board function in this context as that of a blue ribbon jury. They would be people who are not hired by either side, who do not have official positions in the government, who have no axe to grind and whose one outstanding qualification, in addition to independence, is that they are skilled experts in the field of collective bargaining. If they should conclude that some form of third party procedure would be helpful, it seems to me that they are the best qualified people to make such a determination. There have been a number of critical comments here, about emergency boards and their procedures, but it would be unfair to the symposium not to say that the emergency board members actually should be commended for what they have accomplished. The comment was made this morning that the efforts of emergency boards frequently have been counter-productive; that they tend to lessen the likelihood of settlement, instead of the contrary, if I understood correctly. I think that is extremely unfair; I think the reason that the emergency board has not been more successful is: (1) Because labor has lost sight of the original commitment under which it agreed that the emergency boards would be established; and (2) because the emergency boards have so little power. One is always tempted to relive one's own experiences. I try to avoid that, but I think everyone here knows that only a little over a week ago, American Airlines emerged from a three week strike, and it certainly was no emergency board that contributed to that strike because there *was* no emergency board, for reasons that I have never fully understood. On the other hand, the negotiations with the same union that took place in 1966 *did* involve an emergency board, and a strike was averted. What that proves I am not sure, but I do not think that the criticism of emergency boards that was made is really justified.

MR. AARON: I am certainly not rising to defend emergency board members; we shall just have to rest on what we have done or failed to do. But as I understand the proposal, the two criteria that will guide the emergency board in deciding whether or not to order some kind of compulsory procedure are the impact of the strike on the economy and the board's best estimates of the prospects for successful collective bargaining. One of the problems that I have is that it seems conceivable to me that a board might conclude that the impact on the economy was not so severe as to require compulsory procedures, but that the outlook for successful collective bargaining was not too hopeful. Then you do not have any really governing criterion unless you assume that everytime collective bargaining does not work you must have compulsory procedures, even though the impact upon the economy may not be so great. If you take the position that you would not have an emergency board in the first place unless somebody had concluded that the impact was great—if you already had, say, a certification from the National Mediation Board—then you would really eliminate the first criterion immediately because by appointing the emergency board, you have already said that the impact is sufficiently great to affect transportation in a substantial segment of the industry. Also, I am not at all sure that one can really tell about either of the two criteria. That is to say, it is very hard sometimes to tell what the impact on the economy is going to be. It is also very, very difficult to tell what will happen if you leave the parties to their own devices, whether collective bargaining will in fact succeed. And indeed it might be argued that part of allowing collective bargaining to succeed is to allow a strike. There is at least the possibility that the strike, being the motive power to an agreement, might produce an agreement much more quickly. Finally, if you will permit a personal observation, I have participated in the one instance in which the government did

order compulsory arbitration by statute. I—and I think my colleagues on the Board (my partisan colleagues as well as my neutral colleagues)—found it to be generally a rather unsatisfactory solution. In fact it was no solution. We handed down an arbitration award which was supposed to be final and to resolve the dispute; we held hearings for nine weeks; we issued a lengthy award; in the following three years we were reconvened, under the strange provision of the Railway Labor Act permitting the convening of an arbitration board to interpret its award, something like nineteen or twenty times in as many cities, and always on weekends. We handed down over 300 separate interpretations of this “final and binding” award and, as you know, the situation is by no means clear as to where we go from here. The Court of Appeals for the District of Columbia has made some interesting rulings on what part of the award remains and what part is no longer in effect. I raise these things not so much to attack your proposal, as to suggest that it has, if you will pardon my saying so, a kind of delusive simplicity. I think it is far more complicated than your very brief summary of it, and I am looking forward to reading your article, in which I am sure you have spelled this out and have gone into this problem in somewhat more detail, however, I can only go on the basis of your brief summary.

MR. MORRIS: I think the reference to the compulsory arbitration statute enacted by Congress, and the lack of acceptability of the resulting award demonstrates the difference between compulsory arbitration and collective bargaining. It is easy to say that an outsider will render an award, and the outsider might really be a panel of true experts although I question whether any outsider can be more expert than the parties themselves in tailoring an agreement to meet their own needs, but even if this could be so, the parties do not think it is so, and they never will think it is so. There is something about imposition of a settlement from the outside that is bound to affect its acceptability. Whereas, if the parties themselves hammer out an agreement, it is theirs, it is their baby, and not only is there a legal obligation to live up to it, I think there is a moral obligation which also exists because they are responsible for it; not that government over there, or that board over there or somebody else who can be blamed. I am impressed that the proposal which Art Wisehart offers had reference not just to major emergency disputes which might involve many airlines, but possibly disputes involving a single airline, because he made some reference to the current practice of unions singling out individual airlines for strikes. If this is so, and is justification for substituting compulsory arbitration for collective bargaining, then it ought to be equally so in every dock strike, in every school strike, in every automobile strike, for that matter in many, many kinds of strikes. So I think we should recognize the implication of his proposal and decide whether or not we are prepared to abandon collective bargaining. I think that is what the implication is, and I put that bluntly. I do not think that collective bargaining has failed. I think that it has been very successful, but it can be improved, and we ought to concentrate on improving it.

MR. WISEHART: I do not think it is fair to characterize my proposal as an abandonment of collective bargaining. I think that the generalizations that are made about it are unwarranted by the experience that the airlines have had under the adjustment board procedures, where decisions are imposed by third parties, but, nevertheless, are accepted as a matter of course by the carriers and the unions alike. There are many issues, particularly in the field of manning or technological disputes, which can have only the effect of souring collective bargaining relationships. If they were resolved in another way, it could permit collective bargaining to work better. I would like to cite one example that I think has been a soul-searing experience for many of the people in this room, that is the crew complement dispute involving the pilots and the flight engineers. This morning it was indicated that the ratification procedure that unions sometimes follow is a procedure somewhat contrary to the spirit of collective bargaining. But there is

another type of procedure that has been followed which has had perhaps an even more stultifying effect, and that procedure was at the heart of the crew complement dispute. In 1956 the Air Lines Pilots Association at its convention adopted a mandatory resolution specifying that the third crew member in the aircraft had to have pilot qualifications. From that time on, every pilot negotiating committee had its hands tied on that issue when it went to the collective bargaining table. There was no way of contending that collective bargaining, in the face of a mandatory resolution adopted in a convention, could take place. And we all know what the outcome was. The crew complement dispute sired a feather bird—an unneeded additional crew member on jet aircraft. Further, despite the efforts of ten emergency boards, the controversy produced thirteen airline strikes totaling 510 days and, more importantly, upset the collective bargaining relationships involving two unions for a period of ten years. Now, if the emergency boards had been given the authority proposed in my article, they would have seen that there was no possibility of collective bargaining functioning in that kind of a situation. And collective bargaining would not have been hampered by the stresses and strains of what, in my opinion, was a non-bargaining dispute.

MR. HIGSAW: I do not want to argue about the crew complement dispute but I think that issue was not caused solely by the resolution of the pilots to which he refers. The fact of the matter is, that, when the Civil Aeronautics Board proposed to issue a regulation requiring the third man in the crew, it proposed to have that man hold an A and P mechanics license. The air carriers that were opposed to this came in (I specifically remember Pan American—I do not remember whether American was involved) and told the Board they wanted the Board to remove the requirement of an A and P mechanics license because such a requirement would create a craft or class and would, in effect, produce the problem which ultimately came along. The Board took it out. So, what happened? At this point the air carriers who had to have a third man in the flight deck had a choice. They could either do it by using a pilot-oriented person, a pilot or a mechanic. About half of the airlines did it by using pilots and they never had any pilot-crew complement issue. The remainder of them did it by using mechanics and they did have a crew complement issue, and I suggest they created the problem because they wanted to use mechanics. They could get them cheaper than they could pilots. So I do not think the problem is as simple as has been suggested.

MR. HENRY WEISS: I have had some slight acquaintance with this problem, gentlemen, and it is not my intention, certainly (nor do I think it serves a useful purpose), to re-warm some of the old issues. But, what does concern me is this: That Arthur Wischart in his article suggests not that this issue would be removed from the bargaining table, but that other issues would be removed from the bargaining table, henceforth, those relating to technological changes and others which are developments of his so-called "two criteria." This relates to my concern that what we have is a kind of creeping removal of all significant, or many significant, issues. I do not think we should bog down on just how wounded one may, or may not, feel about past history.

MR. KAHN: I cannot resist a comment on Art Wischart's observation that although American Airlines is bigger now than the whole industry was after World War II, the U.S. Government, for some mysterious reason, saw fit not to consider a stoppage at American in 1969 to be an emergency, or potential emergency, and did not create an emergency board. I think this raises a very important question. I did not consider the three-week shutdown of American Airlines last March a national emergency or something that imperiled the health and welfare of the nation. I flew three times during that strike on routes serviced by American, but on competitors' of American, and had no serious difficulty obtaining transportation. Even an emergency board, Art, under your proposal might legitimately conclude that there are many festering labor problems at American and that a good healthy stoppage, if it develops, would be better than

the protracted delays that would be necessary if the settlement were to be reached in conjunction with board hearings, board deliberations and the subsequent obligation to bargain on the basis of a board's report. All this might not be successful anyway, after which there might be self-help and the imposition of an unacceptable, and perhaps incompetent, solution by well-meaning professors who are not as knowledgeable about your problems as you are. I do not see anything so terrible about a three-week strike now and then. I am sorry it happened and I have no opinion on the substance of the outcome. My point is that strikes can have some value and that we should not be too afraid of them.

MR. SCHWARTZ: Arthur's statement of the early history of the crew complement dispute, concerning the resolution of the Air Line Pilots Association about the flight engineer's seat, is true so far as it goes. But at one point a certain group of pilots were free of that resolution and these were the pilots employed by American Airlines. They were no longer bound by that resolution because they left the Air Line Pilots Association and formed their own association and did not adopt any such resolution. At that point the flight engineers of American Airlines asked for arbitration. They wanted to arbitrate the terms of their dispute in that connection, and in connection with their working agreement. American Airlines refused and rejected arbitration. Why? There was no knife at the throat of American Airlines, as Arthur has said, with the lesson of Eastern only a year or two before. There was almost a certainty that if the flight engineers struck, American would use pilots, and that the pilots would cooperate with American to fly the flight engineer's seat. So the flight engineers asked for arbitration with a view toward reaching a just settlement proposed by an impartial person. American said, "No," and refused to arbitrate. That gets me to the general question. As I understand the proposition that has been discussed here, the proposal that there be arbitration of collective bargaining situations rests wholly on the strike threat. But, suppose a union either does not want to strike, or cannot strike effectively. Is there any reason why the same process should not be applicable?

MR. WISEHART: I would simply respond to Asher's comment by saying that no doubt the reason that American Airlines did not want to arbitrate at that time was not because of a presence, or absence, of a knife at its throat, but rather, because the third party in the dispute, namely the pilot group, would not be a party to such an arbitration proceeding; and, without having all affected parties in the proceeding, arbitration would be rather meaningless.

MR. WEISS: I would like to address a question to Professor Aaron (although I must say that I just cannot resist recalling a remark attributed to the former Secretary of Labor, which I am sure is apocryphal, in which he is purported to have said that in certain situations, akin to those that Asher and Arthur were discussing, it all depends upon whose ox is goosed). I would like to ask Professor Aaron whether his observations with respect to the practice in Britain of treating labor disputes as illegal disputes, major or minor apart, does not have as a relevant factor the relative unenforceability of collective bargaining agreements in Britain?

MR. AARON: Well, I think that undoubtedly is true. The whole tradition in Britain of unenforceability of collective agreements has led to what the Donovan Commission has called a two-system structure. There is a formal system embodied in official institutions, and there is an informal system created by actual behavior. Perhaps I have been unduly influenced by my British colleague, Bill Wedderburn, but I am a very strong believer in the present system. But I have a feeling, not only from him, but from studying the research reports and testimony on which the Donovan Commission relied, that even the employers, who say that they would like to see contracts made enforceable—and some of them are suggesting that Britain adopt the more obviously stupid provision of the Taft-Hartley emergency board procedure—when they came to testify before the Royal Commission, indicated their great satisfaction with the method of dealing with shop stewards and just getting at the guts of the issue, without concerning themselves with whether

they were in effect negotiating an addition to the agreement, or adjudicating rights arising under the agreement. I want to make it perfectly clear that I am not taking the position that we ought to abandon our whole approach to these problems in favor of the British approach. What I am saying is that we have been a little smug about saying that we know how to do it and the British do not. We put all our eggs in one basket and make this very nice distinction and say; "Well, if it's rights we handle it one way and if it's interests we handle it the other way." Then it becomes perfectly clear that that approach is not fool proof. It does not work in some instances; as a matter of fact, any neutral in this field who has served as an impartial umpire under an agreement, where he continues to work with the parties on a fairly frequent basis, knows that in many instances you do not adjudicate rights, you work out a new solution to deal with a difficult problem and you put it in the form of an award. It is not an adjudication of rights. Very frequently the parties have followed a very sensible course of simply putting into the contract some calculated ambiguities, awaiting the day when they will have to resolve the issue, but not wanting to face it until that becomes absolutely necessary. I think that the British view of the government's role is still a pretty sound one; it is a position that the labor movement used to have in this country, although not so much anymore. It has its limitations, but in replying in kind to Henry, I will conclude with the even wilder mixed metaphor of one of my academic colleagues, who said to me once in a moment of high emotional pitch: "Once the government sticks its nose under the camel's tent, collective bargaining flies out of the window."

MR. LEVY: I have a question for Professor Aaron. It relates to laboratory conditions during an election proceeding conducted by the National Mediation Board, and it relates to two decisions in particular, *Ruby v. American Airlines* decided by Judge Friendly in the Second Circuit in 1963, and the recent decision by Judge Bryan in the Southern District of New York in the Pan American-Teamsters-BRAC situation in which Judge Bryan enjoined negotiations between the carrier and one union while a representation dispute was pending. My question is: Do you believe that the role of the federal courts in preventing interference in the representation proceedings is or should be as limited as the role prescribed for the courts by the Second Circuit in the *Ruby* decision, and if not, what do you think the role of the federal courts should be in this area?

MR. AARON: First, let me say that I do not feel that my opinions on this question are nearly as valuable as just about anyone else's sitting up here on the platform or sitting in the audience. I would like to respond, I think, primarily to the first reference to laboratory conditions. That phrase to me is an abomination. The National Labor Relations Board is the one that uses the term and talks about the necessity of maintaining an atmosphere where calm, rational judgment can prevail as opposed to passionate or fuzzy-minded reactions by employees induced by the propaganda of the employers or unions as the case may be. I think that is just pure unadulterated "flapdoodle." I do not see that that is the responsibility of the Board, it does not prevail in any other aspect of our lives; I have not observed anybody terribly concerned about keeping a nice calm rational attitude in any other kind of an election, and I think it is impossible to maintain in any event. I think I am pretty much in favor of keeping the federal courts out of it, however, there could be such flagrant misconduct of fraud that you really have to do something that involves a criminal violation of the law. But generally speaking, I think we ought to relax a little bit and "cool it" on these matters. I am very concerned about attempts to influence propaganda. I think that we would be far better off to take a wholly new approach and just stop saying what you *cannot* say, maybe say what you *can* say, and indicate what you *must* say under certain circumstances. I know that this is not really a kind of Railway Labor Act situation, but while we are on that part of it, it seems to me that you can tell an employer or a union that in anything that it publishes we are

not going to abide by the requirements of the statute. Let's take the employer. We do not like this union—we do not want this union; it is a bunch of racketeers and bums, but if you vote for them, we will bargain with them, well, then, I just take my chances on the rest of it. I really believe in free speech even though it is foolish speech, and I recognize that people hear things differently and that the mill hand in South Carolina may hear something quite differently than the truck driver in Detroit, but I am willing even to take that chance. Even in much more difficult problems and the kind that outrage me personally, of appeals to racial prejudice, I would go pretty far in that direction in allowing people to say what they want. I think that is one of the prices we pay if we want to have an open society and freedom of speech. But when you ask me how far the federal courts should regulate in the cases you mention, which I am sure I have read, but do not recall in detail, I cannot answer that question except to the extent that I have. Perhaps some of my colleagues up here could give you a little better answer.

MR. MORRIS: Let me just clarify one thing. The reference to European Courts, I hope, left no impression in anyone's mind that I was speaking for a labor court which would adjudicate either rights disputes or interests disputes. I think interests disputes should be settled by collective bargaining. I think rights disputes should be settled by some form of arbitration. I do not know whether you would call it an adjustment board or what have you. I think statutory disputes, that is, violations of a statute, ought to be settled by a court—a court specially equipped to do so. I just wanted to make that clarification.

MR. UELMEN: I was much interested in the proposal by Mr. Wischart. Others, of course, have faced this type of proposal for some time, and it is being faced now particularly in the public employment field. Airlines are wrestling with the problem and, of course, all sorts of municipalities, school boards, sanitary districts and so forth are also wrestling with that same problem. My comment would be that it has been demonstrated in the public employment field that no matter what type of statute is passed that has compulsion, severe restraints or even criminal penalties in it, there is no statute or order that can effectively restrain the employees from acting when they feel that they are not getting the justice that they desire to get. We are not just talking here about garbage, pick up or truck drivers or classifications of that type, we are talking about teachers, and other professional and semi-professional personnel who have demonstrated their willingness to go out on strike against statutes, against court orders and against all sorts of compulsion that does exist at the present time in some of our state laws. I think that when we are considering any type of amendment to our federal statute, we have to keep that phenomenon in mind, because I think that we do law and order no good when we pass the type of statute that restricts employees to such an extent that they are willing to violate the law to get what they want.

End of Friday afternoon discussion.