CHAPTER II

PROCEDURES UNDER THE RAILWAY LABOR ACT: A PANEL DISCUSSION

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CHAIRMAN GAMSER: Ladies and gentlemen, we are ready to begin the morning's program. I would like, first, to take the the liberty of introducing myself. My name is Howard Gamser. I am Chairman of the National Mediation Board. This Board is composed of three members appointed by the President with the advice and consent of the Senate of the United States. It is charged with the responsibility of administering the provisions of the Railway Labor Act. This statute in turn sets forth the ground rules under which labor-management relations are conducted in the railroad and airline industries.

I trust that you have all followed me thus far, because matters become a bit complicated and confused from here on out. To venture into an explanation of how our rules affecting labor-management relations differ materially and may be distinguished from those with which many of you are more familiar, that is, the rules used by the rest of the industrial world of the United States,

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is a task I will not undertake. Even if I were competent to do so, it would take more time than is at the disposal of all our speakers this morning.

During the course of this discussion, however, lest any of you form judgments or reach conclusions based upon legal precedents in the Labor-Management Relations Act, let me, with a few examples, hoist some warning lanterns for your guidance.

We are now talking about a statute, the Railway Labor Act, under which the commission of an unfair labor practice is a misdemeanor entailing grave penalties and under which compulsory arbitration has been decreed by the Supreme Court in disputes arising over the interpretation of agreements. I could point to many other variations, in legal requirements and practice, from the norms with which the majority of you are most familiar. I think this will become more clear as our panel members make their respective contributions. We are also talking about two major industries in which most spokesmen for each side, labor and management, are on a first name basis with their counterparts regardless of carrier or union involved, and both sides are on a first name, and many other name-calling bases, with the members of our Board.

We are considering the vital field of transportation wherein any stoppage has widespread and immediate economic repercussions and wherein the customers' economic resources are sapped more quickly than those of the combatants. Incidentally, and if you will forgive this aside, in both the airline and railroad industries, although our strike threats and infrequent resorts to self-help—as we euphemistically put it—immediately capture the headlines, the number of man-days lost because of strikes is markedly below that in other areas of economic activity. At this point I knock wood.

As you all know, our labor-management statutes in railroading date back a long way. In 1926, when another statutory scheme was proposed and enacted into law to replace the then existing law, a new provision, the emergency-dispute provision, was incorporated in that legislation which did not appear in either the old Newlands Act or its successor, the Transportation Act of 1920. This provision was later retained in the 1934 revision of the Act.

It has continued to read, since 1934, as follows:

> If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as the President may deem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or of any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

The first Board under the 1926 statute was created in April of 1928. Eleven boards in all were appointed before the Act was revised in 1934.

Since 1934, some 165 separate executive orders, under the provisions of Section 10, have been signed establishing emergency boards. Our first airline board was established in 1946. Since that time the President has appointed 30 boards to deal with the controversies of approximately one dozen trunk carriers, either singly or in various combinations, in this field. The other 130-odd boards have been concerned with railroad disputes affecting singly or in concert about 150 Class I Railroads as well as some 250 short-line carriers—as well as related services such as express.

Our speakers and panel members today are prepared to discuss "Emergency Board Procedures Under the Railway Labor Act" rather than the more general and broader subject appearing in your program, "Procedures Under the Railway Labor Act." I am in full agreement with the planning committee's decision that the more restricted subject is more than enough for us to chew on this morning.

Now let me introduce our participants.

Eli Oliver—Mr. Oliver is a distinguished labor economist and Managing Partner in the Labor Bureau of the Middle West which has offices here in Washington and in Chicago. He has

held consultant positions with the government on various occasions since 1918. He has also, in a private capacity, been associated with the presentation of economic arguments on behalf of railway labor since 1921. He has appeared for both operating and and non-operating unions before numerous governmental boards as an economic expert and before emergency boards in the same capacity in every national wage or rules movement for at least the last twenty-five years.

J. R. Wolfe—Mr. Wolfe is General Attorney for the National Railway Labor Conference, the principal spokesman for rail management. The office of the National Railway Labor Conference is located in Chicago, but more often than not over the past several years it has had representatives and staff physically present in Washington. J. R. Wolfe is not to be confused with his illustrious father, J. E. Wolfe, referred to by the *cogniscenti* as "Doc Wolfe" who captains the management team in all national railroad negotiations. Young Wolfe, over the past couple of years, has played a prominent role in the presentation of the carriers' case before emergency boards.

Now, a very few words of introduction about your own members who will participate in this presentation. On second thought, because they are so familiar to you as officials, past and present, of this organization, I shall not spend time in a recitation of their accomplishments and qualifications. It may be in order, nevertheless, in view of the subject under discussion, to say a few words with regard to their experience with emergency board proceedings.

Saul Wallen—Saul first appeared on our roster in November 1952 when he was appointed Chairman of Emergency Board No. 103. This dispute between United Airlines and the Flight Engineers' International Association was concerned primarily with the computation of basic pay as applied under various flight conditions.

His herculean efforts in this case so endeared him to the parties that the President saw fit to appoint him again, some six years later, in January 1958, as a Member of Emergency Board No. 120. This dispute, involving Eastern Airlines and the same Flight Engineers' International Association, was concerned with

crew complement. Saul also served, at the same time, on Emergency Board No. 121 in a dispute involving Eastern Air Lines and the Air Line Pilots Association. I should also mention that Dave Cole and Dudley Whiting served on these two boards as well. In March of 1958, the Flight Engineers' International Association had a dispute involving the scope clause with Trans World Airlines, Inc., which necessitated the appointment of a third board, No. 123, composed of the same three members.

In 1960, in a dispute between Pan American World Airways and the Brotherhood of Railway and Steamship Clerks, Saul served as a member of Board No. 128. There were a host of issues involved in this dispute.

In 1961, Saul again served as chairman of an airlines' emergency board, Board No. 140, in a dispute involving Trans World Airlines and the Transport Workers Union of America (Navigators). Israel Ben Scheiber and Emanuel Stein of the Academy served as members.

In 1962, Wallen, along with Academy members Seibel and Lynch, served on his first railroad emergency board, Board No. 145. There were 212 line-haul railroads and certain switching and terminal companies represented by the Eastern, Western, and Southeastern Carriers' Conference Committees involved in this dispute.

Saul's most recent service was in the early part of last year as Chairman of Board No. 160. This board consisting of Jean McKelvey, our first female board member, and Art Ross struggled manfully and femalefully with a dispute between the National Railway Labor Conference, representing all our major railways except the Southern Railway and the Florida East Coast Railway, and the Railway Employees' Department, AFL-CIO, representing the shopcraft employees of these roads. This dispute involved primarily job protection measures, including subcontracting limitations. In this particular case, I can personally attest to the fact that Saul gave the President a few lessons in the fine art of arm twisting. Saul and his colleagues made some pointed comments about emergency board procedures in their report.

Lewis Gill—Lew, according to my cursory research, has served

on two boards. The first board on which he served, along with Ron Haughton and Jack McConnell, was Board No. 158 created in December of 1963. This Board handled the dispute between six airline carriers and the International Association of Machinists. Instead of spending its time celebrating the arrival of 1964, this board spent New Year's Eve with the parties and resolved the dispute through mediation in the wee hours of the New Year. Gill's contribution to this effort, above and beyond the call of duty, also involved sharing his bed with an equally exhausted chief spokesman for the union.

In August of 1964, Lew was chosen to serve on Joint Boards Numbered 161, 162, and 163, chaired by Richardson Dilworth of Philadelphia. This was our first experience with a seven-man board. It was assigned three separate disputes between the National Railway Labor Conference and varying bargaining groups made up of non-operating railroad employees. Jack McConnell and Paul Hanlon also served on this board. Later, we had a substitute for President McConnell. The wage issue, for some of these unions, was settled on the basis of the board's report. Three craft unions, however, did not find the recommended disposition satisfactory, and they are now restrained from resorting to self-help by litigation. A job protection proposal of this same board has not been fully accepted nor as yet rejected by either side. This accounts for the substitution by Mr. Oliver for Mr. Schoene on our program this morning. This board is the one that made the learned, cultural reference to the Kabuchi ritual that was reported by the newspapers.

Ronald Haughton—Ron served as chairman of Board No. 158, the distinguished body that used the wee small hours of New Year's Day 1964 to complete the signing of mediated agreements between dazed airline carrier representatives and equally glassy-eyed general chairmen of various International Association of Machinists' airline lodges.

Ron was also chairman of our most recent board, Board No. 164, appointed in September of 1964 to handle the wage dispute between the Brotherhood of Locomotive Firemen and Enginemen and the National Railway Labor Conference. Jake Seidenberg and Lou Crane served with him. Their report was submit-

ted early in November of 1964. It was accepted by both sides, and the dispute was thus successfully concluded.

James C. Hill—Jim, our last Panelist, was supposed to be at the White House this morning, talking to a ladies' tour group, and I was to announce that he was called to the White House. Jim has served on emergency boards three times since 1962. He was Chairman of Board No. 146 that heard the Trans-World Airlines and Flight Engineers' International Association dispute involving crew complements—a big issue. In August of the same year, he was on the board appointed to hear the dispute between the Transport Workers Union of America and Pan American World Airways. That board did not have to formally hear the dispute or render a report since the parties sat down and settled when they saw Ted Kheel, Ed Lynch, and Jim on the scene. This was Board No. 152.

Hoping once more to intimidate the parties into making an agreement, Jim was made Chairman of Board No. 159, created in January, 1964, to hear the controversy between the Brotherhood of Railroad Signalmen and the major carriers over wages. Joe Shister of the Academy served with Jim on this Board. The recommendations of this Board, too, served as the basis for a settlement of this case in April of last year.

That takes care of the panelists.

Many other members of this Academy, in the audience today, have served on emergency boards. In briefly glancing through the list of appointees made by four Presidents since 1947, when the Academy was founded, it should be noted that, with rare exception, each of these boards has had at least one member of this Academy as an appointee; a majority of these boards have had two members; and in many instances, particularly in the past four or five years, all the Presidential appointments have come from the Academy's roster.

It is interesting to note that Donald Richberg in his testimony before the House Interstate and Foreign Commerce Committee considering the 1926 legislation,[8] stated that even though he was

[8] P. 17 of Hearings, 69th Congress, First Session on H.R. 7180 (1926).

there representing railroad labor which looked with great suspicion upon the provisions of Section 10 and supported its adoption with great reluctance, he was nevertheless constrained to say on labor's behalf that, "There should be a final investigation by the highest authority capable of representing the public in order that, in the first place, if possible, their differences might be composed, and in the second place, if these differences went on to conflict that the public might be informed as to who was in the wrong." Such a board, he went on to add, "can fearlessly report on the situation to the public in order to crystallize public sentiment in favor of what should be a settlement in the public interest."

Now, what did Richberg envisage as the qualifications for board membership? At the hearing he introduced a letter from the National Civic Federation which indicated that the President should appoint "the most representative and outstanding men in the United States to serve on that Board." The Presidents have thus honored the Academy by the large number of Academy members who have been appointed to the boards. In turn, those who have been and will be chosen in the future to serve on such boards, have an obligation, that accompanies their acceptance of such an appointment, to give the undertaking the fearless and bold approach of which the sponsors of the legislation spoke.

Gentlemen, as my final comment before introducing our first speaker, Mr. Wallen, may I thank the Academy for including this subject on its agenda of this meeting. The members of our Board, the National Mediation Board, have the final responsibility, in most instances, for the settlement of airline and railroad disputes of national significance. Those of you who serve on emergency boards, those we call upon to act as neutrals, members of representation committees, on boards of arbitration, and those who, at times, perform extra-statutory mediation functions can render valuable assistance by imbuing the parties to these controversies, in this critical transportation field, with the knowledge of the continued need to recognize the vital public interest in the peaceful solution of their labor-management controversies.

The establishment of emergency boards, under the 1926 statute, was part of a joint labor-management effort. Over many

months, across the conference table, each word in the entire proposed statute was mutually agreed upon by labor and management, with "blood and tears" as Mr. Richberg pointed out to Congress. This joint effort, this pioneering in labor-management relations is much akin in spirit to the Hart, Schafner and Marx experiment and many of the much vaunted schemes to achieve industrial peace which we are examining at industrial relations meetings today. Other bold experiments in the promotion of mutually agreed upon solutions to common labor relations problems in the transportation field, such as the B. and O. Plan, the Washington Job Protection Agreement, and many more recent job stablization and protection agreements have come from the leadership on both sides of the table in these industries.

The primary efforts of our Board have been to revitalize and to encourage this spirit of mutual effort in the public interest. Discussions, such as this one—in the spirit of frank approbation and just disapproval—of our efforts and our procedures is sure to be helpful. Again, thank you for your interest and participation.

May I now introduce our first speaker—a provocative man, Saul Wallen, who has a provocative title for his address this morning, "Emergency Board Functions and Procedures—Statutory Myth vs. Living Reality."

SAUL WALLEN: The subject of the good and ill of the Railway Labor Act as it is now being utilized, although not our major topic, is something I would like to discuss briefly because it is ripe for full discussion and review.

Certainly, all is not right with the Act. It has yielded a plethora of strike threats in recent years, with all that this implies in terms of diversion of business from the rails. And while it has not yielded a national strike in recent history, there is strong reason for the opinion that this has been due less to the workings of the Act itself than to the interposition of the Executive Branch and the hostility of the public toward this eventuality.

At the same time the editorial press, and especially the *New York Times,* has frequently told us that the Act is in total collapse; that collective bargaining in the railroad industry is dead; and that railroad labor and management are possessed of a total

inability to cope with their own problems without outside intervention.

I doubt that this extreme view is shared by careful observers of the railroad scene. Certainly the industry and its unions showed a real facility for collective bargaining in the 1920's and 1930's, and they had some success in the 1940's and 1950's. Bargaining over local problems, on individual properties involving complex issues, has gone on over the years and, when these problems have not been raised to the magnitude of national problems, still goes on, probably with more success than failure. It is much too early to call collective bargaining in the railroad industry a corpse.

But to say that is not to say that it is a lusty creature either. The fact is that it is rather anemic; that in national disputes it has in recent years been virtually a dead letter until after emergency boards have rendered reports; and that in some cases on the railroads, and more frequently on the airlines, these reports have become the floor from which further concessions have been sought.

The significance of this observation lies in the fact that the railroad industry is beset with problems. Their effect on the terms of employment is great. The industry has undergone a technological revolution since the end of World War II that has had a tremendous impact on employment. Between 1945 and 1962 all classes of railway employment decreased from 1,420,000 to 720,000 —a decrease of 51 percent. Among the shop crafts, the drop has been 60 percent; among all non-operating employees 57 percent, and among operating personnel 37 percent. No major industry, with the possible exception of coal mining, has had a similar experience. And the end is not yet in sight. Despite the rise in efficiency, the industry, until recent years, has lost ground to competing forms of transport.

Such drastic and fundamental changes in an organized industry must inevitably bring in its trail complex problems of adjustment and inevitable clashes between the short-term interests of management and labor. The fact is that collective bargaining, for good or for ill, remains the only policy the Congress or the public is likely to sanction in the near-term future for reconciling these interests or solving these problems. Hence, there is a profound

importance to the question of how the Railway Labor Act and its administration can be improved.

As Howard Gamser stated, however, a review of the strength and weaknesses of the entire Act is outside the scope of our discussion today. What we propose to do is to point out how emergency boards appointed under the Act function and to stimulate discussion about how their functioning may be improved. It is just possible that an improvement in the way they function may become the point of departure for a better approach to the entire dispute-settling process in the transportation field.

As a starter, it might be well to go back into history. The emergency board provisions of the Railway Labor Act of 1926, as indeed the other provisions, were drafted by representatives of labor and management, were enacted without change by the Congress, and have remained unchanged since that time. In what circumstances did the drafters of the law visualize the Boards would be created, and how did they expect them to function? How do these expectations compare with the realities?

On this subject I make no claim to originality. The original research was done by Professor Jacob J. Kaufman of Pennsylvania State University. In an excellent article, "Emergency Boards under the Railroad Labor Act," published in December, 1958, in the *Labor Law Journal,* Professor Kaufman compared the expectation of the drafters and the Congress with subsequent experience. And I am indebted to that paper for much of what I am going to say.

On the matter of frequency of use of emergency boards, the drafters of the Act and the Congress in enacting it, expected them to be used infrequently. The labor spokesman at the 1926 Congressional hearings stated "I do not think we will have many disputes go to an emergency board." Voluntary arbitration was visualized by the drafters as the most likely alternative to direct settlements.

The prediction looked fairly good from 1926 to 1934. Only 11 boards were created. It continued to look bright from 1934 to 1940, when only five boards were created, but since 1940, 138 boards have been established.

The growing frequency of the use of boards is symptomatic of the failure of bargaining to take place prior to their creation. The stronger the likelihood that the services of a board will be invoked, the less likely is a meaningful search for negotiated solutions prior to its creation. This is compounded by the likelihood of further intervention at the Cabinet or White House level.

This raises the question whether the degree of use and timing of creation of emergency boards in the handling of transportation disputes should be reexamined. The likelihood of direct settlement appears to vary in inverse ratio to the possibility of an emergency board's creation. And if in given circumstances the creation of a board is inevitable, perhaps it should be undertaken as a first step, rather than as a next-to-the-last step in the dispute-handling process.

There is a vivid contrast between the concept held by the framers of the Act about how the boards should function and the way they have functioned since the law was enacted.

At the 1926 Senate hearings the spokesman for the labor organizations stated that the emergency board "is not merely a board for the purpose of informing the public regarding the merits of the inevitable conflict . . . . Such a board would certainly want to exercise first of all the mediatory powers that would rest within its hands . . . . You are going to destroy that function if you set that board up . . . in such a manner that you appear to be creating . . . a sort of super-labor board that will come in and solemnly sit behind a table and summon witnesses and take evidence and consider the matter in private conference and then issue an unenforceable opinion."

As this statement and others show, those who conceived and passed the Act intended emergency boards to be mediators first and fact finders second. In actual experience the reverse has been true. The boards have served primarily as fact finders. Mediation has usually been the second and, more frequently than not, the broken string in their bow.

There has also been a great divergence between the kinds of issues the founding fathers thought emergency boards should hear and the kinds of issues they actually have been dealing with.

Inevitably this has led to a different format for the hearings than was originally contemplated.

Both carrier and union spokesmen and Congressmen in the debates on the bill stated that the boards should be concerned with broad issues. Donald Richberg, then union counsel, stated the Board "has got to deal with the broad factors in the situation and not with the intimate details."

The carriers' spokesman stated, "The Board is not going into a meticulous examination of all this question; it is undoubtedly intended to reach its conclusions on large questions . . . . those matters do not require the summoning of witnesses and the taking of great volumes of testimony."

Richberg, continuing, said: ". . . . if it were a question of an increase of two cents an hour or three cents an hour or four cents an hour, . . . a board of that kind could hardly hand down a decision that would be of any particular effect. It would be too much a matter of opinion . . . ."

How does reality square with myth? The boards have been involved in specific, technical questions. Their wage recommendations have been refined to fractions of pennies, to four decimal places. And as for the board's procedures, I can do no more nor less than read to you the statement of Emergency Board No. 161 on the subject:

> Section 10 of the Railway Labor Act charges Emergency Boards with the duty to 'investigate promptly the facts as to the dispute and make a report thereon to the President within 30 days from the date of its creation.'
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> As Board No. 160 commented: 'While the Act does not specify the manner in which the Board is to carry out its investigation, it seems clear that by providing for a report in 30 days the framers of the legislation must have had in contemplation a flexible, expeditious procedure, suited to the problems of each case, in which all suitable means of information-gathering would be employed.'
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> The Act has now been in effect for almost 40 years, and the parties have long shown a preference for lengthy, formal hearings, of a quasi-judicial nature, in which many witnesses are put on the stand by both sides, and in which mountains of exhibits are filed by each side of the dispute.

The result is that no Board in recent years has been able to complete its report within the statutory period, and if both the railroads and the unions were given a free hand in these hearings their testimony could easily occupy 50 to 60 full days of hearings.

In this case the printed exhibits alone total 75, and when piled on top of one another came to a height of almost seven feet. Even a hurried reading of these exhibits would require not less than 14 or 15 full days of a Board member's time.

The attorneys for both sides have had long experience in this type of hearing, and are men of much ability, with great knowledge of every phase of the railroad industry, and a persistent determination to explore every facet of labor relations in the industry since the first steam engine made its appearance.

The principal witnesses are economists, together with railroad executives and union officials. Every witness who appeared in this proceeding had testified before many previous Boards.

This Board had the distinct impression that this was, to a great extent, a repeat performance of an even longer run than 'My Fair Lady,' with each side knowing exactly what the other side would present and to what each witness would testify.

The parties appear to regard the Board as an audience to an elaborate ritual—something like the Japanese Kabuchi Theater.

Attempts by previous Boards and by our own Board to break through this ritual were quite unsuccessful.

We were, of course, able to prevent the actual reading of a great mass of exhibits and statements, but each party, courteously but firmly, resisted all attempts to narrow the issues.

Both sides seem to believe that in the long run they have a better chance of success by swamping the Board with testimony, studies, surveys, charts, statistics, etc., than by enlightening the Board with a concise presentation of relevant facts.

In view of this, the present Board would like to unburden itself of certain comments.

It is clear that any Board which has attempted to effect a change in procedure has been regarded by both sides as a band of itinerant philosophers. This Board agrees that it is not its function to attempt to bring about basic changes in the industry, or in the philosophy of the employers or the employees. However, this Board does feel strongly that the present procedure needs a basic over-haul to shorten and simplify the proceedings.

This is the statement of Emergency Board 161 on the subject,

and I think it deserves attention, because it summarizes much of what I believe and others believe has been one of the major drawbacks of the emergency board procedures of the Act.

Now, it might be argued, what if there has been a divergence between the original concepts behind the Act and its actual functioning? The test lies in how it meets its basic purpose—to prevent crippling strikes. And this it has done on a national scale.

This Panglossian view overlooks the fact that the Act, in spirit and in letter, calls for more. True, one of its stated purposes is "to avoid any interruption to commerce or to the operation of any carrier engaged therein." But the Act states its purpose is also "to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions." Whether that purpose is being achieved is something else again.

The importance of the need to rethink the functions and procedures of emergency boards under the Railway Labor Act was concisely stated in the report of Emergency Board 161, and I would like to close with a short quotation from that report on this question. They said:

> In conclusion, we hope that not only future Boards, but especially the parties themselves, will give thought to a drastic revamping of Emergency Board procedures along the lines suggested herein. If nothing more was at stake than saving time and money for the parties, and reducing the frustration of the Board members, perhaps the matter would not be of any major concern. But we are convinced that more is at stake—the cumbersome procedures before the Emergency Board are, we think, symptomatic of the whole approach of the parties to their collective bargaining relationships. The pattern of long delays, in both contract negotiations and grievance handling, as well as in procedures before Emergency Boards, is in itself one of the most serious irritants creating difficulties between the parties. We are convinced that if the parties reform their approach to the Emergency Board procedures, it would inevitably lead to similar improvements in the handling of disputes between the parties at other stages. It need hardly be added that any improvements in the labor relations of this critical industry would be decidedly in the public interest.

And to that I can only add, Amen.

CHAIRMAN GAMSER: We now call upon J. R. Wolfe, to hear his views on the subject.

MR. WOLFE: Thank you, Mr. Chairman. I do appreciate the opportunity given me by the Academy to express my views.

As Counsel to the National Railway Labor Conference, I have since 1959 with my associates represented most of the railroads in national disputes. I might say that in 1959 I and a few other railroad lawyers were summoned from individual railroads, after having had experience for some years in the trial of lawsuits, to participate in the so-called work-rules dispute. From that time on I have been engaged before every emergency board and commission handling national disputes.

When I received this invitation, I accepted it with some trepidation because I thought all of the membership of the various boards would be here during my presentation. Then, on second thought, I said to myself, we have gotten along well with most of those boards and their members, both from the standpoint of procedure and of accomplishing the purpose for which all of us entered into the endeavor. It is only recently that we have had some difficulties which I shall discuss as I proceed this morning.

Gentlemen, I want to make two things perfectly clear at the beginning: I did not come here to apologize for emergency board procedures as the parties have used them since 1926, nor did I come here to participate in the burial of those procedures.

I came here for two purposes: *First,* to attempt to explain to you why emergency board procedures, as utilized by the parties over the course of some forty years, are fundamentally and basically sound. *Second,* I came here realizing that improvements can be made in virtually everything; certainly some improvements can be made in existing procedures and I should like to discuss them today.

Now, with those two basic principles on the table, let me proceed to elucidate and expand. My first point, as I stated, is that there is nothing fundamentally or basically wrong with these procedures can best be illustrated by an examination of the proceedings of the two most recent boards which heard and ruled on railway labor disputes.

One of these boards made what we consider an unjustified

attack on these procedures. Some of that attack was read to you by Mr. Wallen.

Let us examine first what we call the three-numbered critical board, Boards 161, 162, and 163. It was an unusual board in membership, in the subjects before it, the climate in which the board entered the dispute, the number of organizations before it, and the experience of the board members in emergency board work. Four of the six members of that emergency board, to the best of my knowledge, had never served on any emergency board before, either in the airlines industry or the railroad industry.

The organizations before that board contended that there were three separate cases, each of which they wanted to try separately. If they were correct in that position, normally 90 days would be consumed just in fact-finding. It was a three-numbered board because the Act had been invoked separately on the three disputes before it. Yet by law the board had to hear the cases in 30 days. What I am saying is that the briefest of historical examinations would have revealed to the members of the board its atypical qualities. It was atypical in membership, atypical in subject matter presented before it, and atypical in the job that it had to do.

We have not said a thing about the criticisms and other statements made by that board. I am sure some of you have wondered about the silence. We are still negotiating on parts of its report.

The meeting which Mr. Schoene is attending today concerns part of that board's report and recommendations. I might add that that part of the report which is as yet still in dispute involves an issue concerning which the carriers were effectively estopped by this board from putting in oral evidence on the subject of job stabilization for about 500,000 railroad employees.

Immediately after the resounding criticism of emergency board procedures by Emergency Boards 161, 162, and 163, which Mr. Wallen just read, another board was summoned by the President to investigate a national dispute involving railroad employees and virtually all of this country's 200 railroads. That dispute was one involving wages between the Brotherhood of Locomotive Firemen and Enginemen and the National Railway Labor Conference and the railroads it represents. It was not an uncompli-

cated case, not at all. The case involved the carriers' contention that firemen should receive no increases since they had been adjudicated unnecessary by Board 282. It involved other issues which gave the board a great deal of room for thought. But Board 164 and the parties had no difficulty whatever in accomplishing the statutory purpose for which emergency boards are designed.

This board definitely ascertained at the outset how much time it had to file a report, and it then made a sensible division of this time between the two parties for presentation of their cases and the board's needs for examination of the facts and report-writing.

The board did not hesitate to indicate to the parties when it thought a point was being too heavily labored, but it did so intelligently. It did not do so solely for purposes of harassment. As a result, the need greatly diminished for such admonishments day by day as the board proceeded with hearings.

Both parties submitted written pre-trial statements and final briefs. Final arguments, however, were not heard by the board. The parties were completely satisfied with the procedure. Each side was able to introduce everything it thought necessary and the board filed its report within thirty days of its first meeting with the parties.

And I might say, ladies and gentlemen, that an agreement was negotiated between the carriers and the Brotherhood on the basis of the board's report shortly thereafter.

Now, this was the latest board which utilized what we call the existing procedures. I think here I owe it to you to explain briefly just what these procedures are, because, while a great many of you, I know, understand them, I am sure many of you are not familiar with them.

They have been compared to the procedures used in lawsuits. They have also been compared to a number of other things, so I think I ought to tell you exactly what they are. The procedure that has been found sound is basically this: giving the parties an opportunity to present their facts and arguments in a controversy wherein the board is expected to rule on the merits. And, believe me, such a ruling involves property interests. For instance, the recommendations of Boards 161, 162, and 163 just completed, in

final settlement, will ultimately cost the nation's carriers an increase in costs of approximately $500 million per year.

Now, we feel, not unjustifiably, that in controversies such as this, where decisions and recommendations are going to be made on the merits and an adjudication is going to be made, that we, at least, should be given the opportunity to tell the board what we think are the material facts and arguments.

The rules of evidence are not followed in these proceedings. It is not like a trial at all, and any of you who have participated in litigation and at the same time have participated in emergency board proceedings are just as aware of that as I am. There rarely are objections. We don't object to hearsay evidence, to conclusions, or to immaterial or irrelevant evidence. We don't cite the best evidence rule. The parties put in what they think the board should have before it in order to make a decision on these momentous and serious questions. That is all it is.

And what I am saying is that that right, that privilege, if you want to put it that way, should not be taken away or diminished, realizing, of course, that the board should be given time to study the evidence and the facts as presented by the parties and time to write its report.

Board 164 did just exactly that, and the parties were well satisfied with its procedure.

I say, in addition, that existing procedure is sound on evidence of the results obtained in the course of 40 years.

Mr. Wallen indicated that collective bargaining in the railroad industry today is anemic. I do not agree with him. I don't think it is anemic, as the record of the past year demonstrates.

Remember, we have 24 unions to deal with; we have 20 with overlapping membership. They are competing among themselves, not only for members but for monetary and rules benefits from the carriers. We don't have just one or two unions to deal with. And these unions deal with us at various times for their own personal reasons.

I am not debating today whether that is right or wrong. I

merely say it is a fact that has to be considered when you evaluate the record of collective bargaining in this industry.

This year we made a voluntary settlement with the Brotherhood of Locomotive Engineers on a nationwide basis and that settlement has been extended among the operating crafts. With the assistance of Emergency Board 164, agreement was reached with the Brotherhood of Locomotive Firemen and Enginemen.

We have yet to deal with some of the fringe supervisory organizations, but no difficulties are anticipated. All rules problems have been settled on a national basis, except that which hangs over on employee stabilization from the three-numbered board. For the most part two- and three-year contracts have been the rule.

As Mr. Wallen said, and on this I agree with him, there has been a series of recent strike threats in the industry, but a large part of that was brought about by the operating rules movement. That was a movement where for the first time in fifty years the railroads served notices on the unions in order to obtain changes in the rules. It was bound to be traumatic because the unions simply are not accustomed to being on the receiving end. Since they hadn't been confronted with demands before, it was more than a little difficult for them. We did have some strike threats, but for the most part these issues have been disposed of.

What I am trying to say is that I do not agree with Mr. Wallen's comments, because existing procedures have been proven fundamentally sound. They have prevented work stoppages in the railroad industry, for the most part, for over forty years.

Mr. Wallen stated that the intent of the framers of the Railway Labor Act was to provide for mediation first and fact-finding second. I heartily disagree, after having read every word of the legislative hearings that preceded passage of the Railway Labor Act, and every word of the floor debates.

That such is not the case—and I think Mr. Wallen should blame Professor Kaufman for misleading him on that point—is best illustrated by the following remarks of Mr. Richberg, Organization Counsel, when questioned by Representative Newton, who said:

"In reference to this Emergency Board, I have gotten the impres-

sion from what somebody said, maybe it was in the hearings, or off the record, that this Emergency Board was sort of a supervisory mediation board.

"Mr. Richberg: Yes.

"Mr. Newton: I got the impression, from reading the language that it was more than that. I got the impression that this Emergency Board, clothed as it is with the powers of investigation, is to create a board to investigate and report respecting such dispute. That is rather broad language."

Mr. Richberg then said: "I didn't want to curtail it. I wanted to add to it."

He was talking about mediation as opposed to fact-finding.

"I was only fearful that the impression would be drawn by the Committee that what we were creating here was merely a board of investigation; that it had two great functions, that it could exercise a final power of mediation, not an initial power of mediation."

In fact, any mediation by a board is extra-legal, because it is not in the Act. You can read Section 10, 45 USC 160, from now until next week and you won't find any mention of mediation in that section of the statute.

I did say I would have some constructive things to say, and I think it is time that I move into that area.

First, I believe, and I am expressing my own personal opinions here today, that it is extremely important that the first day a board meets with the parties it ascertains definitely the time it has in which to file its report. I mean, whether or not the parties are willing to extend the 30-day limitation imposed by the statute. The board will then know what it has to do—there won't be any question about it. Then the board, just as Board 164 did, can say, "All right, if we have 30 days, we will give you six days to present your case, and the other party six days to present their case. Do with it what you will, because, after all, you are the parties in this property rights dispute on which we are going to make a recommendation. Then we will require so many days to study what you have said, or anything else we want to study, and make our report."

What I am saying is, I think a board does itself an injustice when it leaves the time question up in the air and permits these

cases to drag on indefinitely without any real knowledge of where it is going.

Second, Emergency Board 161 mentioned pre-trial conferences. I think they are desirable. I say that for this reason: one of the reasons we had difficulties with this three-numbered board is because its membership entered into that dispute, some members, not all, with the idea that they knew everything there was to know about the case before they heard the evidence. I think we, on the other hand, did not give them credit for knowing anything.

Now, if a pre-trial conference can unearth just how knowledgeable a board is on some of these subjects, we might be able to greatly shorten the hearings.

But you must understand, in disputes such as this, we are representing our clients. We must do so in these million dollar disputes. We don't know all of the members of these boards, and, as I said, four members of that board had never sat on a similar case before. A pre-trial conference in that situation, considering the fact that we had three disputes which the union called separate, might have been of great assistance.

I leave you with this one passing remark; it is my own personal opinion, but I am sure I speak for my colleagues and associates. We shall continue to insist upon the statutory right under Section 10 of the Act, to fully represent our clients and present our side of these interesting but important disputes.

Again, I thank you very much for the opportunity to be here and the chance to speak out on the issues. Thank you.

CHAIRMAN GAMSER: I think Mr. Wolfe's remarks have pointed up the necessity for a definitive legislative history of the Act, and I am happy to announce that our Board is cooperating in the publication of such a volume.

Now, unless you think we are discussing ancient history, I present Eli Oliver, who was very much a part of the discussions in 1926 and 1934.

ELI OLIVER: I first want to apologize because Lester Schoene, if he were here, could discuss this subject more intelligently than I. I want to express his regrets for not being here, and I want to

express my own regrets for being here. I say that because I am reminded of a story about a patient who said to the doctor, "Doctor, I just read an article in the *Reader's Digest,* so I know what is wrong with me and I know what medicine I need. All I want you to do is sign the prescription."

In discussing emergencies in the transportation industry, I speak primarily of the railroads, because the airlines are not under discussion here.

On the railroads we have confronted many crises in the collective bargaining machinery. We confronted them in 1920, 1922, 1926, and several times between 1926 and 1934. It is not unusual that we now confront another. I am not in disagreement with the statement that emergency board procedures have very seriously deteriorated in the last five years. I qualify the statement by saying the last five years because up until that time emergency board procedures had become progressively more satisfactory to the employees, and I think to management in the railroad industry as well.

I also want to limit my statement to national proceedings. During these five years we have had some very important emergency board proceedings involving individual systems and individual labor organizations that have been handled in a very orderly manner, in which the reports were written in a mature and dignified fashion, in which the mediatory procedures were carried on generally in an effective manner, insofar as they were restored to, and in which the statements of fact made in the reports of the emergency boards did not seriously distort the actual facts brought out in the dispute under consideration. From these national emergency board proceedings, I do exclude the one to which reference was last made—the dispute involving the Brotherhood of Locomotive Firemen and Enginemen. I suggest that an examination of these national proceedings, with this one exception, may provide a possible approach to the solution of our current problem.

We have become familiar in recent years with regional differences in social, political, and economic attitudes. I would suggest that it is not without interest that in those proceedings to which I have referred where the procedures were orderly, dignified, and

mature, every emergency board chairman came from west of the Hudson River and the Schuylkill River, and the chairmen of all the other boards came from the east and the northeast of that line.

It is to me a truism, therefore, that the success of procedures before arbitration and emergency boards depends more upon the chairmen of such boards than on the conduct of the parties to the dispute.

There has been some reference today to the history of procedures under the emergency boards. I took part in arbitrations (which were intended originally to be and have been an alternative to the emergency board procedures) in 1927 and 1928 and 1929. The amount of time and the volume of evidence involved in those proceedings may interest you inasmuch as these matters have been referred to today. In 1928 I took part in an arbitration on the Great Northern Railroad, involving only one craft and involving only wage rates, that took ten weeks to conclude. The same was true in 1927 of an arbitration involving a single craft on the New York Central Railroad. In 1928, if I recall the date correctly, the same amount of time was required in an arbitration on the St. Louis-San Francisco Railroad. There has not been, therefore, an increase in the amount of time required for proceedings under the Railway Labor Act if it is remembered that arbitrations are alternatives to emergency board procedures.

The expansion or development of the material presented by both sides in emergency board procedures has come about primarily because of requests from emergency boards for additional information in particular areas, or from strictures in their reports to the effect that certain elements of the dispute were not adequately presented in evidence.

We have heard the chairman of this panel read from the report of the last three-fold emergency board in the industry criticising the great volume of evidence. It should be noted that in the report of this board of which Saul Wallen was chairman, there is the statement that hearings were held for a total of 15 days; the transcript totaled 2,649 pages, and the board received from the labor organization 24 exhibits and from the carriers 26. The proceedings were adjourned at the request of the chairman of the board and by agreement of the parties.

Then what happened? In the board's report, there appears on page 17 three separate footnotes. The first says, "Data supplied by the carriers at the Board's request;" the second footnote says, "Data supplied by the carriers at the Board's request;" and the third says, "Data supplied by the carriers at the Board's request." On page 23 of the same report there is a footnote which reads, "From data supplied by the organization at the Board's request." Moreover, after the hearing was concluded, both parties were asked by the board to submit additional information.

Is it strange, therefore, that as the parties go into a new hearing they survey what previous boards have requested in the way of evidence, they survey the suggestions that the evidence was inadequate in particular areas, and then attempt to supply additional information in light of those requests and suggestions?

In regard to that great board, that three-ply board, chaired by Richardson Dilworth, the very handsome ex-mayor of Philadelphia, for whom I trust every woman in the city voted.

Anyway, we find in the record of the hearing before that board that three proposals of the labor organizations were given substantially less attention in the employee presentation than were the other proposals. The board noted this and said: "The Board concludes that the record does not provide a basis for recommending any of the changes contained in any of these proposals."

We could only conclude from this statement that the board was telling us that we didn't give them enough information for a recommendation with respect to those points. We have had similar statements from other boards. In order to made certain that our proposals are fully considered, we have had to expand over the years the type and depth of information on all the issues which are presented to the boards.

I want to take up now what I consider to be the major problem involved in the use of emergency boards. In doing so, I want to emphasize that I speak only as an individual and not as a spokesman for the railway labor organizations. I particularly want to make this clear to the international representatives of those organizations who are present at this meeting.

I believe that much of the failure of emergency board proce-

dures over the past five years can be attributed to the personnel of those boards and not to the procedures as such. In my opinion, it is vitally important that a new method be found to select the personnel of emergency boards.

The ways in which personnel can be selected are many. My own belief is that there should be an agreed-upon panel of people from which the membership of individual boards would be selected. Labor and management in the railway industry should get together with the assistance of the National Mediation Board and develop a panel satisfactory to both sides. Men of experience should be chosen—not people who have sat on just one or two emergency boards in the past five years, but men of long experience and great understanding of railway problems. Above all, they should have the time to discharge fully their obligations.

In the emergency board proceedings of which I am speaking, I have had the feeling that at least the chairman of the board, anatomically difficult as it may seem, had one foot outside the door, ready to run to handle those grievances he had left hanging in some Hoboken potato chip factory. I know, of course, that all of the gentlemen from your ranks who have served on emergency boards do have other very important matters to handle, but there is no other industry that is so significant to the nation as the railway industry and no disputes as important as railway labor disputes. I may be expressing a prejudice, but in any case, I think railway labor disputes should not be subordinated to the arbitration of grievances anywhere else in the United States. Persons accepting appointments to these boards should recognize they have serious problems before them and they should devote the time necessary to deal with these problems. They should not sit on pins and needles, eager to take flight at the first opportunity from the hearings. The restlessness and impatience of emergency board members has been one major difficulty in the national procedures of the past five years.

I think if a panel such as I have indicated were to be created, if management and labor were to agree to compensate them as much as they are paid for handling grievances in other industries, it would go far to relieve the serious distress which has developed in the last few years.

I am also convinced, of course, that some amendments to the law are necessary. So far as the mediation functions of an emergency board are concerned, if they are conducted informally as they should be, if they are conducted in meetings after the hearings, if they are conducted in the spirit of listening rather than that of instruction (which too frequently has characterized the attitudes of boards in the last few years), they will be increasingly successful.

You heard a statement made here this morning that the railroad industry is getting a smaller share of freight traffic in the United States than formerly. This is a sample of the ignorance, the prejudice, the preconceptions of men who have recently been handling national disputes in the railroad industry. I appeared before an examiner of the Interstate Commerce Commission in a hearing yesterday in which it was clearly demonstrated that the railroads are getting as large a share of intercity freight traffic in recent years as in earlier periods.

Arbitrators read the newspapers just as the Supreme Court is supposed to read the election returns. Railway employee representatives have a difficult time combating the effects on supposedly impartial men of the nationwide publicity campaigns which the public relations departments of the railroads conduct.

You ought not to conclude, just because both management and labor are dissatisfied with the conduct of recent emergency boards, that those emergency boards must have been good. It is really possible for both parties to be dissatisfied with a board that is bad and whose conduct is bad. I use the term "bad," and I think it is mild. I think the conduct of some of the national boards has been iniquitous, vicious, and destructive of the collective bargaining process in the railroad industry.

It is inevitable that emergency boards and other persons dealing with railway labor disputes must handle questions of national policy because railway labor disputes have to be considered in the light of fundamental standards. They cannot be disposed of casually, in the light of a little information received on the side. A member of an emergency board actually told me a few years ago that he talked with a friend who was a boilermaker who told him that the weight on drivers of the engines had nothing to do

with the length or weight of the train. As a result of this information, the board member dismissed all evidence received in the hearing as inaccurate because of his private information.

We must look at the railroad industry in the light of long-term trends, and we must hope that in the future emergency boards will not venture into such serious distortion of facts as to say the "employees have said the railway industry is as prosperous as General Motors." This misstatement, in all seriousness, was made in the latest emergency board report.

I am sure I have taken up too much time, so I will close. You have heard in the citation from the emergency board report that the employees and the management were likened to Kabuchi dancers. I was not familiar with that Japanese term, and I am quite sure there are many section trackmen in the United States who don't know what a Kabuchi dancer is either. But I do know two Japanese words. I understand that "Ohio" means "good morning" and "Sayonara" means "goodbye." So I would be very happy to say to all the members of the emergency board that handed down that report, "Sayonara."

CHAIRMAN GAMSER: Mr. Oliver, we are going to make sure that part of the qualifications of every new member of an emergency board is to know that the *caboose* pulls the train.

I will turn this meeting over to Saul Wallen, who will introduce some of the people about whom our last two speakers have commented. He will give them the chance to discuss some of the substantive questions that have been raised.

PANEL CHAIRMAN WALLEN: Thank you, Mr. Gamser.

I should like to defer any reply to both Mr. Wolfe and Mr. Oliver for a time and to have my colleagues on the panel speak briefly about questions touched on by both of them. I will ask them to confine themselves to no more than ten minutes each, so that we can complete our program approximately on schedule.

Jim Hill has been introduced to you. You have heard something about some of his activities in the last few minutes, whether properly or not, I will leave to others to judge.

I would like to ask Jim to speak briefly on the way in which

disputes have developed under the various Section 6 notices under the Railway Labor Act in the last several years and what effect this has had on emergency board procedures.

MR. HILL: I jotted down one or two reactions and I have to give them before I enter on to my subject, in the light of what was said.

I thought that after Howard Gamser had described the Full Employment Act for arbitrators and then introduced us in such glowing terms, that it would be appropriate to entertain a motion to adjourn. I suggested this to Ronnie Haughton, but he was not brave enough to make such a motion.

I have a feeling of serious puzzlement and humility, standing here before you. The puzzlement is brief. I was born and reared west of the Hudson, but I was living east of it at the time of my appointment. The humility is that I am in the presence of experts, and I mean this sincerely, real experts, who have devoted their lives to this industry. I and many others who have had a brief moment on the stage have been exposed to their expertise for which I have a tremendous respect.

I cannot mention it, however, without mentioning—and this too is serious—the famous remark of John R. Commons, who counselled people in industrial relations to beware of the tyranny of the expert.

It seems to me that there is an underlying assumption, as you look to the comments about what has gone on before these boards, which some of us here would challenge, and we hope that, at least, the audience would consider. That is, the assumption that, in order to deal in the 1960's with a wage dispute, it is necessary to go into such questions as the parity or lack of parity of the railroad average earnings of several hundred thousand workers with the averages of all manufacturing in the decade of the 1920's, and whether or not this should now be restored.

The assumption that it is necessary to go into all the questions of whether you make adjustments for changes in the employment mix, such as whether you count health and welfare as a wage equivalent or not.

Now, I don't say you should not take those things into account. Whether you do or not could make a big difference in the outcome. I do say, however, that every argument made has been made before at least six previous emergency boards, and any suggestion that you refer to it by reference or cut it down is looked at askance by those who present the cases. Every single exhibit has been presented to a previous board or to six or seven previous boards. The only difference is that there is a new and added figure which brings it up to the latest year.

There is an assumption that you must go into every issue. Thus, an emergency board dealing with wages, work rules, and tremendous issues of this nature had to devote itself to, and make recommendations on, whether or not an employee had to work the day before and the day after a holiday in order to get holiday pay. This was one of the issues before the combined board.

I am struck with the Kabuchi Theatre analogy. I call to mind one that I like a little better. When Ben Aaron was expressing himself on this subject a few years ago before a different audience, he said this ritual was as stylized as the courtship dance of the great crested grebe. And I say to you that if this produced results, I would have no criticism whatever. And I say, too, if talking things out leads to good results, then talk it out for days, for months, and even for years. We do this in the U.N. But in the case of the courtship dance of the great crested grebe, which I don't think I have ever seen but have heard about, it is my understanding that this has a predetermined result. Broadly speaking, this result can be called a meeting of the minds.

Now, one other preface: It seems to me, to look at this in any perspective at all, is not to look at emergency boards as such—our experiences in emergency boards in 1963 and 1964, what was happening, their success or failures, in the '60's is not what was happening in the '20's or the '30's; it may not be what will happen in the latter half of the '60's. Conditions change considerably. I suggest to you this is in a way a tribute to railroad bargaining. If you ask the question: What is it that destroys or challenges industrial relations in any industry, what makes it tough on us all, I would say that there are three things:

If you have an industry with many, many unions rather than one or two, you have a difficult problem.

If you have an industry in which the issues are (I don't know the word but Saul Wallen used it) "fractionated," so that you are taking up wages in one forum and fringes in another, let us say, then these problems are enlarged.

If you have an industry in which there is injected as a central issue, a challenge to job security, then the problems are immensely enlarged.

It is one thing, as Bill Wirtz said, to talk about the working conditions under which you will perform your job. It is another to try to bargain about whether or not you will have that job.

All three of these conditions are uppermost in the last couple of years in the railroads with respect to the problems they have to address themselves to. And if you look to the whole transportation industry, for example, these are characteristic problems. One railroad may bargain with 20 or 30 unions. I think there are five major operating unions, 25 non-operating, 11 principal ones, and there are some 15 maritime unions with which many of the railroads have to deal. If you look to the airlines, the companies bargain with 14 different unions. If you look to the shipping industry, they bargain with 15 or 16. If you want to find stability in the transportation industry, you must look to the fourth branch, the trucking industry, where they bargain with one.

A brief re-cap of what went on in the 1963 and 1964 round of bargaining may illustrate these points and also illustrate something that stems not directly from the Railway Labor Act. It stems from customs and practices in the industry, permitted under the Act.

I was tabbed in the first of these boards for the Brotherhood of Railroad Signalmen case, and I breathed a sigh of relief. At least, this would be just one group, a small union; I wouldn't have the headaches that some of those to follow would have. Well, the tradition of uniformity, the patterns, the intra-industry comparisons and sacred differentials in the railroad industry are such that when you deal with one union you have all the others breathing down your neck, and you can't avoid it.

That meant that the carriers presented the case exactly, with all the exhibits, as though all the non-operating unions were there, together, as they always had been for twenty years. The signalmen broke loose from the others because they wanted to get a skill differential. They were suffering from many years of uniform cents-per-hour wage increases across the board, so that the differential between the top skill and the lowest was greatly compressed, so that the top skilled people were considerably depressed compared to other industries.

We examined the skills. We looked at the equipment. We studied the wage problems of the Signalmen alone, but we knew that we faced the possibility of setting the wage pattern for ten other, much larger, unions.

Consider the chronology of these disputes under Section 6 of the Railway Labor Act. A dispute is born when one side, say a union, serves notice that it wishes to reopen to make certain changes. These are not fixed-term contracts; you can serve a notice at any time. Then the carriers serve a counter-proposal. This defines a dispute, as defined by a rather unimaginative legal mind which insists that the Act must mean what it says. It lives out its life with a docket number.

In 1962 the six shop craft unions opened up on "rules," and this is a horrible over-simplification. All I can say is that this is a field in which it is impossible to express it in too complex terms. These rules concerned sub-contracting, leasing and purchase of equipment, work assignments, and technological changes. The proposals were sweeping and drastic on both sides. The carriers threw the book at them in their counter-proposals; this constituted one dispute. Eventually, it went to Saul Wallen in Emergency Board 160.

In February 1963, the Signalmen opened up on wages alone. The carriers responded with their whole book of rules proposals. This was a separate dispute.

In May 1963, the shop crafts came in on wages. The remaining four of the eleven unions—the Telegraphers, the Clerks, the Maintenance-of-Way people, the Hotel and Restaurant Employees —also reopened on wages, but with a different proposal. These

four, plus the Signalmen, came in on stabilization of employment, or what I loosely call the rules issue. At the same time, all eleven non-operating unions came in together on such fringe proposals as vacation and health and welfare. The carriers responded with a wage proposal which was out of this world, and proposals on rules, supplemental unemployment benefits, and fringe benefit proposals.

Without going into the details of this, what is the posture? The Mediation Board has I don't know how many disputes. The Signalmen are before one emergency board on wages. They have a separate dispute before a different board on their demand on fringes. Their demand on stabilization of employment was docketed as a third dispute for a different board—except that it became the same board because they finally combined several boards into one to get over the impasse. The shop crafts went to the Wallen board on the rules issue, and the combined board on wages and fringe benefits. All the remainder were thrown into this common hopper, but technically, under the law, you could have had even more fragmentation—not three boards but five. Yet all of these proposals and counter-proposals had been officially noticed before any of these boards was appointed, indeed before any mediation began.

Now, if the boards are to play a role in mediation, I submit that the job is not made easier by the fact that a board has one union before it, or a group of unions, on a wage proposal while the fringe benefit proposals of the same unions are part of a separate dispute, to be referred at some future time to a separate board. Even the carriers' counter-proposal on wages was not, technically, before our board in the Signalmen's case. It came in later.

It was out of this mixture that you got this hydra-headed monster of a seven-man board, one party or the other insisting that these were all separate disputes, and by their so insisting the gimmick was evolved of appointing seven men to the combined Emergency Boards 161, 162 and 163. This board was supposed to set up panels to hear the separate disputes. But the problem of this fractionalization of issues which are so closely related, which makes mediation virtually impossible, was resolved by the

fact that this triple board heard everything as a seven-man board and sat down and wrote its recommendations in those terms.

PANEL CHAIRMAN WALLEN: We heard some reference to disputes with respect to the question of, should the primary functions of emergency boards be mediatory or quasi-judicial and fact-finding? I would like Lew Gill to comment on this point, as well as on the question, are emergency boards actually boards for enlightenment or boards for filibusters?"

LEWIS M. GILL: I feel much better than I did a half hour ago, since my friend Eli Oliver has so graciously dismissed me from these proceedings. I can discuss the subject with greater facility, I feel, in the "Sayonara" posture.

The question of whether the board is to be mediatory or judicial, whether its function is to be mediatory or judicial, has intrigued me greatly. I think one of the things we should inquire into is what the parties want us to be. One of the cliches in our profession, and you will hear a lot more about this tomorrow, at one of our early sessions, is that the procedures should be what the parties want them to be; that we are the creatures of the parties. That may not necessarily be the main criterion in these Presidential boards, because they are committed to carrying out the public interest rather than private interest. But still, I think it is a fair assumption that the parties, within certain limits, should be allowed to present their cases as they want to. Not at the length they might want to, I hasten to add, because that would involve more difficulties than we are already in. But it is relevant to inquire: What do the parties want us to do? Do they want us to mediate or sit as judges?

I think the answer is very clear that they want us to do both, but not at the same time, and especially not in the same room.

Our experience was that references to settlement proposals were viewed with horror and outrage by both sides whenever they were mentioned at the hearings, as they sometimes were, by some overzealous spokesman for one side or the other. But once we stepped out into the corridor, then all bets were off; it was perfectly in order. We were then mediators; we could discuss the proposals freely, make additional ones, and act in the usual mediation func-

tion. Presumably, we were sealing off that portion of our minds which was dealing in a judicial way with the matter.

I submit this is not quite as ridiculous as it sounds. I am in the odd position of defending the procedure. We are supposed to be attacking it here today, but it seems to me there is a real purpose in the "judicial" hearings, even though the board is mediating at the same time or is going to mediate shortly thereafter. That purpose is to demonstrate to the board that the settlement proposals, which the party is going to present or has already presented in mediation, are reasonable and should be followed by the board, both as mediators and later, if their mediation efforts fail, in formulating their recommendations.

In short, it is a process of conditioning the board to be receptive to the proposals which will come later.

As an example, let us assume that the railroads, on the record, are proposing no increase and perhaps a decrease. The unions are demanding a 25-cent increase. When it comes to the mediation stage, assume that the railroads will propose a 5-cent increase, with the unions proposing a 15-cent increase, with each side protesting that they are doing so at a great sacrifice to accommodate the public interest.

Now, if there had been no formal hearings, no evidence at all, the board would have no way of weighing these proposals, except with the expertise they may possess, if any, and their knowledge of the field. But, having had the hearings and having heard the evidence, they would not be tempted to do what we are accused of doing all the time, that is, to split the difference. If the board had nothing else to go on, they might be tempted to propose 10 cents as a fair average between 5 and 15. The evidence is designed to incline the board to lean closer to the 5-cent figure or the 15-cent figure, as the case may be.

Even more pertinent examples could be given on fringe matters, but I don't want to take up what little time I have left by going into other examples.

In summary, I would say on this question, Saul, that the judicial function, alongside the mediation function, is not at all meaningless in these proceedings. It often does serve and can

serve a real purpose. My only serious criticism is that we could do with less of the formal trappings and excessive detail of the presentations.

This brings me to the question of whether the aim of the parties is enlightenment of the board. I think it is enlightenment or at least persuasion, but the real question is whether they are achieving that aim in the way they present their cases. On that I would make just one brief observation.

All too often both sides, and this is meant seriously, have embraced the advertising philosophy which was attributed to the head of one of the major tobacco companies some years back, that constant repetition of a point, even if it seriously annoys the listeners, will best succeed in planting the point in their minds. Whether this is a valid advertising theory, I am not prepared to say, but I suggest that it does imply a very unflattering concept of the mental capacities of the board members. The assumption may be justified in some cases, but it is not a good way to be persuasive. They may get the impression that they are being treated as dullards who cannot get the point unless pictures are drawn for them, and a great many pictures at that. Once that impression enters their minds, the very lengthy presentations are likely to have a boomerang effect.

PANEL CHAIRMAN WALLEN: Now, from Ron Haughton I would like to have an observation about the responsibility of emergency board members for governmental policy such as guide lines for judiciary behavior and the like.

RONALD W. HAUGHTON: I have just a couple of points to make before I address myself to a consideration of the responsibility of emergency board members to observe the economic guideposts devised by the President's advisers. These were endorsed by the President in 1962 and again in 1964.

If one examines the comments we have heard today, it may be that valid criticisms go primarily to the form of many emergency board recommendations, rather than to the substance. The great mass of these reports in their final recommendations have not been "bad" by the practical test of acceptability. The actual recommendations have generally been accepted by the parties in

what has been a reasonably free collective bargaining atmosphere. Regardless of the specifics of particular recommendations, one can hardly say that they have not in the past at least narrowed the areas of dispute. There has always been room for flexibility regarding the final agreed-upon package.

Perhaps there are some insurmountable problems in the collective bargaining process when one talks about the possibility of doing away with some 40,000 jobs, as was the situation in the Firemen's case. But if we, for example, are talking about whether there will be a 15-cent or 10-cent per-hour increase, or paid vacations, there is a lot of room for give-and-take. The fact is, on such issues as these, there has been an astonishing degree of final acceptance by the parties of emergency board recommendations. I repeat that the record has not been bad.

Basically, the board members have been motivated, within the framework of the presentations, to come up with something that has been fair and reasonable. Although questions have been raised here today, there is no question but that the record as presented at hearings has influenced the boards one way or the other. It also serves to educate the board so that it can work with the parties in meaningful mediation.

One final word on criticisms of the emergency board procedures. When you recognize the complexity of the issues and the size of the bargaining units, an elapsed time of three to four months between hearing and final decision does not appear to be too great a cost to pay for careful consideration of all the issues. I do raise a serious question as to the desirability of proceedings going beyond three or four months. I submit that the expense of any particular emergency board proceeding is quite modest if compared to recent expenditures, for example, in regard to the highly successful East Coast longshore fact-finding project conducted by the U.S. Department of Labor. This fact-finding program involved only 60,000 workers, while a single emergency board proceeding can involve several hundred thousand workers.

On the matter of the Presidential guideposts, while I have researched the matter and have talked to some of the people that were in on its formulation, I suggest that the impact of the guideposts is vague. Essentially, we are told that 3.2 percent is the

average annual increase of the national product over the past ten years, adjusted for cost-of-living increases or decreases. If one goes farther back, the percentage gets smaller; if we look at more recent times, it gets larger.

The President's Council of Economic Advisers, and the President in a special message in 1962 and again in 1964 have said the following about the guideposts:

> I count on the sense of responsibility of the nation's industrialists and labor leaders to maintain price and wage policies in accord with the non-inflationary guide posts. The choice for key private decision-makers is clear. The appropriate non-inflationary standard for annual wage increases is total employee compensation per man-hour, not just straight time, . . .

The national figure computed on the basis of the above formula has been set at 3.2 percent. However, the fact is that frequently companies and unions in some of the nation's largest manufacturing industries, and in the building and construction industry, have agreed upon economic settlements which have exceeded the 3.2 percent benchmark. It has been said, though, that the guideposts do exercise a kind of restraining influence. Incidentally, I have calculated the recent economic settlements between the nation's railroads and the Engineer's union to have been a 7-percent increase. It has been estimated that the comparable increase in the automobile industry was 5 percent.

Technically, even strict adherence to the guideposts allows for an upward flexibility to the extent of the approximately one percent expected annual increase in the cost of living index. If at the start of 1964, for example, a company and a union had negotiated a 3.2-percent increase, plus a cost of living clause, the total increase for the year would ultimately have been about 4.4 percent. It can be argued that anything less than this amount would not have allowed for an erosion of the real annual increase assumed by the President's Council.

While the experience has been that private negotiations have not felt rigidly bound by the guideposts, I suggest that members of publicly appointed emergency boards should give them great weight. An emergency board on which I recently had the honor to serve (No. 164 involving the Firemen's Union and most of the nation's railroads) did just this.

Meanwhile, absent an enforced national wage policy with all its unpleasantness and built in unrealities, the best the country can expect from the guideposts insofar as collectively bargained settlements are concerned, is the hope that labor and management will negotiate with some restraint so that their efforts will not result in a directly related price increase. Only the parties, themselves, can really tell us how much influence the guideposts have had on their economic negotiations. The indications are, however, that they have been at least an inhibiting factor to inflationary increases.

PANEL CHAIRMAN WALLEN: We are almost at the conclusion of this session. I would like to extend my personal thanks to the panel members and to Mr. Wolfe, and to Mr. Oliver for substitution for Mr. Schoene. We attempted to bring to you a discussion on a subject which is of significance and importance to the railroad industry and to the nation as a whole.

In doing so we, of course, have to and do challenge some basic assumptions and the status quo. When you challenge the status quo, let me remind you, you also challenge what in many cases are vested interests. Perhaps this increased the provocativeness of our discussion today. In any event I think it has been a fruitful discussion. Thank you.