

IV. CURRENT ISSUES AND CHALLENGES IN THE RAILROAD INDUSTRY

- Moderator:** Margo R. Newman, NAA Member from Toronto, Ontario, Canada
- Neutral:** Herbert L. Marx, Jr., NAA Member from New York, New York
- Panelists:** William Miller, Senior Executive Director, Industrial Relations Department, Transportation Communications International Union, Rockville Maryland
- Richard Radek, Vice President and Director of Arbitration, Brotherhood of Locomotive Engineers and Trainmen, Cleveland, Ohio
- Mark MacMahon, Vice President, Labor Relations, Norfolk Southern Corporation, Norfolk, Virginia
- Lisa Mancini, Vice President, Labor Relations, CSX Transportation, Inc., Jacksonville, Florida

Newman: Welcome, everyone. I'm Margo Newman, and I wanted to thank you all for coming on a Friday afternoon, Memorial Day weekend. There was some discussion amongst the panel as to whether there would be as many attendees in the audience as there are panel members and we surpassed that hurdle. So thank you for giving us your time.

The topic of this session is entitled "Issues of Current Interest in the Railroad Industry," and while there are many, the subject area we've chosen to address is whether railroad arbitration is becoming more adversarial. Panelists will share their thoughts on whether dispute resolution as a whole in the railroad industry has changed for better or for worse, the factors impacting upon that, how that plays out in the arbitration process, and what can or should be done about it. After the panelists share their views, there will be time for you to ask questions or make comments of your own.

Now, I have the privilege of introducing my distinguished panel. Among other positions, Bill Miller is the Senior Executive Director of the Industrial Relations Department of the Transportation Communications International Union. What you won't find in Bill's biographical sketch is the fact that he chose to attend Cal-Poly Technical Institute because it had the best intercollegiate

rodeo team in the United States. He was the NCAA bull riding champion. He rode as a professional cowboy and was the California state champion a few times over. Bill said that he eventually ended up with the union when he discovered that he could throw the bull around better than he could ride them. (Laughter.)

Next to Bill is Lisa Mancini who has been Vice President of Labor Relations for CSX since January 2004. As you will see from her bio, her previous career was in public transit and city government, including the position of Director of Preventive Maintenance for New York City Bridges. What you may not know about Lisa is that she has an extreme fear of both heights and flying, which has provided challenges to her professionally, since she has had to walk up and down the cables of the Brooklyn Bridge on a number of occasions and in her present position boards an airplane weekly without the help of drugs or alcohol. So Lisa brings an interesting perspective to this issue with her experience both inside and outside the railroad industry.

Next to Lisa is Rick Radek. Among other pursuits, Rick is International Vice President of the Brotherhood of Locomotive Engineers and Trainmen. Rick's bio speaks volumes about his interest in music as well as his wit and alludes to his proficiency as a trumpet player from which he earned his living exclusively for 5 years. What it does not tell you is that he used to breed English setters and is currently writing Sherlock Holmes stories that are faithful to Conan Doyle's originals and for which he is doing his own historical research. One of his stories is pending publication. As Rick says, he plays trumpet for sanity and writes books for fun.

Next to Rick is Mark MacMahon. Mark has been Vice President of Labor Relations for the Norfolk Southern Railroad since 2000. His bio tracks his career path in the railroad industry. What it does not tell you is that about 12 years ago Mark took a year leave of absence (not being assured his job would be there upon his return) and he and his wife sailed to South America and back in their 37-foot sail boat. Not only was Mark's position with Norfolk Southern there for him upon his return, but so was a notice of deposition in a discrimination lawsuit, which had been filed in his absence, amidst speculation that he had been sent away by the railroad to be unreachable.

Finally, last but surely not least, Herb Marx, who I'm sure you all know, and if you don't, you should. As you can tell from his fascinating bio, Herb worked with the Office of Strategic Services during World War II, decoding messages from parachuters. Many of

you know of his extensive collection of dictionaries. Perhaps you don't know that Herb has 740 empty tea cans in his office. Rick told me that Herb sent him a Sherlock Holmes tea can, learning of his interest. Herb will offer a neutral take on the topic.

I thank all of our panelists for agreeing to participate in this session, especially at this time, and I am going to ask Bill to speak first.

Miller: Good afternoon. It is nice to see a rather intimate group. I think I know everyone here. It is surprising to speak out to an audience where there are no strangers. As the eldest partisan member of this group, I have been allowed the opportunity to exercise my seniority to go first.

Let me begin by stating that like the animal world, in primitive human societies, the weak were subject to rule by the dominant. In contemporary legal terms, there are those who have a right to rule and others who have an obligation to obey. Feudal societies and industrial societies had structures that reflected these we—they relationships based upon relative power.

Out of these structures, there have evolved our adversarial system, party politics, prosecution and defense in the legal system, and our employer–employee confrontations. These are the systems associated with the conception of democracy. They appear to be democratic because they include legally recognized oppositions to those who previously claimed the exclusive right to rule. This, of course, does not make society or the workplace democratic in a true sense. Clearly, the workplace was never intended to be democratic, but because of union representation, the employees do have a say in their workplace through negotiation and arbitration. As such “say” is exercised, disputes and conflict are inevitable.

Although some may believe that learning to deal with these daily challenges is something that can wait until adulthood, it is actually on the playground as preschoolers that dispute resolution skills are first developed. At a very early age, most preschoolers learn the valuable lesson that selecting the appropriate dispute resolution process is often the single most important factor in successful and painless resolution of a dispute.

Now, generally, dispute resolution methods follow along a continuum where the parties become more like animals the further they go along that path—avoidance, negotiation, mediation, arbitration, litigation, and finally self-help. As one travels along this trail, the dispute becomes more adversarial. The costs—monetary,

physical, or emotional—become greater. Options become more limited, and the parties increasingly lose the ability to control the outcome. As one who has been involved in each of the dispute resolution methods, and has been around longer than I would care to admit, I believe the opening of door number four—arbitration—was historically significant because the parties not only sought the intervention of a third party, but granted that third party *decisionmaking power*. This was opposed to going the more formal litigation process, which would have been far more expensive and usually more time consuming.

On the playground, the decisionmaking power is often entrusted to a mutual friend, someone who has had similar experiences, who is seen as fair and trustworthy. Jim and John as children playing on the playground know that when they have a particular problem, they need someone to resolve it. They can certainly go to mediator mom. They may, however, seek to avoid that formality, or the more lasting impact of magistrate mom. Critically, while recognizing the value of resolving their disputes themselves, they also recognize that there are times when you will have to submit to that third party. Similarly in the adult railroad world, the choice of who will serve as an arbitrator will often be critical to the desired outcome. Just as the children were careful to select a person who they respected and whose decision they would honor, so, too, should care be taken in the appointment of an arbitrator. One who needs to understand the dispute, listens to the evidence, renders a fair decision, and above all, is not afraid of incurring the wrath of the loser.

That was the way I was brought up to believe the arbitral process should work. Over the years, I believe the process has become tainted. It has become more adversarial on account of the parties' divergent goals. Twenty or 30 years ago, advocates were often not as polished as most advocates of today. At hearings, the arbitrators (we refer to them in our industry as referees) often had to be genuine referees. Today that has changed. In the past, after a vigorous fight, the parties understood what "final and binding" meant. In those days the parties took their lumps, they learned to live with them and fight again another day.

Today, if unions win a big case worth substantial monies, you can almost invariably count on opening door number five—litigation. How did we get where we are today? The answer is several fold, but in its simplest terminology, it revolves around a couple of key components: One, union membership has dramatically de-

clined, and unions are fighting for survival. Two, railroads have been forced by stockholders to squeeze every penny of profitability it can out of its work force, no matter if it is contrary to the collective bargaining agreement. Because of these diametrically opposed positions, losses for either side today are far more costly than they were 20 or 30 years ago.

Third, labor relations departments on most railroads have been dramatically changed over the years. It used to be that transportation or marketing departments would seek the advice of labor relations before they enacted changes that could affect the collective bargaining agreement. Today it is far more common to have a transportation department tell labor relations what they have already done and then say it is their problem to defend the action. Labor relations has changed from being a source of advice and counsel to other departments to being their arbitral janitor. The result is that because labor relations input is often not used as a preliminary step before doing something, the carrier loses costly claims that might have been avoided. Simply put, if other departments had met with labor relations before jumping the gun, they might have been able to open door number two—negotiations with the union—wherein its needs might have been met without doing harm to the union membership.

Unfortunately, because railroad management, in its desire to satisfy the stockholders, is seemingly reluctant to seek this advice, there is absolutely no reason for me to believe that arbitration will not continue to become even more adversarial. We will continue to shake hands and behave cordially in front of you arbitrators, but after you render your decisions, we will go referee shopping, find different forums, litigate, or seek self-help.

I miss the spirited and unpolished advocates who said what they meant and meant what they said. They have been replaced by professional advocates who say whatever works, ignore past precedent, and evaluate the repercussions of an unfavorable decision primarily in terms of its impact on their personal income.

The question is: Are we so locked into our respective positions, union versus management, that we are doomed to a continuing escalation of greater confrontation? My inclination is to believe that we are not likely to see a radical change of attitude in the near future, which from an arbitrator's point of view is probably good news in that it guarantees continued work. Nonetheless, as the eternal optimist, I believe we can make changes. One of the changes is for top management and stockholders to gain a greater

appreciation of the value of a labor relations department that can work as a partner in planning.

I am not naïve enough to believe that stockholders are particularly worried about the employees, but I do believe they are concerned about the relative value of their stock and the thickness of their wallets. Until they realize that they could be money ahead by working with unions rather than running roughshod over their employees, and until they decide to use their labor relations departments as proactive planners rather than reactive defenders of such behavior, hostility between unions and carriers will not lessen.

If railroads would begin to operate in this fashion, it would not mean there will be no disputes, but there would be less. Profitability would increase. Unions would not feel like we have our backs against the wall. Simply put, until carriers view their employees as a valuable asset rather than a necessary liability, the adversarial relationship will not get better. With that said, I will close for the time being as I know my carrier counterpart can hardly wait to get up to endorse everything that I've stated. (Laughter.)

Mancini: Good afternoon. When Margo asked me to talk about this topic of how railroad arbitration has changed over the years, I thought that she must have confused me with someone else, since I have been in labor relations at the railroad for fewer than 2 years and cannot really comment much on the historical changes. I agree with Bill to the following extent, however. The stakes have gotten higher, and certainly, many of the unions have lost membership. The TCU, in particular, has lost many of their members, and the railroads are focusing always on becoming more and more competitive.

I do see the role of our labor relations department in a different light from Bill. In particular, what Bill does not see are the times that the operations department comes to labor relations and stops what they were planning to do based on our advice, and at our railroad, that is happening more and more regularly as people are desperate to address their needs. For example, one of our perennial challenges is the weekend availability problem. I have not had a Saturday since the weather got warm that I did not have a call saying, "So why is it not okay for us to run trains with managers? And why would that be a problem for us?"

So I think that we are often involved at the front end of decisions. I think that we are a partner with operations. We are not telling them what to do or, more likely, what not to do, but we

are trying to advise them on how they can reach their objectives, either within the labor agreements or by negotiating a change to labor agreements. Sometimes we do have to tell them that if they take a particular action that it could result in a work stoppage, and that usually does convince them to think in another direction.

I have spent a lot more time outside the railroad industry than I have inside it, so Margo asked me to comment a little bit on the differences between arbitration here and elsewhere. They are very different. Elsewhere, there is a party pay system. There is an evidentiary hearing. But I think the largest difference relates to the parties' understanding as to what the agreements actually meant.

I was in San Francisco for 4 years as chief operating officer of the San Francisco Muni, and in those 4 years, there was only one important rules case that went to arbitration. There were dozens of cases about discipline, generally discharge cases that were challenged, but only one rules case. I attribute that to the people from operations as well as from labor relations. Although I was in operations, I sat at the bargaining table and negotiated the labor agreement, and it was a complete agreement. On the union side, the general chairman also sat at that bargaining table. So when we left, there was not confusion, and there was no need to refer back to a 1986 agreement or another arbitration case.

There was complete agreement. Therefore, the need to question what a rule meant did not exist. In 4 years, the one important rules case dealt with going from two operators on a train to one. The agreement allowed us to do that unless there was a safety concern, and the question that was answered through this process was whether or not there was a legitimate safety issue. So it was not a matter of interpretation but a matter of looking at the facts.

With that, I think that we can go forward collectively. I do not think it is the arbitration process that is our problem. I think it is the negotiation process and the relationships within our organizations as opposed to arbitration.

Radek: I know most of you in this room, but not all of you. I hope my remarks do not embarrass anyone unless you need it, in which case I hope they upset you a lot.

I was recently at Idaho State teaching a writing class—technical writing and brief writing. When I teach this class, I like to use an example of some really poor writing, and I start out by reading this paragraph. You will probably recognize some of it.

It was the best of times; it was the worst of times. It was the age of wisdom; it was the age of foolishness. It was the epoch of belief; it was

the epoch of incredulity. It was the season of light; it was the season of darkness. It was the spring of hope; it was the winter of despair. We had everything before us; we had nothing before us. We were all going direct to heaven; we were all going direct the other way. In short, the period was so far like the present period that some of its nosiest authorities insisted on its being received for good or for evil in the superlative degree of comparison only.

Now, I use that paragraph as an example of really horrible writing because it is redundant. It is something that you would not use if you were writing a brief and thinking about economy of language. At the same time it is probably the most renowned and powerful paragraph that has ever been written in western literature.

And I think that to a large extent it says something about the state of arbitration in the railroad industry right now. It is the best of times, and it is the worst of times, and I would like to first talk a little bit about why it is the worst of times.

In my experience, which goes back a considerable number of years, arbitration in the railroad industry has taken on an increasingly adversarial bent. From your vantage point as arbitrators, you may not see it to the extent that we do. You do not see the beginning of the process before you are brought in. You do not see what happens afterwards much of the time. But some of you have observed to me that there is more and more adversarial relationship invading this process.

It is the relationship of the parties. The parties are having trouble these days. The evidence is everywhere. There are two or more lawsuits pending over national negotiations and the Section 6 notices that have been served. There are fights between employees and the carriers and between employees and other employees over work jurisdictions, crews, and other matters.

In my practice right now, I have more arbitration decisions and enforcement proceedings than I have ever had over the previous 23 years. You can see it in the polarized positions that the parties have taken over the National Mediation Board's proposed rule making having to do with filing fees, time limits, and other matters. How does this impact the process and how is it relevant to you who are arbitrators? Let me relate a couple anecdotes.

A long-time arbitrator called me recently and said that the railroad had been in touch with him or her; that there was increasing pressure on this individual. He/she said, "Please don't call me any more to arbitrate unless you and the railroad have some agreement as to the disposition before I get there."

Another arbitrator rescinded a proposed finding at the adjustment board because pressure had been applied. I don't know if you have been contacted by union organization advocates as these individuals evidently were contacted by the carriers—I hope not—but I can tell you right now that none of you have ever heard from me about a case.

I understand what professional ethics means in this business, and so what I would ask you to do, if you are contacted, is immediately to tell the other party. Say, "Wait a minute. We are going to get so and so on the phone, and then we'll have this conversation, but we are not going to have any conversation until that point has been reached." I know that things come up and that sometimes it may be necessary to talk, but those conversations should not be *ex parte*. I hope that you may talk with each other during the time that you are here about this problem. I am not going to preach to you. I know all of you here are very upright professionals and people of integrity. I know most of you and I am not directing my remarks at you, but I think it is something that needs to be talked about because there is no question this is creeping into our daily affairs, and we have to do something. Enough of that.

The parties always have to get along, and we can conduct ourselves in a professional manner. Maybe you can help us with that a little bit. I would like to say a little bit about the best of times.

We have quite a good relationship in our organization with the Canadian National (CN) Railroad. We have made agreements without going to arbitration boards. We have streamlined the dispute resolution process, and during all of last year, we had a total of 10 or 11 disputes that are going to arbitration. In this industry, that is just an astounding thing. At the same time, on the Union Pacific Railroad, we had 1,100 to 1,200 cases go to arbitration—many of which were the very same case. We could not reach abeyance agreements or lead case agreements. It has not been a good relationship between the parties there in many instances. But improvement is possible. The experience of the CN is valuable and maybe sometime those of us in the industry might take a look at why that relationship works and why it produces good results for the parties.

At any rate, thank you very much for listening, and thank you, Margo, for having me here today.

MacMahon: I have several introductory comments. First, I'd like to say that when Margo invited me to be on this panel, she

neglected to point out to me that it was Friday afternoon on Memorial Day weekend. (Laughter.) And the second thing I'd like to say is that when I noticed Roy Carvatta, retired Director of Mediation for the National Mediation Board, sitting in the audience, I remembered how he impressed me when I was a brand new labor relations officer, very early in my career. We would get these notices from the Board and he would sign his name in one and a half inch high letters. I always thought to myself, "That must really be some important dude." I was right about that. (Laughter.)

Looking at the question of whether arbitration has become more adversarial, I hark back to earlier in my career when my railroad was handling a lot of cases before the National Railroad Adjustment Board. I came to Chicago frequently to argue cases. Our practice was to invite the carrier member to go to lunch because we thought that would encourage him or her to work extra hard on our behalf. In one particular case, I recall we had invited the carrier member to go to lunch. But the employee member was also a friend of mine so I invited the employee member to join us also. Then, we went into the hearing and we got into a confrontation over procedural irregularities. The Board threw the two presenters out of the room. While we were out in the hall we could hear the employee member and the carrier member screaming at each other at the top of their voices. After a little while, they finished their executive session, brought us back in, and we finished the hearing, and then we went to lunch. As we were sitting there at the restaurant—myself, the carrier member, and the employee member—and the employee member turns to me and says, "Mr. MacMahon, would you ask the carrier member to pass the salt?" (Laughter.)

So when you look back at that kind of thing and compare it with what we have today, my take on the situation is that arbitration is not becoming more adversarial at all, with all due respect to what other people may have suggested.

One matter that is more of a problem is the issue over what is a major-minor dispute. We see instances where the union will assert that something is a major dispute that they are entitled to strike over, when it clearly is a contract dispute that should be arbitrated. Early in my career, we would probably go years between having a union representative threaten to strike. Now, I have some general chairmen where two or three times a month it is a major dispute. Of course, the problem with that is the same as it was with the boy

who cried wolf. When is it really a serious issue that has to be dealt with, and when is it merely trotting out this threat that is not based on any sound reasoning?

I agree with Rick that we do see more litigation and we see that because in many instances the railroad is forced to litigate, to require the dispute to go to arbitration where it should be. I am not talking about many cases, but only occasional ones, and it is just something that is not pleasant, and I don't like it. Recently, we had a general chairman say we had a major dispute because the hotel we house our crews in was unsatisfactory. We have been housing crews in that hotel for 13 years, but all of a sudden it is a major dispute. Those kinds of claims are troublesome to me.

In terms of arbitration itself, I do not think it is becoming more confrontational. The parties are still behaving professionally in arbitration, and they are behaving with professional ethics for the most part. What Rick mentioned concerning the necessity to enforce awards in court, in my entire career of more than 20 years, I have been involved with one of those kinds of cases. It is not a particularly prevalent event from my point of view.

There is pressure on the railroad management side to operate efficiently. There is pressure to control costs because railroads are very competitive with the other modes of transportation, and of course that does drive railroad management in the direction of trying to operate efficiently.

It is also clear to me that arbitration works. On our operating craft side, we routinely have arbitration boards with three or four operating craft referees that we use, and we schedule these folks three or four times a year before we even have cases. We may have a dismissal case, for example, and it is common for us to have a decision in such a case within 4 months, which is really fast compared with some other kinds of cases that can drag out for some period of time.

As arbitrators, one thing I would like to see you folks do—and many of you already do this—if you are hearing a dismissal case and you decide that management is wrong, go ahead and give us a bench decision, and tell us that. Don't take another several months to render the decision. We have some arbitrators who will give us a bench decision and say, "I am going to reinstate this person, and I am going to think about what I am going to do about the claim for lost time." So that's just a suggestion that I could make to you.

I want to conclude by saying I noticed Bob Harris was in the audience here a little earlier. I had an extremely unpleasant experience with him one time when I forgot to turn off my cell phone, and so I took care of that today. (Laughter.)

Newman: Okay Herb? I believe I really scared them into keeping within the time limit. I have not had to pass along the “wrap up” message at all.

Marx: Unfortunately, over the past few years, I have been able to collect a number of those sayings that go with “chronological enrichment.” For example, “Watch out, there is a step there.” You did not hear it, but Margo just added to my collection—“Do you want to sit or stand?” (Laughter.) Thank you, Margo.

I want to take on this topic from the point of view of the referee-arbitrator. We do not deal with the matters that you have been hearing about that come before the disputes get to us, or the complicated matters that come afterwards—litigation and so on. Of course, referees are aware of these matters. I also thought that it would be well to make sure that everyone knows about the significant differences between railroad arbitration and other types of labor arbitration. However, looking around the room, I am sure I don’t have to discuss that topic because there is no one here who is not familiar with railroad arbitration. (You two up front here, I will be glad to buy you a drink later and tell you about it.) (Laughter.)

Seriously, I thought it might be valuable to take just a moment for many of you who represent either organizations or carriers as well as possibly a few of the neutrals, who may be exclusively familiar with railroad work, to recognize that the system of arbitration under the Railway Labor Act, an Act that preceded the National Labor Relations Act by 8 years, does have lasting virtues, and that the relationships from the referee’s point of view is a much more dignified, collegial, and pleasing relationship than is typical elsewhere.

I am sure I speak for many of you, but if not, I certainly speak for myself, that if it is necessary to call the parties, for example, on a scheduling question and it is not a railroad arbitration, I will be referred to somebody’s message machine, but if it is the railroad industry, I can call the carrier or union representative and I can almost feel the person answering the phone standing up and saying, “Yes sir, Mr. Referee.” So that’s kind of nice. I enjoy that.

I would like to make some separate comments on some of the issues that my four colleagues have already spoken about. As I do so, I am glad to say without fear or favor, because no matter what I say, I have been privileged—and I hope I continue to be privileged—to be at their service as a referee. Let me tell you first the story of my nephew who lives in Minneapolis. While I was on my way to the Duluth Iron Range Railroad north of Minneapolis, my wife and I stopped to visit him and his wife. They had six- and four-year-old daughters. My nephew said to his six-year-old daughter, “Why don’t you ask Uncle Herb what he does?” So she said, “Uncle Herb, what do you do?” I said, “I am an arbitrator.” She said, “What’s that?” And I did my very best to start to explain to a bright six-year-old what an arbitrator is. I got about two sentences in when she said, “Oh, do you mean that if I have an argument with Sarah, you’re going to come and tell Sarah she is wrong?” (Laughter.)

Now, you are all laughing either as parties or arbitrators because, quite frankly, that is the expectation of most of the people here. Bill Miller did not give his usual first line when he addresses neutrals. He normally says, “I’ve only got one thing to advise you. What we want is a sustaining award.” Is that right, Bill?

Miller: Absolutely. I will figure out the logic later.

Marx: But more practically, there have been changes in the process, not so much adversarial. But I would love to see these changes reversed. I don’t think it is going to happen, but it is something for those of you who are carrier or organization representatives to consider. I refer only to a part of the process which is covered by the National Railroad Adjustment Board. As everyone in the room knows, an increasing percentage of disputes are handled not there, but through Public Law Boards. Nevertheless, the Adjustment Board still exists. When I started, I was greeted by Roy Carvatta at 110 South State Street—a building with ceilings much higher than this, and when you wanted to turn on the lights, you pulled the chain.

Before the Government Services Administration declared that the building was unsafe and moved us to other quarters, what was interesting about the process was that there were not 3 or 4 full-time representatives of the carriers, there were 8 or 10. And each organization, except those that had their own headquarters in Chicago, had at least one full-time person there, and each had an office in this one building on one floor.

It happened repeatedly that a representative of one side or the other would be reading a brief or a submission of a case that was scheduled for hearing that week and he would say, "Gee, this does not seem right. We ought to be able to fix this." All he or she had to do was to walk around the corner to an adversary's office and sit down for a minute. What do you know? The cases got settled.

The time came—and I am not going to go into the rights and wrongs of this because I don't want to light any fires here—but there was an attempt to move to Washington. It did not work because of what the law said. Some organizations wanted to go and some didn't. Nevertheless, and I am not suggesting whether this was wise or not but it happened, the carrier representatives were all moved to Washington. But for the Adjustment Board hearings, they must still come from there to here. I should say it's up on Rush Street now, and quite frankly, nobody has got time to sit down and get rid of a number of cases.

One of you mentioned that arbitrators were concerned about cases that were settled. Believe me, we encourage the settlement of cases at all times, with certain knowledge that the barrel will never be empty, and there will always be enough work, so we certainly suggest that the parties try to settle. I am sorry I spent so long on that subject, but all I am saying is that maybe there is a way to reduce the geographic distance between the parties in some manner to give them more opportunity to be more collegial.

As to the hearings themselves, I do not see any increase in adversarial behavior. Certainly, once they are at the table, matters go very well. We should not overlook the fact that although we are operating under the old law and the constraints of many regulations, the fact is that both parties are engaging in a number of experiments all the time—expedited hearings, hearings held without submissions being sent to a referee in advance, or cases decided on the submissions alone without the necessity of having a hearing at all. Among the organizations, particularly the TCU, there is a recognition that the world will not come to an end if they review claims and, in some cases, go back to the source and simply say there is no merit.

Going back to the first topics that were raised, I felt a particular sympathy with what both Lisa and Bill were talking about. I understand the problem for the unions and the company labor relations representatives. I want to endorse the early use of labor relations people to evaluate proposed company actions before they are

taken. As my long-ago boss used to put it, labor relations people are too often brought in with our mop and pail, after others have made a mess.

I also want to mention that in terms of adversarial matters in railroad arbitration, I am not saying it is the best of times. Our Dickens expert has read that opening paragraph beautifully, but part of the worst of times, of course, is when arbitration is used as a tactic by either organizations or management to obtain other objectives. For example, take the instance where a carrier gets a decision that it does not like. It could have been a representative case because there are a hundred more exactly like it. The parties had not agreed in advance that it would be the lead case so the carrier is going to try again with another referee.

The union's response to the carrier's refusal to accept a lead case was practiced on me by my distinguished colleague, Jack Fletcher, now one of our finest arbitrators, who at the time was one hell of a representative. When the carrier decided it would not accept a case as a lead case, Jack filed 800 identical cases. And I had to hear them. It did not take long to hear them, of course, but it sure as hell disturbed my record to have 800 sustained claims and about 20 denied claims for that year. That did not do me any good.

I will end with this: Maybe some of you saw the Oscar presentations about 2 or 3 years ago, which always run too long, as you know, and get extremely boring. There was a British actor accepting the award for best actor in a movie, and in his eloquent way, he was going on a little too long. They put up this sign in front of him that the television audience could not see. He looked down, paused, and said, "Wrap it up? In my country, that means your fly is open." (Laughter.) Thank you.

Newman: Thank you to all the panel members. We have some time for questions or comments. We would ask you to please tell everybody who you are, and feel free to ask a question directed to anyone in particular or make a comment that you think is applicable. David.

Vaughn: David Vaughn. I am a member of the National Academy and President of the National Association of Railroad Referees. I want to thank the Academy for including a railroad-specific panel in its program. I know that the Academy has a broad array of topics and industries that we need to address, but I think that it is very good that the Academy recognizes that a goodly number of its members work on railroad cases, and there is a goodly number of attendees at the National Academy of Arbitrators Annual Meet-

ing connected with the railroad industry. The industry has been very supportive of the Academy over the years. It is good that the Academy is reciprocating.

We are also thankful for the support of the parties of the National Association of Railroad Referees (NARR). We have a day-and-a-half annual meeting that is devoted exclusively to the Railway Labor Act, primarily Section 3. So far, all the meetings have been in Chicago, and we invite the participation of all people who are in the industry or who have cases in the industry to join and participate in the organization.

Usually, I am looking out for the interests of the referees who have cases and who hear cases under the system. I have a question and comment, and I will put it generally out to the parties concerning arbitrators who have now been trained to be referees but who have not yet heard cases. The parties will recall that just prior to 9/11, there was a training program that was scheduled to bring new people into the Section 3 process. There is always a demand for fresh blood, new arbitrators, fresh approaches, new meanings, etc., and this Section 3 committee put together a program in that regard. I think the number of participants was 35. One of the lynch pins of that program was that each of the arbitrators who made that commitment—financial and time wise—would be assigned a case.

You all know that the first case is the toughest to get in this industry. But when you have that first case, it is a good opportunity to show what you can do and get your name out to the parties so that the process can continue. Unfortunately, in the aftermath of 9/11, with various disruptions, that element disappeared—to my knowledge, none of the people who went through the program have gotten any cases as a result of being in that program.

Now, some people have caught on by themselves, but there was an expectation on the part of the people in that program that they would get the opportunity to show the parties what they could do by getting at least one case. I don't want this to become some footnote to history. I think there is an implied obligation on the part of the parties and the Board, and frankly, the NARR, to see that the people who did not get the benefit of their bargain actually get a case. I don't know how it gets accomplished administratively, but I do know that we have in this room a lot of representatives of the parties and people from the Board, and I would encourage you, in your Section 3 process, to consider ways to close the loop.

Newman: Thank you, David. Charlie?

McGraw: I would like to follow up on David's comments.

Newman: That's Charlie McGraw.

McGraw: Sorry. If you remember correctly, I think when we first broached this, it was labor that made the request that we either hold one hearing with these arbitrators or that they be given a short docket. It was labor that was pushing for that but we got opposition from the NMB. I still think it is a good idea and I think we ought to propose looking at it again. We are willing to do it.

Newman: Administratively we have the NARR. Perhaps they can be involved with the parties to put together a list of potential new referees and help circulate that list.

Are there any comments or questions about the issues that our panelists have talked about? I have a comment, but I would like to hear from the audience. I see someone back there.

Well, Charlie, you aren't finished.

McGraw: No. I just had a comment. When we had the training, I was a lead spokesman for it, and in coming to these meetings, I continue to have people tell me, "I went to your training. We are not getting any cases." I want to see this changed, and I don't have the answer.

Newman: It is a valid point. Thank you. Thank you for making it.

There was somebody in the back row. Could you please identify yourself?

Gutpaul: My name is Lisa Gutpaul, and I am a "wanna be." I was a litigator until 2000, and I have been on the postal panel. One of the reasons I wanted to become a dedicated neutral is that litigation has become so awful, so ugly, so mean, that I wanted to help change that process. From what I understand about railroad referees, I'm not sure how we can help you. Certainly *ex parte* contact should never be allowed. If that's causing a problem, certainly, arbitrators can help you there, but what else could referees do for you?

Miller: Any railroad referee who is approached by anybody on an *ex parte* basis should tell the other side or I would never want to use them. Integrity is the only thing you have got in this business, and it works both ways. My word has got to be good, and the other side's word has to be good.

If you give me decisions—Every time I have come to an Academy meeting, I look across the room at the variety of arbitrators. At one time or another, you have all probably been one of the greatest arbitrators I have ever known. (Laughter.) But subsequently,

you have all disappointed me and went down the wrong road. I expect that to happen. As long as I understand how you got there, I am okay.

You are not going to fix our problems. I know Mark and Lisa don't totally agree with me, although I think in their hearts they probably do. Being old, maybe "over the hill," I remember the days when I used to be able to call and talk to labor relations and say, "Let's work this out." It didn't always work, but now I see labor relations only as a defensive tool. What's got to happen is, if you have arbitrators who listen to the case and are not worried about the consequences, and they render the tough decision, top management will see that this can be a costly endeavor. Perhaps they will then open the other doors for negotiation or mediation prior to going to arbitration. That's your job. We hire you as an arbitrator. That's all I want you for. I don't want arbitrators to come in to mediate. If I want a mediator, I will hire a mediator. All you have to do is play it straight.

MacMahon: I will respond to that. Bill and I had a discussion yesterday on this topic and, at least from my perspective at my company, I don't agree that the labor relations department is out of the loop. My folks are mostly in the loop. A lot of this depends on how the labor relations department is perceived within the company. If the labor relations department is perceived as being an obstacle by the managers who are trying to run the railroad, then the operating department is much more likely to avoid labor relations and simply do what they want as Bill is positing. But if the labor relations department is perceived as being there to help the operating department, then they are much more likely to be included in the planning and before actions are taken.

As I look back earlier in my career, it was not unusual for me to get a phone call saying, "We want to do this, that, or the other." Labor Relations would say, "We got our agreement out, and you can't do it—rule 32 says you can't," and that would be the end of it. Today what we say is, "You can't do that, but maybe you can do this, and maybe we can structure it this way." So I don't agree, at least with respect to my property, with what Bill is positing.

One other comment I have—we don't always succeed—but we try very hard never to surprise our general chairman. So when there is something that we are going to do that may not be taken well, we try to, at least, tell the general chairman about it first. It is dangerous not to do that, and so we work very hard in that direction.

Miller: May I respond? In defense, in our private discussions I did respond back to Mark that traditionally, the Norfolk Southern has been “one hard assed” railroad to deal with. They are tough guys, but I give them this much credit: They are straight. They have always played it straight with us.

Our general chairman has a pretty decent relationship with labor relations. They fight regularly, but they fight fairly. I actually believe that the NS is behind the times, and that if some of the other railroads behaved in the same fashion, we might have a few less fights because they really do play straight. I have been in negotiations with Mark and his people. They are tough negotiators. They know what they are doing. But when it is done, I know what the agreement means.

And I will give them one other compliment: That over the years with the NS, we have usually had a fairly speedy handling of arbitration. They have recognized that losses can be costly, and usually, they have wanted to move forward with them. So if that will work as a backhanded compliment, that will be fine.

Newman: You take any you can get. Frank (Francis Quinn), did you have something to say, question or comment?

Quinn: I think Bill hinted at it. I think things are more adversarial with some railroads than others.

Miller: Absolutely.

Quinn: I guess I don’t want to start World War III, so I have no follow-up. (Laughter.)

Marx: I just wanted to say a word to our helpful litigator in the back who wants to be a neutral—and you will be—regarding her distaste for litigation. You will be interested to learn that in railroad arbitration, other than those of a monumental nature, there ain’t no lawyers on either side.

Wesman: Betsy Wesman from North Carolina. In other industries where they have a lot of grievances, especially where there is a substantial backlog, parties often get together to go through cases. It is my understanding that there is some effort to do that in the railroads. Can any of you address that?

Marx: Sometimes known as throwing the grievances against the wall to see which ones will bounce.

Newman: Is there anything going on that you can tell us about?

Miller: I don’t want to monopolize or filibuster, but Mark and I, 4 or 5 years ago, when Conrail was merged into the NS and CSX, we were involved in what some of you might identify as media-

tion/arbitration. That process resulted in the resolution of probably 4,000 or 5,000 cases. There was a healthy monetary settlement that was distributed evenly. But at the same time, it saved the carriers and the NMB a great deal of money, and made the membership a whole lot happier in the process. And I think traditionally a lot of railroads have tried that.

MacMahon: A paltry sum of money. (Laughter.) And second, when we did settle all of these claims, Arbitrator Marx bitterly complained to me because he was looking forward to rendering a decision on several thousand of them.

Newman: I have one final comment before thanking our panelists. In listening to everybody, the one thing that was most worrisome to me as an arbitrator was Rick's comment about *ex parte* conversations and his perception that there was pressure being put on referees. As a result of that, either arbitrators were not pleased about remaining in this industry, or they felt the need to accommodate by considering things that are totally inappropriate in rendering awards.

When I came into this industry more than 15 years ago, having done substantial work elsewhere, it was astounding to me to see the different relationship between the parties—to be invited to lunch by the parties, or that one party would call me up regarding scheduling matters and say, "I have already talked to the other guy, and he agrees." The *ex parte* conversations, although not substantive, had this air that it was not really *ex parte* even though it was coming from one side.

I was taken aback at that time because I was not sure—I didn't know the industry—I was not sure whether that was legit or not, and I would make it a point to say, when I went to hearing, "We had this conversation," or "Did you really agree?" As time went on, I learned that that was the way things were. And I was thrilled about it. The *ex parte* conversations would never go into a substantive matter, and I must say I never found any inappropriate contact with me, nor would I venture to say anybody would let that happen.

We all understand the difference between what we understand as congeniality versus inappropriate conduct. What I am taking from some of these comments about adversarial behavior is that perhaps we, as neutrals, need to realize that the industry is changing, and our assumptions about what is acceptable *ex parte* contact need to be reexamined. Perhaps we need to recognize that maybe the relationships have changed. Our response to what we

don't see in front of us at the hearing but what we know goes on behind the scenes is a concern to some of the advocates. We need to reevaluate the comfort that we once saw existing between the parties.

Radek: I wanted to say something in response to Frank's question, and that is sometimes, on the same railroad, you see substantial differences in the relationships between the parties and their various committees. That can be indicative of something that is wrong. It may be an absence of good faith. We would all be better off if we could work at some of those relationships where we have this, let's say, unevenness or even dislike.

Newman: Could you all join me please in thanking the panelists very much for their participation, and we thank all of you not only for coming but for staying. Have a great day.