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OCTOBER TERM 1970

In the Matter of:

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Petitioners, vs. UNITED TRANSPORTATION UNION, Respondent.	Docket No. 189

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Petitioner	)	
vs	)	No. 189
UNITED TRANSPORTATION UNION, Respondent	)	

The above-entitled matter came on for argument at 1:42 o'clock p.m. on Monday, January 18, 1971.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

WILLIAM H. DEMPSEY, JR., ESQ.
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On behalf of Petitioner

JOHN H. HALEY, JR., ESQ.
605 First National Bank Building
East St. Louis, Illinois 62201
On behalf of Respondent

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Number 189, Chicago and Northwestern against United Transportation Company.

You may proceed whenever you are ready, Mr. Dempsey.

ORAL ARGUMENT BY WILLIAM H. DEMPSEY, JR., ESQ.

ON BEHALF OF PETITIONER

MR. DEMPSEY: Thank you, Mr. Chief Justice and may it please the Court:

The question in this case has to do with Section 2 First of the Railway Labor Act. The provision that says that it shall be the duty of parties to a railway labor dispute to exert every reasonable effort to dispose of their cases.

More precisely, the question is whether,if a union violates Section 2 First, may a company secure its -- notwithstanding the fact that all of the other formal procedural requirements of the act have been met. That is to say that conferences have been held and that mediation has been had and the board has terminated jurisdiction and either an emergency board has or hasn't been appointed, but in many cases the relevant cooling off period has run.

And I think that I can summarize very briefly the factual events that led to the presentation of this issue here.

The dispute between the parties had to do with the number of brakemen that should be employed upon the trains of the NOrth Western. This is a part or an aspect of a much broader long-standing controversy between the railroads and the unions with respect to a wide range of work rules that the railroads have maintained are unduly burdensome anachronisms. I suppose the most prominent example of this sort of a problem has to do with the use of firemen on diesel locomotives.

With respect to the brakeman problem the carriers of the country secured very substantial relief in the mid-1960s by virtue of a compulsory arbitration statute thatwas enacted by the Congress in late 1963. And pursuant to that legislation arbitration boards sat across the country and the consequence was that the carriers were authorized to eliminate thousands and thousands of brakeman positions, all, however, subject to the obligation to proect existing employees.

Now, on the North Western the authorization for elimination went to something in the way of 200 crews which represented a substantial saving of something in the way of $2 million a year. But these awards expired in January of 1966 and so in June and July of 1965 the union began its efforts to recapture its positions by serving upon some 80-odd railroads Section 6 proposals which would have restored all of the eliminated positions.

Q Was that expiration by the very terms of the award and --

A It was by the terms of the award, Mr. Justice Blackmun, as required by the statute.

Q What was the -- if there was a terminal point on that presumably corrective action?

A Well, the hope of the Congress, I take it, was that during this two-year period, as some of the courts have indicated who have reviewed this matter, that a new plateau of work rules and manning regulations would be achieved through collective bargaining.

The alternative, of course, is to make the solution a permanent one and Congress drew back from that in the hope that the parties would work out their own differences during this period. But, unhappily, that hope has not matured.

And what happened then at the expirationof the awards was that the union in pursuit of these Section 6 notices, insisted upon carrier-by-carrier negotiation which put them in a position to call whipsaw strikes against individual railroads. And the consequence of all that was a series of strikes and threats of strikes in '68 and '69. And the consequence of that was surrender by most of the nation's railroads of practically all the benefits that they had secured under these arbitration awards.

Now, the union got to the North Western rather late in this series of mediations, but in any case, conferences were had; mediation was held and the board terminated its jurisdictionover the case in October of 1969; October 16th, I believe.

So that the 30-day cooling off period ran on November 16 of 1969 and three days later the North Western brought this suit, alleging that though conferences had been had and mediation had been held they were not the sort of conferences and they were not the sort of mediation contemplated by the act because the union, it was charged, had not fulfilled its obligations in terms of bargaining that were imposed upon it by Section 2 First.

The District Court granted a restraining order; a hearing was had on the motion for preliminary injunction, but at the conclusion of the North Western's evidence the District Court dismissed the complaint without reaching the merits of the allegations on the grounds that Section 2 First of the act is not enforceable by the courts but only by the National Mediation Board.

The District Court did grant an injunction pending appeal. After an expedited appeal the Court of Appeals affirmed on the same rationale, but recognizing that its decision was contrary to the decision of the 4th Circuit in the Piedmont Aviation case, the Court of Appeals stayed its mandate

pending the outcome of these proceedings before this Court.

Now, here the Respondent urges the adoption of a rationale of the lower courts, that is Section 2 First does not impose judicially enforceable obligations.

The AFL amicus curiae, on the other hand, suggests that even if 2 First is judicially enforceable, that the mode of enforcement should not include strike injunctions because of the prohibitions of the Norris-La Guardia.

I want, of course, to touch upon both strands of these arguments, but before I do that I should like to indicate to the Court the range of different kinds of problems that have been dealt with by the courts under Section 2 First. Because it is our view that if the decision of the lower court is affirmed there will be a very dislocating effect with respect to a substantial and important body of case law that has been built up on the premise that Section 2 First is enforceable.

Now, of course one kind of case is the one that was alleged in the court below: in _____ and I won't go into the evidence because the lower courts never reached it, but the character of the allegations gotto whathas been called "subjective bad faith" bargaining, at least many of the allegations go to that. So that this is the kind of case in which it's charged that the union came to the bargaining table with a predetermined position and a determination not to

deviate from that position no matter what relevant considerations might be advanced by the carrier. It was, in the terms of arbiters sometimes used in this area, "a surface bargaining, take it or leave it" bargaining. And the only option given to the carrier was to concede or to strike.

Now, I should like to indicate that 2 First is a two-way street with respect to this kind of charge, as the pending litigation brought by the United States against the Florida-East Coast Railway indicates. We have described that litigation in our supplemental reply brief.

But there, the Government, joined by the unions, is asserting that the railroad, the Florida East Coast, should not be permitted to put into effect its sweeping Section 6 proposals, notwithstanding the fact that it has exhausted all the formal procedures of the act on the grounds, as the Government charges, that the railroad has not complied with its bargaining obligations, under Section 2 First.

Now, there is another kind of a problem, one that the courts have dealt with under 2 First, and that has to do with the bargaining authority of the collective bargaining representatives. In the case at bar, for example, the evidence showed that the union representatives refused even to discuss a compromise proposal by the railroad that would have involved the payment of very substantial additional compensation to the existing employees: something in the way of

an extra thousand dollars a year.

And it showed also that the reason -- of course, this is on the carrier's evidence; the union hasn't had a chance to put a case in -- that on the carrier's evidence it showed that the reasons that the agents, the collective bargaining representatives refused even to discuss this proposal is because a convention resolution tied their hands and this kind of a restriction upon the authority of bargaining representatives has been held by the First Court of Appeals in Piedmont Aviation to contravene Section 2 First.

In addition, the enforceability of moratorium clauses has been dealt with in the lower courts under Section 2 First. Moratorium clauses are coming into more widespread use in this industry. The hope, of course, is that in this industry, as has been true in others, the disputes can be settled and then there can be, for a substantial period of time, some reasonable tranquility.

Q Mr. Dempsey, is there a split among the lower courts as to the judicial enforceability of 2 First?

A No split to my knowledge, except the split that was opened by the decision of the lower court in this case.

Q That's the way I understood it. Prior to that there was no split?

A Prior to that decision we have cited

something in the way of 30 to 40 lower court decisions in our brief, including the decisions of four Circuit Courts of Appeals. that sustain the enforceability of 2 First.

In the moratorium area, Mr. Justice Harlan, the leading decision is one written by Judge Friendly for the Second Circuit Court of Appeals quite recently in the Seaboard World Airlines case. The problem here arises when the union concedes that its Section 6 notice is within the terms of the moratorium, so that there is no question for the adjustment board.

While it asserts that the moratorium clause is not valid, either because it's hostile to the purposes of the Railway Labor Act, or for some other contract reasons. And the lower courts have considered and decided those cases and enforced the moratorium clause by a strike injunction.

Q Would you tell me briefly what a moratorium clause is?

A Well, there are different types, but basically the moratorium clause would bar the unions and the carriers from serving Section 6 notices covering prescribed subjects; generally speaking, the subjects that are resolved in that particular contract for a particular period of time. And they may be accompanied, although I don't think it's necessary that they be accompanied, but they may be accompanied by a "no strike" clause, as in the Boys Market kind of a case

that the Court had last year. And, indeed, the Seaboard World Airlines case did involve a moratorium clause with a no strike provision.

And as I say, the courts enforce those clauses by virtue of the obligation of Section 2 First upon the parties not only to make but to maintain rates.

Q And a moratorium clause is a promise that -- made by each party in consideration for the other's promise, I suppose, that neither party will bring up a certain subject for X years?

A That's right.

Q Under Section --

A -- we decide on -- and whatever else it is that we have settled and we have promised not to bring --

Q And you have promised not to bring that up for eight years?

A Right. Usually not quite that long.

Then also --

Q Do you have any of your cases that you have cited directed to enforcing the obligation, not only to bargain, but to bargain in good faith or to make -- what does the statute say, "make reasonable offers." Are they directed specifically to analyzing what reasonable efforts are?

A Some are. I think the bulk of the cases probably are directed to the kind of problems that I'm talking

about now --

Q Or just flat refusals to bargain at all?

A No; I don't think there are many flat refusals to bargain. The question is always --

Q Not since the Virginia.

A Not since Virginia; that's right. But there could be a situation of a flat refusal to bargain on the basis of a position of law that the moratorium clause does or does not bar the proposal. That kind of a case will arise.

Q Do you equate these two phrases: the good faith bargaining and the duty to use every reasonable effort?

A Mr. Chief Justice, I don't, myself. I think that -- I read Section 2 first as somewhat a broader provision than the good faith bargaining clause in the LMRA and I suggest that the kinds of cases I am describing now indicate that it is. The enforceability of a moratorium clause may fall under Section 301 jurisdiction of the LMRA but under the Railway Labor Act there is no equivalent and so it's put under Section 2 First.

Now, I think in one -- in the Chicago-Rock Island case Judge Friendly observed that Section 2 First was written in somewhat broader language and it might well have a broader scope.

For example: the lower courts have also decided whether the bargaining unit should be a multi-employer unit

in a particular controversy or a single employer unit in a single controversy, depending upon which of those methods of negotiation seem to give the greater promise of a peacable resolution of the problem and they decided that under Section 2 First, and I think there is no equivalent kind of decision under the LMRA good faith bargaining clause.

So that the lines of cases that I am talking about may fall someplace else under the LMRA, but I don't think they fall under the good faith bargaining provision of the LMRA.

And finally, I should mention the role that Section 2 First plays in the status quo provisions of the act. Now, in Jacksonville Terminal and in, last year in Detroit and Toledo Shoreline, this Court indicated that the structure of the act contemplated that both parties maintain the status quo during the exhaustion of all of the major disputes procedures of the act.

And there is no difficulty here if one looks at the status quo provisions that come into play when the mediation board terminates its services because Sections 5 and 10 clearly apply to both parties. But there is a difficulty, a textual difficulty with respect to Section 6 which governs the relations of the parties during this whole period of conferences and mediation because Section 6, in terms applies only to the carriers.

Now, it's plain to me that the court discerned

that difficulty in writing the Shoreline case because after describing these various status quo provisions in 6, 5 and 10, the Court concluded by saying this: these provisions must be read in connection with the implicit status quo requirement in the obligation imposed upon both parties by Section 2 First.

Now, the point that I want to make is that where such an important and variegated structure of case law has been built in this area upon the premise that Section 2 First is enforceable, and enforceable by strike injunction because every case that I have talked about is a strike injunction case.

Now, the Respondent, I respectfully submit, has a heavy burden to meet in showing that indeed Section 2 First is not enforceable.

Now, let me briefly talk about the arguments made on both sides. I'd like to discuss the question of justiciability first, putting aside for the moment the Norris-La Guardia Act.

We say in the first place that the language of the statute strongly supports us. It says that "it shall be the duty of theparties to comply with 2 First." Secondly, we say that the legislativehistory of the act supports us, again quite strongly. We discussed it in some detail on pages 35 to 38 of our brief and of course I don't have time to

review it in detail here, but by way of illustration, let me simply say that Mr. Richberg, who discussed this matter with the Unions in the hearings of some considerable length, summarized his position by saying this about Section 2 First:

"The legal obligation is imposed, and as I have previously stated, and I want to emphasize it, I believe that the deliberate violation of that legal obligation could be prevented by court compulsion. There is nothing to the contrary in the legislative history of this provision."

Now, third, and I suppose really first in order of importance, this Court in Virginian Railway, held that Section 2 First is enforceable by the courts. There this Court enforced an injunction or affirmed the validity of an injunction against the carrier which not only bound it to treat with the employees within the meaning of Section 2 Nine, but also to exercise, exert, every reasonable effort to settle their dispute with the union under Section 2 First.

And it was argued to this Court that Section 2 First is not justiciable and this Court rejected that contention. I think the key paragraph, perhaps in the opinion is one of those that is quoted in page 50 of our brief. I'll just read one sentence of it:

"It," that is the statute, "at least requires the employer to meet and confer with the authorized representative of its employees; to listen to their complaints, to make a

reasonable effort to compose differences. In short, to enter into a negotiation for the settlemtn of labor disputes such as is contemplated by Section 2 First."

And every subsequent expression of opinion by this Court about Section 2 First in Virginian is clearly in accord. We have quoted all the relevant passages from a number of this Court's opinions, beginning on page 52 of our brief. Let me just read one from the leading opinion in Elgin, Joliet and Eastern versus Burley. This is what the Court said there:

"Thus, one of the statute's primary commands, judiciably enforceable, was found in the repeated declaration of a duty upon all parties to the dispute to negotiate for its settlement. This duty is not merely perfunctory; good faith exhaustion of the possibility of agreement is required tofulfill it," citing Virginian and Section 2, among other provisions.

Now, the Respondent and the lower court rely upon MKT, but in MKT this Court simply held that Section 2 Ninth of the act was designed specifically to cover representational disputesaand that provision withdrew those disputes from the court. And it simply said with respect to 2 First and 2 Second that these more generally phrased provisions could not detract from that more specific intent, going to that kind of dispute. But we don't have a representational dispute here

and this Court has never said anything that in any way intimates that it ever intended to cut into Virginian.

Just a word or two about the mediation board. The lower courts thought that the mediation board had authority to enforce Section 2 First. In the first place the statute doesn't say that. This Court, in Detroit and Toledo Shoreline last year, in rejecting a long-standing interpretation of the board of the act, said that the board has no adjudicatory responsibility in major disputes.

Secondly, the legislative history, again which we set forth in detail in our brief, shows that the Congress, that the framers of the act, rather, were anxious to withdraw any adjudicatory authority from the board so as to preserve its neutrality, its ability to conciliate.

Next, the board has never, as a matter of practice, enforced 2 First, as the materials which we set forth in our brief establish, I think. And then, finally I think it ought to be noted that the mediation board would be powerless to enforce Section 2 First in a very great many cases because once the board releases its jurisdiction then it's out of the picture for the 30-day cooling off period after that and for the next 60 days associated with the hearings proceedings of emergency.

And so for these reasons we urge that Section 2 First is judicially enforceable by the courts and not by the

boards.

Now, as to Norris-LaGuardia --

Q May I ask --

A Yes, Mr. Justice White.

Q If the parties absolutely refuse to bargain, or one of them does and the mediation board is in it and the parties still refuse to bargain, what could the mediation board do about it, except terminate?

A I think they have to terminate, Mr. Justice White; that's what the statute to me says. It says that when the board has exhausted to bring the partiesto an agreement and they can't do it, that it's supposed to release the case. As a matter of fact, I understand that in the Florida-East Coast case where the Government is now urging that the Florida-East Coast violated Secton 2 First by not bargaining. The Florida-East Coast sued the mediation board to get them to release the case and the mediation board released the case before that case went to trial.

I think the mediation board is obliged to release it after a reasonable period of time and I think they do that. I don't think that the Government would be taking the position in Florida-East Coast that the railroad had violated 2 First if it also thought that the mediation board had violated its responsibility by releasing that case.

Now, as to Norris-La Guardia, our position, put as

simply as I can, is that based on this Court's prior decisions and the legislative history of Norris-La Guardia, Norris-La Guardia simply does not apply to a case in which the claim is that there has been a violation of an important provision of the Railway Labor Act. We think that's what Graham and Steel and Tunstall and Virginian and Chicago River says.

In Chicago River, for example, the Court said, and that of course is a strike injunction suit, said that this Court has authorized the use of injunctive relief to vindicate the processes of the Railway Labor Act. And it has held that the specific provisions of the Railway Labor Act take precedence over the more general provisions of the Norris-La Guardia.

And that principle is thoroughly rooted in the legislative history of Norris-La Guardia, which is discussed in some detail in our reply brief. Congressman La Guardia spoke tothe problem and he said quite plainly that Norris-La Guardia is not intended to touch the Railway Labor Act.

And the lower courts, in a consistent and long line of decisions, said Chicago River have declined to apply Norris-La Guardia in both major and minor disputes where the claim was a violation of one of the significant provisions of the act.

The amicus suggests that an exception should be made with respect to Section 2 First. We have discussed the

various policy considerations that the amicus advances in our reply brief, and I don't have time to deal with them now, but I would like to make one point, because I think central to the amicus's analysis is the suggestion that there is an alternative way of securing the interests protected by Section 2 First and that is by getting an injunction early in the game compelling good faith bargaining so that an agreement might occur before a strike.

Now, we suggest that that is not a practical remedy because it would require a bad faith bargaining suit to be instituted right in the middle of negotiations in the early or middle stages and to institute that kind of litigation we think would be destructive of collective bargaining. Indeed, we think that's what this Court said in substance last year in Boys River in discussing the availability of a damage -- There the court said that the institution of that kind of litigation would be damaging to the relationship between the parties.

Now, besides that, and equally important, we're dealing here with the statute in which the negotiating periods are long and protracted and if the carrier were to come into court in the early or middle stages of those periods the union would always be able to say: well, now, look there is a long road ahead of us and positions inevitably change and it is simply too early to make a determination but you are

not bargaining in good faith andthat is precisely what the courts have said -- the court said in the only case that we have been able to discover in which that kind of relief was sought: the District Court in the Northern District of Georgia in an opinionaffirmed by the Fifth Circuit Court of Appeals and adopted by that court, said in substance: you're here too early. This suit is premature; disposition of the union may topple of its own weight in the course of the further negotiations and discussions that are required by the act.

So that it is only at the terminal stages when a threat of strike of real damage is imminent that the courts, we feel, will entertain a suit to enforce Section 2 First.

Is I have any time left I would like to reserve it, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Dempsey.

Mr. Haley, you may proceed whenever you are ready.

ORAL ARGUMENT BY JOHN H. HALEY, JR., ESQ.

ON BEHALF OF RESPONDENT

MR. HALEY: Mr. Chief Justice and may it please the Court:

I think I can best respond to the argument of Counsel for Petitioner by outlining the act itself, rather than to deal with it.

Section 2 First, with which we are dealing here, was not ever intended by Congress and has never been held by this Court to be judicially enforceable. Section 2 First was intended by Congress to be enforceable by the National Mediation Board through the power of the National Mediation Board to maintain or to continue to require the status quo to be maintained and to prevent self-help, until the mediation board should be satisfied that the bargaining conduct of the parties had been such as to meet the requirements of Section 2 First.

And further we would urge, that to subject the bargaining conduct of the parties, both prior to mediation and during the compulsory mediation for which the act provides to a judicial review after mediation would destroy the whole scheme of the Railway Labor Act for the resolution of major disputes; because it would necessarily interferewith the relationship that the National Mediation Board must and does maintain its dealings with the parties in order to bring about agreement and to require it to disclose those -- its dealings with the parties who were destroying its effectiveness and would put the crux at the bargaining table ex post facto, when it was the purpose of the act to limit the functions of the court in these cases.

Section 2 First first came into railway labor legislation as Section 301 of Title 3 of the Transportation

Act of 1920 which set up a system of compulsory arbitration by the Railroad Labor Board for railway labor disputes. Of those disputes which were not decided by the parties and Congress under what Section 301 then provided of Title III of the Transportation in almost the same language that the parties shall make every reasonable effort to resolve disputes and those which it couldn't resolve were to be decided by the Railway Labor Board.

This Court first considered that provision and that language in the Pennsylvania Railroad cases in 1923 and '25 and held that Section 301, which is the equivalent now of Section 2 First, the 1926 act was not judicially enforceable, notwithstanding it was couched in mandatory language because of the absence of any provision for a penalty for its violation or any other indication that it was intended to be judicially enforceable.

Following that decision by this Court there occurred the 1921-'22 shopcraft strike which involved some 600 to 7,000 railroad employees and railroad labor relations and railroad labor legislation was a subject of considerable public concern at that time. It was -- the need for change was recognized in the platforms of both political parties; it had been the subject of three Presidential messages to Congress. And when Section 2 First as we now have was enacted it was Section 2 First of the Railway Labor Act of 1926.

enacted in those circumstances, and agreement by both parties as to the provisions of the act and it was enacted in substantially the same way, which is Section 301 of Title III of the Transportation Act of 1920, and it has remained in those words since 1926.

And thus it was enacted without the prohibitory provision or any other provision that this Court thought in the Pennsylvania cases was necessary to show a judicially enforceable intent. It has stayed that way since.

In enacting the Railway Labor Act of 1926, the Senate reports show and the House reports show that the Congress deliberately rejected a compulsory system of resolving railway labor disputes with adequate means for judicial enforcement as it might have done merely by making Title III ofthe Transportation Act of 1920 judicially enforceable. But, instead the parties agreed to a process which has been in effect since. It left Section 2 First in its nonjusticiable language, but prohibited changes by carriers in agreements without notices. It prohibited the status quo being changed after notice until after mediation was concluded; established the Mediation Board as the representative of the public in the disputes and provided for compulsory mediation by the government agency, the Mediation Board.

The Virginian case that Counsel spoke of, found a judicially enforceable obligation in the prohibition of

Section 2 Ninth which came into the act in 1934, against the railroad dealing with the representative of its employees other than the representative certified by the National Mediation Board. Up to that time the question of representation of the employees had, was what was the trouble in railway labor legislation, because collective bargaining had long been accepted as a fact in the railroad industry.

But an injunction in that case prohibited the railroad from dealing with other than the representatives certified by the mediation board and it also required the railroad to deal with the certified representative and in the manner prescribed by Section 2 First. But in that case the Court did not suggest that the District Court retain jurisdiction; there had been no negotiations up to that time; didn't suggest that the District Court retain jurisdiction to determine whether the ensuing negotiations met the requirements of Section 2 First. Instead, this Court suggested that in the event conferences failed the services of the mediation board be invoked and thus this Court suggested the antithesis of further litigation, further mediation and the attachment of the jurisdiction of the mediation board to prevent self-help by maintaining the status quo until the mediation board should determine whether there was compliance with 2 First.

Thereafter, when the lower courts commenced to assume jurisdiction of disputes arising under the Railway

Labor Act, this Court in a trillogy of cases, limited the apparent general jurisdiction of the Federal courts in 1943 in Switchmen's Union against the National Mediation Board, General Committee of Adjustment versus the Southern Pacific and General Committee Adjustment against the MK and T Railroads.

And in those cases, in the _____case made it plain again that Section 2 First was not justiciable and the Court has recognized through the years, most recently under Detroit and Toledo Shoreline that it is the National Mediation Board which determines whether and when the conduct of the parties complies with Section 2 First, not the courts. And it's the National Mediation Board which has the power to deprive the parties of self-help or to enforce compliance with 2 First by continuing to deprive a party of self-help or when it is satisfied that the Section 2 First requirement has been met, and the dispute cannot be resolved to remit the parties to self-help.

Q Mr. Haley, what do you suggest the Court meant in the Burley case in the language that one of the statute's primary commands judicially enforceable, is found in the repeated declaration of duty to do all that's necessary to reach a solution?

A As I interpret that, Mr. Chief Justice, Justice Rutledge was there speaking of the power of the courts

to maintain the status quo until the mediation board could return that Section 2 First had been complied with. It was talking thereto of the powerof the courts to compel a railroad to deal initially with the certified representatives and of the employees and to keep the railroad from dealing with some noncertified representatives of the people; the jurisdiction of the courts to enforce the status quo; the jurisdiction of the courts to hold the parties into compliance with the status quo provisions until the administrative process of the act had been exhausted.

The National Mediation Board is well aware of its duties and responsibilities to enforce compliance with the provisions of Section 2 First and thus that awareness was perfectly apparent from a recent decision of the Court of Appeals for the District -- for this Circuit, the District of Columbia Circuit, in the Machinists case against the National Mediation Board.

It's also apparent from the speech of Mr. Howard Ganzer, formerly chairman and a long-time member of the National Mediation Board and from Professor Smith's article in the Michigan Law Review, together with the complexity of the problem of determining whether every reasonable effort is being made, all those recited. But the Board obtains its information with respect to the quality of the bargaining, not in an open hearing, but in conferences with the parties,

separately and together, as is its usual practice. It talks with each party, obtains the information as to their position; it participates in the bargaining sessions of the parties and considers and observes their conduct during those negotiations and in its private confidential talks with them, and on the basis of its direct contact with theparties, both secretly, informally and in observing the parties in their conduct with each other across the bargaining table; necessarily makes a determination as to whether and when each party has made every reasonable effort to resolve the dispute and thus, necessarily decides whether to continue to prevent the exercise of a party, exercise of self-help by a party who is only seeking to go through the motions, something that is hard to conceive that a union would ever do because it can only accomplish something by securing agreements. But, nevertheless, it's through that informal method that the mediation board obtains the information for which it bases a determination as to whether to continue its jurisdiction and thus deny self-help or to -- that Section 2 First has been complied with and the dispute cannot be resolved and the parties should be remitted to self-help.

The Board's conclusion that it reaches from its conduct with the parties should not be subject to judicial review because as it appears from the testimony or from the legislative history and the information furnished the Court

in the Machinists case against the National Mediation Board, the legislative purpose, the Congressional purpose for providing for compulsory mediation of disputes was to cloak the efforts of the mediation board in or to cover them or to eliminate them from public scrutiny, because otherwise it would be -- the effectiveness of the mediation board in determining whether a party was making every reasonable effort, contemplated by Section 2 First, as well as its mediatory functions, would be destroyed by requiring it to come into court and tell what each party had said to it; what each party had said to the other, because in the next case no one would say anything to the mediator or to the National Mediation Board.

And for fear that they would then be hailed into court later, but if the mediation board can talk to this party and find out its position; talk to this party and find out its position, it may well bring them together. The same situation is true under Section 2 Ninth with respect to the mediation board's certification of the representative of the parties. It's not required to conduct a public hearing; it's not required to make any orders; it's not required to find any findings of fact; it expresses its conclusion in the form of a certificate as to who is the representative of a particular class or craft.

In dealing with whether theparties complied with

Section 2 First and should be remitted to self-help or that both parties should be, the mediation board merely notifies the parties of the failure of its efforts. It conducts no public hearing. But to expose its mediatory efforts to subsequent litigation would destroy its function and obviously if both parties and the mediation board knew that at the end of the line that notwithstanding exhaustion of the requirements of the act, the courts would make the ultimate determination as to whether there had been compliance with Section 2 First. And whether the courts might require the parties to renegotiate or remediate in order to accomplish compliance with Section 2 First are plain and clear was never contemplated by Congress; there is not a suggestion of it in the hearings before the House or the Senate. There is not a suggestion of it; the suggestion is that the process that was being established was a voluntary function not a compulsory process; not compulsory arbitration such as was done by the Director General during the government operation of the railroads after which Title III of the Transportation Act of 1920 was patterned, but instead it was to provide for the amicable disposition of the matter, an inducement to the parties to bargain and to reach an agreement.

It was not conceived, as was the National Labor Relations Board, as an agency to enforce, to make and enforce cease and desist orders. They proceed, as this Court has

recognized many times, upon different bases. One on compulsion of the Labor Management Relations Act with all of the attendant troubles its gotten into in trying to determine whether the parties have engaged in good faith bargaining.

The Railway Labor Act proceeded on a different basis. Had Congress intended courts to play a part in it it could so have provided in 1926, in 1934 when the act was slightly amended; it would have been possible at any juncture to make Section 2 First justiciable by providing a penalty for its violation or that courts shall have the jurisdiction to determine whether there has been compliance with it, notwithstanding negotiations and mediations and an investigation and report by an emergency board.

We respectfully suggest to the Court that it not, or I want to mention the Piedmont case because under that case which is -- with which the Seventh Circuit thought its opinion in conflict, the court remanded the case for a determination by the District Court if it should determine that there was, in fact, a major dispute, whether the conduct of the parties in the prior negotiation and mediation had fulfilled the requirements of Section 2 First.

Thus, that court, and to require the redoing, remediation or renegotiation, I assume the courts have the jurisdiction to require that of the dispute until the District Court should be satisfied that the parties have made every

reasonable effort contemplated by Section 2 First to resolve the dispute.

Now, in the Piedmont case, as in all other groups of case law on which the Petitioner relies and which the Petitioner cites, the question before this Court has never been raised nor decided as Petitioner concedes on page 9 of its reply brief. Those decisions have been rendered upon the assumption that Section 2 First is justiciable. They have rendered upon the basis of statements that are pure dictum in opinions of this Court, as for example, Mr. Chief Justice Burger inquired in the Burley case.

What was said there about Section 2 First and the procedures of the act with respect to major disputes, was dictum because that case was concerned with the legal authority of a union to compromise the monetary claim of an employee, a minor dispute pending before the National Railroad Adjustment Board.

Q Pardon me; did you refer to Page 9 of the --

A Of the reply brief of the Railroad's reply brief, Mr. Justice Black. And where -- I might read it so -- "While this Court has not of quest decided a precise issue before it in this case," now that's the language I refer to.

So that as --

Q That has to do with the Norris-La Guardia Act aspect of the case, as I read the sentence.

A I read it --

Q "This is the clear intention of its opinions dealing with the interrelationship of the Labor Railway Act and the Norris-La Guardia Act. That has to do with what I had thought was the amicus argument, rather than with yours.

A Well, I viewed it just the other way, but I did want to mention that because Norris-La Guardia has been mentioned.

As the case stands now, unless Section 2 First, with Section 2 Firstnot now being treated by this Court as justiciable and imposing the judicial obligation, the violation of it obviously is not an unlawful act within themeaning of the Norris-La Guardia Act, for which an anti-strike injunction might be issued to hold it justiciable. And to hold it an affirmative duty the violation of whichwould be in violation of the act, what then raised questions under Norris-La Guardia and it might make SEction 2 First then an unlawful act for which an anti-strike injunction might be authorized by Norris-La Guardia.

But, unless and until it is so construed by this Court, it does not have that stature, and as Judge Friendly observed in the Rockland Island against the Switchmen's Union case, he questioned whether the violation of Section 2 First could amount to, and does amount to, an unlawful act for which Norris-La Guardia might warrant an anti-strike injunction,

construing it as a nonjudiciable, nonjudiciable enforceable duty as this Court has in the past. It could serve no basis for, could not serve as a basis for an anti-strike injunction under the Norris-La Guardia Act and we would not be confronted with all the other questions that would arise if it should be -- if Norris-La Guardia should be brought into play, by treating it as a legally enforceable obligation, a violation which might constitute the violation of a duty under the act, together with many, many other problems which, if there were a little more time, would arise.

This Court, departing from its treatment of Section 2 First as nonjusticiable, a position it has held for forty years and now holding it justiciable and taking a seat, ex post facto, at the bargaining table in Railway Labor Act disputes, function which I do not believe Congress ever intended the Courts to perform.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Haley.

Mr. Dempsey, you have four minutes left.

REBUTTAL ARGUMENT BY WILLIAM H. DEMPSEY, JR., ESQ.

ON BEHALF OF PETITIONER

MR. DEMPSEY: Thank you, Mr. Chief Justice.

Mr. Haley has laid such stress upon the role of the mediation board that I thought perhaps it might be useful to call the Court's attention to the relevant statutory provision here which is Section 5 First of the Act. It's the

only section in the act which goes to the duties of the mediation board. It says this: "that the said board shall promptly put itself in communication with the parties of such controversy and shall use its best efforts by mediation to bring into agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said board shall at once endeavor as its final required action to induce the parties to submit their controversy to arbitration. If arbitration shall be refused the board shall at once notify both parties in writing that it's mediatory efforts have failed and then the status quo is held for 30 days."

Mr. Haley is speaking of a statutory arrangement under which the decision and to whether 2 First had been complied with, would be committed by the Congress to an administrative agency and then it would be specified that there should be no judicial review of those determinations.

Surely the Congress could write such a statute, but it is simply importing too much under this statutory language to conclude that that is the system that the Congress here established.

Beyond that, the practice of the board has not been to decide Section 2 First questions. Mr. Haley referred to a speech given by Mr. Ganzer, the former chairman of the board. It is quoted in pertinent part in our brief on page 76 at

footnote 31. What Mr. Ganzer said there was that certain airline spokesmen had suggested that the board should not release the case for mediation "if either party has not, in the opinion of the board, made every effort to resolve the dispute." But Mr. Ganzer characterized this as "advocating a greater exercise of discretion than heretofore employed by the board."

And he questioned whether "there is statutory language to allow the board to make such a determination," and then he went on to discuss the procedural steps, such as hearings and the right to put in evidence and that sort of thing that the board might have to employ.

Q Mr. Dempsey, am I correct: is there an absence of penalty provisions in the statute?

A With respect to Section 2 First, Mr. Justice Blackmun?

Q Yes.

A Yes. Section 2 Tenth provides for criminal penalties for violation of certain of the subsections of Section 2 but it does not include Section 2 First.

Q Well, then is there any significance in that --

A No, there isn't, Mr. Justice. This Court, in effect, held in Virginian, because the penalty section does not touch section 2 Ninth, either and of course there is no

dispute that the Court in Virginian held 2 Ninth enforceable and beyond that, the Court in the Texas and N.O. case said that the absence of judicial penalty is not determinative with respect to considering the enforceability of these sections. So that --

Q Well, didn't the Virginian enforce Section 2 First on --

A Oh, yes, Mr. Justice White. I'm just assuming --

Q How did it do that? In its opinion it said that Section 2 Ninth requires the company to treat with, and if you are going to treat with you have to treat with Section 2 First --

A Section 2 First, but let me point out again that the injunction itself used the words: "treat with, and exert every reasonable effort." I am hard pressed to understand how Virginian can be distinguished in any way. I was simply making the point with respect to Mr. Justice Blackmun's question that even if one put Section 2 First aside, that the penalty provisions don't apply to 2 Ninth, either. And surely no one would question that Virginian enforced 2 Ninth, but the way the effort to distinguish Virginian, I suggest, simply has to fail, and let me put it this way: if, in the wake of that affirmance by the Supreme Court of the injunction in Virginian, the railroad had failed to exert every reasonable

effort, I submit that a contempt action would lie. The Court simply did not exhort the parties in Virginian; it affirmed an injunction that is presumably binding on the parties.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Dempsey. Thank you, Mr. Haley. The case is submitted.

(Whereupon, at 2:40 o'clock p.m. the argument in the above-entitled matter was concluded)