TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:	)	
	)	
TRANS WORLD AIRLINES, INC.,	)	
	)	
Petitioner,	)	
v.	)	
	)	No. 86-1650
INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS	)	

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Petitioner,

V. : No. 86-1650

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS

Washington, D.C.

Tuesday, January 12, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:58 p.m.

APPEARANCES:

MURRAY GARTNER, ESQ., New York, New York, on behalf of the Petitioner.

STEVEN A. FEHR, ESQ., Kansas City, Missouri, on behalf of the Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear argument now in Number 86-1650, Trans World Airlines v. Independent Federation of Flight Attendants.

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

ORAL ARGUMENT OF MURRAY GARTNER, ESQUIRE

ON BEHALF OF PETITIONER

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

This case involves union security provisions, which is another way of saying compulsory payment of union dues.

It is also here, as was the last case, on Petition for Certiorari to the Eighth Circuit.

For more than a year now, because of the decision of that Court, thousands of flight attendants employed by TWA have contributed more than $2.5 million to the treasury of the union, against their will, and under threat by TWA that if they did not do so, they would lose their jobs.

The Court below held that it would be a violation of the Railway Labor Act for TWA to do otherwise, because it said the union has an agreement with TWA pursuant to Section 211 of the Railway Labor Act, which requires TWA to make those threats and which requires those flight attendants to pay those dues.

The agreement to which the Court and the union point, however, was part of a contract effective by its terms only

from August 1, 1981 to July 31, 1984.

From 1984 to 1986, TWA and the Respondent Union, which I will refer to as "IFFA," were engaged in negotiation and mediation under the auspices of the National Mediation Board, in an attempt to reach a successor agreement.

Those efforts were unsuccessful. No successor agreement was made. No successor agreement is in effect now.

QUESTION: Do I take it then that all issues have been bargained to impasse?

MR. GARTNER: All issues that were on the table in the sense that the entire agreement was on the table. There were a great many issues.

QUESTION: There is no more bargaining going on?

MR. GARTNER: The only bargaining which is going on, Mr. Justice White, is in attempt to reach an agreement. Whenever the union wants to resume negotiations --

QUESTION: But TWA does not challenge the fact that the union is still the collective bargaining agent for its employees?

MR. GARTNER: No, it does not challenge it, because under the statute, really, it has no right to challenge it. There is no procedure under the Railway Labor Act which would allow TWA to initiate a decertification process.

QUESTION: So what does the company have to do? Just refuse to bargain and then be found guilty of an unfair labor

practice?

MR. GARTNER: As Your Honor knows, there is no Unfair Labor Practice under the Railway Labor Act.

QUESTION: Yes.

MR. GARTNER: But the equivalent. There really isn't a good answer to that question, Justice White, because there is no comparable procedure under the Railway Labor Act, as there is under the NLRA.

QUESTION: So once a bargaining agent is certified, that is the end of it, that is forever. Is that it?

MR. GARTNER: That is almost true. That is almost true. And the National Mediation Board does not have a good procedure for decertification, certainly not by the employer, and it is very difficult for the employee.

QUESTION: Thank you.

MR. GARTNER: Despite the fact that there is no successor agreement, the Court below held that the union security provisions of the old agreement continue in effect because parts of the prior agreement survive, as the District Court described it, and I quote: "...as a mutilated collective bargaining agreement."

That, as Your Honors know, is not a term known to the statute or to the art.

The Court below said very little about Section 211, or the words of this Court, in the Street case, about the

limited inroads which that section permits, by agreement of the union and the carrier, on the complete prohibition of compulsory dues payment otherwise mandated by Sections 2 Fourth and 2 Fifth.

Ignoring that statutory provision, the Eighth Circuit justified the exaction of dues from non-member, permanent replacements and crossovers -- that is, people who went to work during the strike and crossed the picket line -- during the strike and the continuing self-help period in which we are now, by characterizing the union security simply as an extremely important condition of employment, without regard to what the statute required in order to have that as a condition of employment.

QUESTION: The Court thought that under the terms of the contract, and under the Railway Act, the agreement would continue except with respect to the changes that the company notified the union about?

MR. GARTNER: Not under the terms of the contract, Justice White. The Court below was driven by its conception of what the Act required in what it said was its interpretation of the contract. But because of what it believed that the Railway Labor Act required, in terms of bargaining about each single provision, it construed a duration clause which on its face was completely unambiguous and which provided for the non-renewal of the entire agreement, as though it provided for partial

renewal of the agreement.

So that the Court was not construing the contract. It was simply using the Railway Labor Act to change the words and the meaning of the contract.

QUESTION: Is your first submission at least that once you gave notice of change pursuant to the contract and Labor Act, and the expiration date of the contract came about, and you exhausted all Railway Labor Act procedures and you were in the self-help phase, the entire contract is over?

MR. GARTNER: That is what the Ninth Circuit held and that is what we relied upon.

QUESTION: And thereafter you are completely free to change any condition of employment without bargaining?

MR. GARTNER: I do not think that question is before the Court in this case, Your Honor.

QUESTION: If you are not free, if there are some provisions you are not free to change without bargaining, how come you are free to change the union security clause without bargaining?

MR. GARTNER: Because the union security clause is the specific subject of a specific provision of the statute which requires an agreement. It was enacted in complete accord with and adoption of similar provisions of the National Labor Relations Act, which have been uniformly interpreted to require that union security provisions and on the expiration of the

contract, regardless of whether all the other provisions of an NLRA contract continue in existence.

Now, before the decision below, the first, second, seventh and ninth circuits had recognized that agreements under the Railway Labor Act may expire in accordance with their terms, but that because of Section 6, the conditions established by those agreements nevertheless continue during the status quo period during which negotiations are carried on for the purpose of trying to reach a new agreement.

With specific relevance to the question in this case, the Second Circuit, in the Manning case, held that a dues checkoff agreement may expire in accordance with its agreed termination date, but is then continued for the limited status quo period, even though the carrier had not proposed to change it but merely to let it expire.

The proposal of the union in that case to include a dues checkoff provision in the new agreement would not seem any different from what the parties here intended. Both parties intended to have a union security clause in a new agreement, but not to have a free-floating union security clause without an agreement.

No court of appeals, until the Court below, has held that after a contract expires and after the conditions it established continue in existence, for, in the words of this Court, the almost interminable status quo period, as the Court

said in Detroit and Toledo. And no new agreement is reached that parts of the old agreement continue further into the self help period. Even under the NLRA, as I have indicated, Justice White --

QUESTION: I thought you said that question was not before us here. The way you are talking now, you are expanding that proposition not just to the union security provision but to all the provisions of the contract.

MR. GARTNER: I agree, Justice Scalia, it is not before you. The only reason I am mentioning it is that Respondent has spent to much time trying to persuade the Court that it is before you and the only point I want to make is that even under the NLRA, where there is some provision about continuing bargaining about other provisions, the very union security provisions which was adopted in the RLA by the model of the NLRA, is held to expire.

So I will not pay any more attention to that question.

QUESTION: It seems to me you have to either argue you want to be like the NLRA or you do not want to be like the NLRA.

If you want to be like the NLRA, you ought to give up on the proposition that the rest of the contract does not continue but say that nonetheless, the union security provision doesn't continue.

On the other hand, if you want to be different from the NLRA, then --

QUESTION: We have no choice Justice Scalia. That his what Congress wanted. Congress said that the two provisions should be the same. That is what the legislative history discloses.

It is not a matter of giving up on the other points. The other points are not here. They were not in the case below, they are not in the grant of certiorari. So we will not say any more about it.

With reference to Section 211, which this case is about, that Section requires an agreement. The agreement here was expressly limited in time to July 31, 1984.

It did not renew itself, because both parties served notice that they wanted to have a changed agreement and therefore the condition for non-renewal was met.

I make that statement only with specific reference to the union security clause.

Section 6 of the Act then required, as the Manning Court in the Second Circuit and as the Ninth Circuit in the Reeve Aleutian case, that all conditions, including the union security clause, be continued during the status quo period.

There is nothing in the Railway Labor Act, however, that subsequently transforms that statutory obligation to adhere to that condition od employment embodied in the union

security clause, which transforms it into a new agreement after the status quo period has ended.

QUESTION: Mr. Gartner, let me just ask this question. Is it not correct that the District Court and the Court of Appeals thought that the agreement, even without the aid of the statute, provided for automatic renewal with respect to the provisions that were not the subject of negotiation?

MR. GARTNER: No, Justice Stevens. I think it is very clear in both opinions that the only reason that they reached the decision that they did is that they believed that the statute required there to be contracts in the Railway Labor Act coverage which were interminable and did not have any termination date.

This contract had a termination date.

QUESTION: I can understand how you read it that way as support for your position in the language. But I am just perhaps quibbling about what the Court of Appeals held.

They say there were two issues. The District Court stated there were two issues.

One, did Article 28, the duration provision of the contract, cause parts of the contract that were not subject to bargaining to continue in effect, or did notice of certain attendant changes trigger a total termination of the agreement? And he said he answered that a different way than you would answer it.

Then they said the second issue is a statutory issue, and they don't reach the statutory issue.

Maybe they are dead wrong, but it seems to me that they held, if you have just nothing but the language of the contract, that the contract, in a mutilated form, as you put it, did survive.

MR. GARTNER: If Your Honor is referring, as I believe you are, to the Eighth Circuit's decision --

QUESTION: Correct. Page 4(A).

MR. GARTNER: Page 4(A).

QUESTION: At the bottom the page they start the discussion and they state the two issues. And the first one seems to be a contract issue and the second is a statutory issue and they say we only decide the contract issue.

MR. GARTNER: But on Page 5, they say, we construe the terms of the duration clause of this agreement in light of the national labor policy enunciated by the Railway Labor Act, which governs airlines as well as railroads, and in light of pertinent decisions bearing on the issues. And then they go into a long discussion about the purposes of the Railway Labor Act and the Florida East Coast case which dealt with an existing agreement, no with an agreement which had a termination date or which purported to have a limited effective term.

And they construe, as they say, they purport to be

construing the language of the contract, but they are not construing the language, they are saying that the Railway Labor Act requires this result; and in effect what they are saying is, whatever the parties said, the Railway Labor Act says that you can't do it that way, so we are going to pretend that they did it another way.

QUESTION: I just don't read their Opinion that way. I agree that they construed it in the light of all these policies you describe. But the bottom line seems to be their interpretation of what the agreement provided.

MR. GARTNER: Justice Stevens, I think this is an important point and I would like to dwell on it for a minute or two.

Every other Court which has construed a similar contract, which has construed the contract, without the baggage of its interpretation of the Railway Labor Act, have held that this kind of a contract provides for the non-renewal and the termination of the agreement.

So the only way that the Eighth Circuit reads the contrary result -- and they said specifically, we will not follow the rationale of Reeve Aleutian.

The practical effect of the Court's decision offends all reason. What the Court has done is to say that after an agreed contract term has ended, if a union insists upon striking to attain its new contract objectives, and the

employer decides to maintain its operations by recruiting and employing permanent replacements, the employer must induce the replacements to come through the union's picket line to work in order to defeat the strike, and in the same breath, tell those permanent replacements and crossovers that they must pay initiation fees to the union -- not only dues, but initiation fees -- to the same union which is conducting the picket line so that the union will have the funds to continue the strike.

That is the effect of the Court's decision.

In the many cases in which this Court has defined the scope of Section 211, and parallel provisions of the NLRA, it has never suggested that without a current agreement, and in the self-help period, 211 permits such a requirement.

Nor do I think it needs much argument to establish that if the Unions had asked Congress to pass a law in those words to achieve that objective, that they could have attracted much support.

Our submission to this Court is that Congress did not pass such a law with respect to union security clauses, that this Court has not interpreted union security clauses, particularly under the Railway Labor Act, to have that meaning.

QUESTION: Then you do say, Mr. Gartner, that a union security clause in a collective bargaining agreement under the RLA, whatever may be the law with respect to renewal or implied continuance of other such clauses, union security clauses are

different because of the special statutory treatment in 211?

MR. GARTNER: Yes. Yes, Mr. Chief Justice.

QUESTION: But you still hang upon the fact that this contract terminated, right?

MR. GARTNER: At least this provision terminated. This provision terminated.

QUESTION: All right. But let's assume that the termination provision that you rely upon did not exist and you had a contract that was simply of indefinite duration.

The result would seem just as absurd under that contract, too. You would have the same situation of a strike occurring and those new hires who don't want anything to do with the union are paying the union to try to get them put out of work.

MR. GARTNER: I tend to agree with that, Justice Scalia.

This Court has said, in Hanson, in Street, in Allen, and Ellis, that there is a very limited function and authority granted by Section 211, and that that function is to deal with the problem of free riders.

QUESTION: How do you get out of it in a situation where you -- and I gather most of the contracts in this industry are not with a fixed termination date as this one. Am I correct about that?

MR. GARTNER: No, Justice Scalia. I think in the

airline industry, many contracts are.

As a matter of fact, the amici in their brief say on Page 25, I believe it is, that this contract, this TWA contract, is typical of contracts in the airline industry.

IN the railroad industry, there is a difference.

QUESTION: All right, but let's assume, whatever industry. If I can't get out of this situation, if there is no gimmick in the statute, I can't rely on 211 in those other situations where the contract, by its own terms, is still in effect.

So if I am bound to say the absurdity has to exist in all these other situations, why shouldn't it exist here, too?

MR. GARTNER: I do not think, Your Honor, that this Court is bound to say that. This Court has never addressed that question as to whether in those other situations the permission granted by Section 211 allows unions and employers to threaten permanent replacements and crossovers with a loss of their jobs if they don't pay money to support the strike.

This Court has never made that decision. And I think that it is an open question. But it is not a question that we have to deal with in this case because we fortunately did have a contract which had a termination date.

The Respondent prefers not to talk about Section 211 or to acknowledge that it is a limited exception to the otherwise complete prohibition of compulsory dues requirements

in the Act.

Instead, it has directed the Court's attention to Section 2 Seventh. And with respect to Section 2 Seventh, I would only think it necessary to direct the Court's attention to what the Court itself said in Detroit and Toledo, that 2 Seventh is not a status quo provision which has anything to do with a major dispute procedure.

All that Section 2 Seventh does is to provide for the enforcement of existing agreements and then to call Section 6 into play.

Well, Section 6 was called into play in this situation. It was in play for two years. TWA complied with all of the requirements of Section 2 Seventh and Section 6 and those sections have no further application in this case.

I would like, if I may, to reserve the rest of my time.

QUESTION: Before you do, may I ask a question?

Assume that you have a rate of pay that is not the subject of negotiation, you have an impasse develop. Do you agree that you are under an obligation to continue to pay the people at the old rate of pay, the contract rate of pay?

MR. GARTNER: I would go so far as to say that you may not pay more than you have offered during the negotiations because that would be denigrating to the union.

Whether you may pay less is I think a question to

which Justice Douglas addressed himself in his dissenting opinion in the Jacksonville Terminal case.

QUESTION: What I really wanted to ask you about is if there is an obligation to maintain certain working conditions during the period of impasse, is that a statutory obligation or a contractual obligation?

MR. GARTNER: That is a statutory obligation.

QUESTION: So it really is your view, is it not, then, that the entire contract terminated when you gave whatever the date period was after the notice?

MR. GARTNER: That is our view, yes, Justice Stevens. That is the view that the Ninth Circuit holds. That is the view that the Second Circuit has expressed.

QUESTION: I thought you had taken a different position in answer to Justice Scalia.

MR. GARTNER: No, I haven't taken a different position. I think what I've said is that there may be some need to discuss that question in a different case, but not in this case.

But you are asking me for our view.

QUESTION: I think it may relate to the theory of what happened tot he balance of the contract. That is what I did not know for sure what your position was.

MR. GARTNER: It is not an issue before this Court, because there is nothing in the record which indicates that TWA

made any other changes other than the ones that it had specifically proposed.

QUESTION: Mr. Gartner, if it really were the law that some provisions of the contract survive until they are, at least until you have bargained to impasse on them, if that is the law, then you have the problem of distinguishing out this union security provision -- which you have tried to do.

MR. GARTNER: Yes.

QUESTION: So you really have two provisions. One, the whole contract is over, or two, even if it is not, this one is.

MR. GARTNER: Yes. That is right. And I would add that the reason that we do not believe that there is a comparable impasse procedure under the RLA as there is under the NLRA is that the RLA imposes such a very long and detailed and specific bargaining duty and procedure --

QUESTION: So that is a substitute for impasse bargaining.

MR. GARTNER: Well, but then when you come to the end of that you are at an impasse on the entire contract.

QUESTION: Exactly.

MR. GARTNER: Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Gartner. We will hear now from you, Mr. Fehr.

ORAL ARGUMENT OF STEVEN A. FEHR, ESQUIRE

ON BEHALF OF RESPONDENT

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

I would like to start by attempting to clarify some things in the record.

First, the notion that this case was tried upon a narrow ground related to the sole change of union security is untrue. TWA filed this case as a declaratory judgment asking the Court to declare, among other things, that the contract expired. The Court declared the opposite.

In our answer, we specifically alleged twice that TWA could make only those changes which it had submitted to the statutory procedures. And there is no question but that that is what both Courts held.

QUESTION: That allegation that you repeated, was it on the contract or statute or what?

MR. FEHR: The District Court held both under the statute and under the contract.

QUESTION: But what about your argument?

MR. FEHR: We believe that both under the contract and under the statute, either one or both, you can only make the changes you submitted to the process.

QUESTION: So even if there hadn't been a provision in the contract, about any part of the contract surviving, the

statute itself would say yes, everything survives except what has been submitted for change.

MR. FEHR: That is correct.

QUESTION: What about the provisions that have been submitted for change?

MR. FEHR: I think the only logical reading of Section 6 and Section 2 Seventh is those provisions which have been submitted for change may be altered by the carrier during the self help period.

QUESTION: And if it is wages, why, as soon as the stay put period is over, the employer is free to go up or down on wages?

MR. FEHR: The carrier is free to implement the changes which have been proposed.

QUESTION: right.

MR. FEHR: In which the National Mediation Board has performed its function. It is not free to implement any change it wishes at that time.

In other words, if it proposed $8.00, it cannot implement $6.00. But it can implement $8.00.

QUESTION: But all the other provisions remain exactly the same?

MR. FEHR: Provisions which have not been subject to the bargaining process of the Act may not be altered, yes.

QUESTION: But it really makes a big difference, at

least to my understanding of the case, whether the reason any of the terms and conditions may not be changed is a contractual reason or a statutory reason.

As I read the Court of Appeals, they said it was a contractual reason. They did not reach the question.

MR. FEHR: The Court of Appeals said that, that is correct, Your Honor.

QUESTION: They did not reach the statutory issue.

MR. FEHR: that is correct.

QUESTION: And if we read the contract otherwise, just read it as a plain, ordinary contract, it seems, by its terms, to expire. It says in so many words that it will renew unless they serve a notice. And they served the notice.

MR. FEHR: I disagree with that rather strongly, Your Honor, and the District Court did.

QUESTION: I know the District Court read it the other way.

MR. FEHR: They preferred to express it as to what the parties themselves believed to be the effect of the contract.

The contract says it renews itself indefinitely without change unless you give a notice of an intended change.

QUESTION: Correct. So that means that if you do give the notice then it doesn't renew.

MR. FEHR: Well, but it is somewhat difficult.

QUESTION: Under ordinary grammar. I don't know anything about the bargaining history.

MR. FEHR: I think it is rather unusual to construe a notice of a specified intended change to be a signal that you may then make any change you wish whatsoever.

QUESTION: No, that is not the point at all. The contract in terms says that it shall remain in effect until July 31, 1984, and thereafter shall renew itself without change for yearly periods unless written notice of change is served. Written notice of change was served. Therefore, it doesn't renew itself. That is plain language.

QUESTION: That is what other courts of appeals have held, isn't it?

MR. FEHR: Absolutely not, Your Honor, other than the Reeve Court.

QUESTION: Other than what?

MR. FEHR: Other than the Ninth Circuit Opinion in the Reeve case.

QUESTION: So there is a holding right in your teeth, I guess.

MR. FEHR: But the other courts of appeal which use the word "expire" in connection with an RLA contract do not use the word as TWA would use it. They do not mean expire so as to allow the carrier to implement anything and everything during self help.

QUESTION: Are they talking about the statute or are they talking about the contract?

MR. FEHR: Most of those cases -- there are really only four cases that deal with changes a carrier may make during self help.

QUESTION: I understand. But to the extent that they read "expire" differently, as you are saying, they may be talking about the statutory effects rather than what the contract itself provides.

MR. FEHR: They mean expire so as to get to the status quo period, expire so as to get to the self help period. There is no case, other than the Ninth Circuit case, that says once you get to self help, anything goes, the carrier can change anything and everything.

Perhaps the best example of it is Judge Posner's Opinion in the Seventh Circuit in EEOC v. United when he uses the words "expiration date." But even as he uses the words "expiration date" he says that the passing of the expiration date does not allow the carrier to implement any changes. It only allows the carrier to implement those which were the subject of Section 6 notice.

QUESTION: But again, is he saying that because the contract doesn't allow it or is he saying it because the statute doesn't allow it?

MR. FEHR: He is saying it under both. And so did

the District Court.

QUESTION: But the Court of Appeals did not.

MR. FEHR: The Court of Appeals did not reach the pure statutory issue. That is correct.

QUESTION: Except in construed the contract in light of the statute.

MR. FEHR: It did make comments to that effect, yes, Your Honor.

You should also perhaps look at how both Courts framed the issue below. As Justice Stevens pointed out, the issue was framed by both Courts in broad terms as to whether the contract survived both under the statute and under the contract, and the framing of the issues did not even specifically mention union security.

Also in response to a question you posed, Justice White, there is no formal decertification procedure under the National Mediation Board. There are certainly methods in which a new union can be voted in. In fact, TWA's flight attendants have been represented by four different unions over the course of 40 years.

There is a rather central point, a rather central case which has not been mentioned yet today. And that is the decision 22 years ago by this Court in BRAC v. FEC Railway, and I think we need to talk about that case a little bit.

QUESTION: Did you talk about it in your brief?

MR. FEHR: Rather extensively, Your Honor.

This is, I believe, the case the Court envisioned 22 years ago in FEC when the Court said that it would make a sham of the bargaining and mediation processes of the Act if the carrier could unilaterally achieve what the Act requires be done by the other orderly procedures.

And TWA has barely mentioned the rationale of the FEC Court in its brief, and with good reasons, because that rationale really has nothing whatsoever to do with duration clauses in contracts.

The Court talks about the spirit of the ACT. And I think we have to ask and answer the question today of what is the spirit of the Act the Court was talking about in FEC.

TWA claims that spirit is that existing agreements be honored. But that has nothing to do with the rationale of FEC which talks about the community of carrier and employees which is only interrupted by a strike, which talks about a reversion to the jungle if the carrier may use the occasion of a strike to tear up the entire contract, which talks about a carrier using a dispute over limited issues to make sweeping changes that the carrier did not bring to the bargaining table, and which talks about providing the carrier an incentive to provoke or prolong a strike so that it may break the union and simply annul the entire collective bargaining agreement.

They key word is "incentive." The purpose of the

RLA, which flows directly from Section 1, is to promote bargaining to the fullest extent possible so as to avoid self help.

And what violated the spirit of the Act in FEC was the carrier's interpretation of the ACT, which would have given the carrier a substantial incentive to engage in self help.

We have these elaborate processes, what the Court has described as machinery, designed to adjust disputes and avoid self help. But if the carrier can so easily side step that elaborate machinery merely by submitting some changes to the processes of the Act while hiding others until self help, then those procedures are indeed a shambles.

QUESTION: It is hard to envision that Congress would have intended a scheme under which the working flight attendants here have to finance the union's efforts to displace them. It is rather strange, isn't it?

MR. FEHR: The union's primary objective is certainly not to displace the working flight attendant.

And secondly, Justice O'Connor, that was exactly the result in the FEC case which has been on the books for 22 years and Congress has made no effort to change it.

The FEC Court specifically found that a union security provision was a working condition subject to Section 2 Seventh of the Act which may not be altered unless there are negotiations over that provision, except in certain instances

during a strike, which is certainly not at issue here because the strike was over long before the District Court even ruled.

QUESTION: Did the union insist on collecting the agency fee during the strike?

MR. FEHR: I don't know that, Your Honor. I only know that union security provisions is one of the issues as to which the carrier attempted to change without bargaining and the Court indicated that you could not do that, except insofar as necessary to operate during the strike.

And the rule of FEC is that the carrier and the union must bargain over that which they intend to change. Under any contrary rule, I submit, the Railway Labor Act simply does not work. A Section 6 notice of intended changes is of little value if during self help the carrier may make any change it wishes.

How effective can the National Mediation Board be, if it is only mediating the changes the carrier has proposed and does not know what other changes the carrier intends to implement during self help?

QUESTION: On the other hand, I really wonder how successful any mediation effort is going to be if you are requiring the carrier, if it wishes to avoid the situation that has occurred here, to put on the table elimination of the union security agreement every time.

That doesn't seem to me something that is likely to

produce a quick agreement between the union and the company, and that is the effect of what you are saying. In order to avoid this situation, every time you have to put on the table the first thing we are going to do is eliminate the union security clause.

MR. FEHR: There are several answers to that, Justice Scalia, the first of which is that that pretty much is the result of FEC.

Second, if somehow the carrier cannot operate if it has to enforce the union security agreement during a strike, it can apply to the District Court, as authorized by FEC, for an exception to the requirements of 2 Seventh, which we haven't talked about yet.

And third, in fact, TWA has in its proposals issued some provisional proposals that would be in effect only during a strike. If you will examine TWA's opening proposals that are in the Joint Appendix, they talk about changing the crew complement, et cetera, in turn, if there was a strike.

So I think there are ways to deal with that.

QUESTION: You mean like a proposal that will only be operative during a strike?

MR. FEHR: TWA made just such a proposal, Your Honor.

I question how often a carrier would submit to interest arbitration if it knew that in self help immediately following its rejection of arbitration it could obtain far more

from self help than the arbitrator could even conceivably award.

I also question how seriously a carrier would take the recommendations of a Presidential emergency board when the board will not even address the carrier's hidden agenda for self help.

In short, we believe, as the Courts below believe and as I believe was the message of FEC, that the machinery of the Railway Labor Act only has a chance to work if it is given the chance to do so.

With that, I would like to focus for a few moments on the specific language of Section 2 Seventh of the Act and Section 6 of the Act, and of Article 128 of the contract.

Section 2 Seventh says, no carrier shall change conditions embodied in agreements except in the manner prescribed in agreements or in Section 6.

And the emphasis on changes in conditions in agreements as opposed to just changes in agreements is significant. It clearly contemplates that there will be changes other than by agreement. It clearly contemplates that there will be changes other than by wholesale substitution of one agreement for another.

The phrase "in the manner prescribed in agreements" has no relevance here. There is no agreement requiring TWA to eliminate the union security provisions or the grievance

procedure or make any of the other changes that it made.

So that leaves us with the question of what changes may be made in the manner prescribed in Section 6. And Section 6 requires that carriers and unions give notice of their intended changes and agreements.

So when you may make changes in the manner prescribed by Section 6, is that any change or is that just the changes of which you gave notice?

I would submit that the only logical conclusion is that pursuant to Section 2 Seventh, the carrier may make only those unilateral changes of which it gave notice.

We should then perhaps focus a little more closely on the language of Section 6. Section 6 says three times in the space of a single paragraph, it uses the phrase "intended changes or intended change." A carrier and union must give 30 days' notice of intended changes. If the services of the NMB are invoked, no changes may be made until the NMB has finally acted upon the quote "controversy" close quote.

What is the controversy? I think obviously the controversy is the changes intended.

So when a carrier may make those changes of which it has to give 30 days' notice, what changes are those?

The only logical conclusion it seems to me is that they are the changes which were the subject of the controversy, the changes which were acted upon by the NMB, the changes which

were the subject of the Section 6 notice.

Any other conclusion would simply completely eviscerate the meaning of the words "intended change."

And as to the contract itself, it provides that it renews itself indefinitely without change unless you give notice of specified intended changes. And again, as with its construction of Section 6, as with its construction of Section 7, TWA contends that what was intended was that notice of specified intended changes would be a signal that the carrier could do anything it wanted during self help.

There is just nothing in the Act, or in the contract, I believe, that allows, much less requires, such an interpretation, so at odds with the Act's primary objective, which is the prevention of strikes.

This Court has described the RLA as an integrated, harmonious scheme. No less than four sections -- Section 2 Seventh, Section 5, Section 6 and Section 10 -- forbid changes so that the processes of the act will have an opportunity to work.

The position espoused by TWA would make those procedures optional for carriers. It would allow, as the District Court said, the carrier to opt out of the bargaining process and submit only selective changes or perhaps no changes, if the Union had submitted some, knowing that there are no limitations once self help begins.

Moreover, it is absurd to contend that the result below has somehow deprived TWA of its right to engage in self help. TWA has engaged and is engaging in massive self help. It has operated with substantially a work force that includes a large number of replacements. It has implemented each and every one of its bargaining proposals without compromise and it has implemented many other changes as to which it never bargained. And all that is at issue today is whether TWA may unilaterally implement that which it never proposed.

If I could borrow a line from the United States, in a brief filed in the FEC case: "The self help the Act contemplates is self help in adjusting the particular disputes being negotiated." In other words, the carrier must bargain over that which it intends to change.

QUESTION: Was the United States a petitioner in that case?

MR. FEHR: There were two consolidated cases and the United States was the plaintiff and petitioner in one of those two, yes, Your Honor.

QUESTION: Mr. Fehr, on this point, what language are you relying on in Section 156 which says hat where a change has been proposed, in every case where such notice of intended change has been given, blah, blah, blah, rates of pay, rules or working conditions, shall not be altered until the controversy has been finally acted upon?

The implication seems to be, that when that proposed change has been acted upon, you can alter not just the matter of that proposed change but rates of pay, rules or working conditions generally.

MR. FEHR: The operative language appears, I believe, in Section 2 Seventh, which says you shall not change agreements except in the manner contained in agreements or in Section 6, which we believe was enacted to say you can only make those changes you submitted through Section 6 procedures.

I don't think there is much question but that that is what the Court held in FEC. And Justice White pretty well says it in his Opinion in FEC.

QUESTION: That section may just refer to agreements that are continuing beyond, by their terms, beyond the negotiation period.

MR. FEHR: I find it hard to conceive of the notion that Congress enacted Section 2 Seventh only to deal with contracts that happen to be of indefinite duration without saying this section shall apply to contracts that are only of indefinite duration.

A more logical conclusion is that the statute was intended to say, you shall not have contracts with what the District Court characterized as comprehensive termination dates where every change, every part of the contract, completely self destructs if you give notice of one change.

QUESTION: But you are not changing an agreement if the agreement is not in effect. If the agreement is terminated, you are not changing it.

MR. FEHR: But 2 Seventh says you shall not change conditions as embodied in agreements. It does not say you shall not change agreements.

QUESTION: Conditions as embodied in agreements.

MR. FEHR: Well, if they just wanted to say contracts, they could have said you shall not change contracts.

QUESTION: How come you can change the expiration clause?

MR. FEHR: You can vary -- the expiration clause is really in most contracts, including this one, more of a moratorium clause. All it really says is, you shall not give notice --

QUESTION: So you are modifying what the expiration clause says.

MR. FEHR: Well, sure. You can construct a duration clause that says you shall not change certain things before a date certain. That does not relieve you of your obligation to bargain over that which you want to change, at some point.

I did want to point out that obviously TWA's desire to take a strike, that is settle, once it had begun, is clearly colored by its belief it could obtain far more through self help than the Act contemplates, far more than its mere

bargaining proposals.

For all we know, but for TWA's belief that it could annul the entire contract during self help, there would never have been a strike.

And also, if TWA is limited in its scope of self help by the scope of its bargaining proposals, that merely puts it on an equal footing with the union. A union cannot make a unilateral change. It can only strike to secure change through an agreement. And clearly, any proposed changes in agreements must be submitted through Section 6.

As the Court said in Shoreline, only if both sides are equally restrained, can the Act's remedies work effectively. And I think, under the Act, we have a comprehensive scheme where both sides are limited in their exercise of self help by the scope of their bargaining proposals.

I would like to speak briefly about the only case which the Court --

QUESTION: May I interrupt you with one question before you go on?

MR. FEHR: Sure.

QUESTION: Would you tell me what you understand Section 156 to mean when it says there shall be no change until the controversy has been finally acted upon? What in your view do the words "controversy has been finally acted upon" refer

to?

MR. FEHR: I believe the controversy is the changes submitted to the bargaining procedures of the Act. And Section 6 says you may not change any conditions, including noncontractual conditions.

QUESTION: Just go a little slower for me.

Say you don't come to an agreement and you go through the various mediation procedures and they all result in an impasse.

May they then change?

MR. FEHR: They may change the conditions which were subject to the bargaining process.

QUESTION: Right. Right.

QUESTION: But only as proposed.

MR. FEHR: That's right.

QUESTION: But only as to their proposal. I see.

MR. FEHR: I think that is the clear result of the FEC opinion and of the reading of Section --

QUESTION: And they may never change anything else?

MR. FEHR: Anything over which they have no bargained, no, except insofar as necessary to operate in a strike --

QUESTION: Under that case.

MR. FEHR: -- in the FEC Opinion.

QUESTION: And if the strike is over, they can never

change?

MR. FEHR: No. All they have to do is issue a Section 6 notice of changes and submit those changes in the bargaining process and let the NMB submit its statutory function in that regard.

QUESTION: Or, if the agreement itself provides for a change.

Right? I mean, that is clearly allowed. That is clearly allowed. The agreement itself can provide for a change.

MR. FEHR: Sure, if an agreement says in Year One you will be paid $8.00 and in Year Two you will be paid $9.00, that is a change in a manner prescribed in an agreement. Or if there is a new agreement that says you will be paid $10.00. That is a change in a manner prescribed in an agreement.

QUESTION: What if it says in Year Four our agreement as to what you will be paid will cease and you will be paid what we determine you will be paid?

MR. FEHR: If it says that, I suppose you could do it. But it doesn't say that, Your Honor.

QUESTION: It doesn't say that. It just says in Year Four, what we had agreed to pay you will cease.

Don't you think it is implicit that we will pay you what we feel like it after that?

MR. FEHR: No, Your Honor, I don't think that is

implicit in the statutory scheme and I don't think that is implicit in Section 2 Seventh.

I think to give any comfort to TWA, the contract would have to virtually say that we agree that once the self help period begins the carrier may make any changes it will.

QUESTION: You mean that is different than saying this contract will expire completely on a date certain?

MR. FEHR: But the contract does not use the word "expire," Justice White.

QUESTION: Well, I know, but what if a contract does?

MR. FEHR: I still think it is different, yes, under Section 2 Seventh.

QUESTION: So that the parties may not provide for the expiration of a contract and the disappearance of all obligations of the --

MR. FEHR: Yes.

QUESTION: -- of the railroad to observe any working conditions?

MR. FEHR: I agree with the District Court when it said that under the RLA you may not have contracts that completely self destruct upon notice of specified intended changes.

QUESTION: That is, a I said a while ago, that is certainly changing a provision of the contract, without any bargaining.

MR. FEHR: I don't think I am following you, Justice White.

QUESTION: Well, the contract says expire, it is all over, and the union says sorry, but it isn't. I know we agreed to it but it isn't.

MR. FEHR: But this contract provides that it renews itself from year to year without change.

QUESTION: But in my example, my example, all the contract says is it's over.

MR. FEHR: If the contract provides that the carrier may do what it pleases.

QUESTION: No, it just says the contract is over.

MR. FEHR: Then I think under Section 6 and Section 2 Seventh you have to bargain over the specific changes you intend to make.

I might add, I hope that this is not inappropriate, that in your Opinion in FEC, --

QUESTION: I know exactly what I said.

MR. FEHR: But let me highlight a couple of words. You characterized Section 2 Seventh as specific and unequivocal.

Now, if all Section 2 Seventh means is that contracts are enforceable, that is not specific and unequivocal. That is general and unnecessary. It's redundant. Because Section 6 already says that.

QUESTION: So whether this is a contractual decision in this case or based on the law, it is open for de novo review here.

MR. FEHR: Again, I don't follow the question.

QUESTION: Maybe both Courts may have agreed with each other below, but they agreed on a question of law.

MR. FEHR: They resorted to evidence in the record for aid in interpreting the contract. There is no question about that.

QUESTION: But the meaning of the words in that contract certainly is not a question of fact subject to the clearly erroneous rule.

MR. FEHR: The Court relied on evidence as to what the parties themselves who were at the bargaining table believed the clause to mean. That certainly is a matter of fact.

QUESTION: Mr. Fehr, it seems to me that your last concession really suggests that there is not as much policy involved in all of this as you have been saying. You acknowledge that everything that TWA wanted to do here it could do without violating any of the policies of the Railway Labor Act, so long as it had said in the agreement, instead of this agreement shall terminate on X date, and nothing more, so long as it had said, this agreement shall terminate on X date, whereafter, we shall have the right to impose whatever terms

and conditions we want.

MR. FEHR: I suppose if you would get the union to agree to such an agreement, Your Honor, it would have that effect.

QUESTION: Unless you think the union agreed to that when it agreed to the fact that the contract terminates on such and such a date.

MR. FEHR: But when the union agreed to it, the union, perhaps their counsel had read the FEC case and knew that you could only make the changes that you had submitted to the bargaining process.

Look at the rationale of FEC and tell me what that has to do with duration clauses.

QUESTION: Even so, you are just talking about using the wrong words. And there is no great policy of the RLA that will come tumbling down no matter how we come out on that point, because the same policy can be achieved by just putting it that way.

MR. FEHR: The central theme of the RLA, Justice Scalia, is you have to bargain over that which you intend to change. There is elaborate machinery that says you must submit your changes to the processes of the Act and confined and refined so as to avoid self help.

QUESTION: Unless you put the change in the agreement. You have acknowledge that you can say in the

agreement, after X date we will have whatever terms and conditions we want. You have acknowledge that you can do that.

MR. FEHR: It is somewhat of a facetious example, Justice Scalia. But I suppose that is possible. That is not realistically what happened or what is likely to happen.

The theme of the Act seems to be clearly that you have to bargain over that which you intend to change. Otherwise, a carrier can submit a single change to the bargaining process, wait for self help and then change anything it wishes. And there was not a single change proposed here, but there were many, many changes made other than those which were the subject of the Act's statutory procedures.

Right along the lines of the FEC Opinion, it really has made a sham of the Act, to say there can be no bargaining over union security or the grievance procedure or many other things, but that as soon as self help comes, we are going to eliminate them.

The carrier can simply hold back and wait and say during self help I can break the union by implementing all these changes. And that is pretty close to what happened in this case.

I have only a few moments, so I would like to say something about the Reeve Aleutian case. I think that the Court simply missed the boat entirely. It did not analyze the contractual language. It did not discuss what the meaning of

Section 2 Seventh was. It did not discuss the rationale of FEC. It accepted a distinction of FED which its own District Court said was not clear and which has nothing to do with the rationale.

It says that the Act is concerned with changes in agreements, when the Act in Section 2 Seventh and in the FEC Opinion, clearly we are concerned with unilateral changes, where there is no agreement to change. And Reeve gave us the anomalous result that a carrier that proposed no changes in bargaining could make any change it wished during self help.

I would refer to Justice Posner's, in the EEOC case, his discussion of the use of the term "expire" in construing RLA contracts. I think it explains many of the semantics which TWA poses.

As the arguments that you should adopt National Labor Relations Board, there are many reasons why you should not do that. You start with the statements in Burlington Northern and Jacksonville Terminal, to the effect that you simply do not adopt, import wholesale a detailed panoply of law from the NLRA into the RLA.

Second, that simply begs the question. Before you would say that Board law should be applied, you would have to first determine that the contract expired contrary to the Courts below. You would have to first determine that Section 2 Seventh does not mean what we say it means and what the

District Court said it meant, before you even reach that issue.

In addition, the case law under the Board is really not all that different. I would refer the Court to the TRICO Products case.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Fehr. Your time has expired.

Mr. Gartner, you have three minutes remaining.

ORAL ARGUMENT OF MURRAY GARTNER, ESQUIRE

ON BEHALF OF PETITIONER - REBUTTAL

MR. GARTNER: Thank you, Your Honor. I wish I had more time to respond to many issues, but I know I do not.

One issue I would like to deal with immediately. I have heard this and the Court has seen it so many times in the Respondent's brief, that TWA was under an obligation to negotiate about and to deal with the changes it intended to make.

TWA did not intend to make a change in the union security clause in the new agreement. And that is all that the Railway Labor Act requires it to do.

The Railway Labor Act says you shall tell the other party for the purpose of negotiation what changes you want in the new agreement -- not what changes you want during the self help period.

The self help period is uncontrolled by the statute, and this Court has said so many times, but most recently in the

Burlington Northern case that the self-help period is not dealt with by the Railway Labor Act.

Now, to a few other points.

Counsel says that there was a request for a declaration in the complaint below with respect to the expiration of the contract.

The prayers for relief in both with respect to the plaintiff and the defendant appear on Page 94 and 107 of the Petition for Certiorari and they very clearly limit themselves to a request for a declaration that the union security clause and related provisions have expired. That's it. That is the request for relief.

Counsel says that the framing of the issues by the Court below did not even mention the union security clause. If the Court looks at 1(A) to the appendix to the Petition for Certiorari, the very first sentence by Judge Bright in his Opinion is: "The question presented in this case is whether the union security induced checkoff provisions contained in Article 24(A-L) of the 1983 Collective Bargaining Agreement between TWA and the Independent Federation of Flight Attendants are now in effect and should be enforced."

That is the Court's statement of the issue. And counsel says that in framing the issue the Court did not even mention union security.

The FEC case, I think, has been dealt with adequately

in the briefs. I have no problem with Justice White's dissent.

QUESTION: It wouldn't make any difference if you did. It was a dissent.

MR. GARTNER: But it was also pointing out that the majority was dealing with a contract which everybody acknowledge was effect which was in effect at the time.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Gartner. The case is submitted.

(Whereupon, at 1:58 O'clock p.m., the case in the above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

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HEARING DATE: 1-12-88

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I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the

Date: 1-19-88

Margaret Daly

Official Reporter

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