THE RAILWAY LABOR ACT

HOWARD W. RISHER, JR.*

FOREWORD

by

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When the editors of the *Boston College Industrial and Commercial Law Review* asked me to contribute an article on a subject of long interest, the Railway Labor Act, I suggested that it be co-authored by my associate, Howard W. Risher, Jr. Mr. Risher has recently written a study, *The Negro in the Railroad Industry*,[1] and has been awarded a grant by the Manpower Administration, United States Department of Labor, to do his doctoral dissertation on the manpower implications of the railroad labor law. Upon receiving the consent of the editors, Mr. Risher proceeded to write a draft which I found so compellingly sound that I instructed him to send it to the editors on his own. In turn, they requested me to add this foreword.

In 1946, I published my first (and I believe *the* first) critique of the Railway Labor Act,[2] followed during the next two decades, by several detailed analyses of aspects of the Act.[3] This law, however, had been so widely, if uncritically praised, that those who questioned its effectiveness were, in spite of the overwhelming evidence, held in disrepute.[4] Whether this was because an attack on the efficiency of

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1 Industrial Research Unit, Wharton School of Finance and Commerce, University of Pennsylvania, Report No. 16, The Racial Policies of American Iudustry (1970).

2 Northrup, The Railway Labor Act and Railway Labor Disputes in Wartime, 36 Am. Econ. Rev. 324 (1946).

3 Northrup, The Appropriate Bargaining Unit Question Under the Railway Labor Act, 40 Q.J. of Econ. 250 (1946); Northrup, Emergency Disputes Under the Railway Labor Act, 1 Proceedings of the First Ann. Meeting, Indus. Rel. Research Ass'n 78 (1948); Northrup, Unfair Labor Practice Prevention Under the Railway Labor Act, 3 Ind. & Lab. Rel. Rev. 323 (1950); Northrup & Kahn, Railroad Grievance Machinery: A Critical Analysis, 5 Ind. & Lab. Rel. Rev. 365, 540 (1952); H. Northrup & G. Bloom, Government and Labor, Ch. 12 (1963); H. Northrup, Compulsory Arbitration and Government Intervention in Labor Disputes, Ch. 5 (1966).

4 After presenting a paper at the first meeting of the Industrial Relations Research Association, supra note 3, I was virtually screamed off the platform by the late I.L. Sharfman, noted authority on the ICC. Professor Sharfman and others were particularly incensed because the emergency board procedures of the Railway Labor Act were criticized. They could, however, offer no challenge to the facts stated.

the Act was seen to involve also an attack upon the ability of academicians and lawyers, as third party intervenors, to decide labor matters better than industry or union officials is not clear, but I suspect that it colored the arguments.

Now that it is perfectly respectable to realize that the Railway Labor Act is a dismal failure, criticisms of the Act should concentrate on proposals for its restructuring. In doing so, however, critics should be aware of the underlying reasons why the Act failed to live up to its bright promise—indeed, why it *could not* live up to the expectations of its authors. There are several reasons why this is true.

1. *It is impossible for collective bargaining to work as planned where statutory government intervention is on the horizon.* As soon as strike control legislation is enacted the parties learn that preparing for intervention is far different from preparing for collective bargaining. If refusal to settle involves a strike, the parties must consider the strike costs. If instead it involves only intervention, no such restraint exists. I summed up the experience in a previous work.

> The result is not strike control, but settlement avoidance. Fearing that to settle will mean a less attractive "package," that it will be a sign of weakness, or that it will involve criticism from rivals or fellow officers or managers, union and companies soon prepare for the emergency procedure instead of for collective bargaining and settlement. The aim is to force intervention—to create the emergency. The more adamant, obdurate, and intransigent the parties, the higher is likely to be the return from public intervenors who see as their principal job the task of ending the strike—or avoiding the emergency. With headlines screaming and merchants complaining about business effects, the payoff is likely to be greatest to those most willing to fight for more, and most willing to create more and greater emergencies.
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> Emergency dispute laws thus create their own rationale. Behavior becomes tailored to the laws. The more laws enacted, the more "emergencies" are created, and the more "necessary" become the laws.[5]

2. *The Railway Labor Act is special privilege legislation*, the product of the once great political power of the railroad unions. It has been administered as such. This accounts for the dismal administrative records of the National Mediation Board and the National Railroad Adjustment Board in bargaining unit determinations, protection of individual rights, and grievance adjustments.

[5] H. Northrup, Compulsory Arbitration and Government Intervention in Labor Disputes, 183 (1966).

3. *Public finding of grievance arbitration removes the brakes from union responsibility.* Hence, the National Railroad Adjustment Board is flooded with cases. There is no reason why taxpayers should indulge this irresponsibility. The railroads and railroad unions should pay for their arbitrators as do the parties in all other industries.

4. *Basic reform of the disputes procedure of the Act can occur only if the settlement process is divorced from public protection.* Elsewhere, I have proposed in some detail the use of the partial injunction to prohibit such disputes, and penalties on the parties for invoking the procedure (tax profits and sequester dues).[6] It is important for the government *not* to establish a disputes procedure, but instead to confine its activity to prohibiting the emergency. Let the parties settle the dispute themselves, but do not let them cause an emergency and they *will* settle the dispute or be penalized. Too simple? Why not try it?

Although the Nixon proposals do not meet these criteria, they are a distinct improvement over the status quo in that they establish machinery which in turn will be invoked by those who can see a profit in creating emergencies. It is hoped that discussions such as Mr. Risher's will produce sound reform of the Railway Labor Act.

TABLE OF CONTENTS

[6] Id. at 191-204.

I. INTRODUCTION

The significant feature of the Railway Labor Act (RLA) of 1926,[1] according to one commentator writing shortly after the Act's passage, was "the underlying idea . . . that the railroads and their employees can best settle their own troubles and that government ought to intervene only when they fail."[2] Although such a statement may appear ludicrous in light of recent history, this premise was indeed the rationale for congressional acceptance of the legislative proposals prepared jointly by railroad labor and management after lengthy negotiation and significant compromise. Moreover, while the statute was largely a product of the parties rather than of the Congress, it was based solidly on nearly fifty years of experimental legislation concerning labor-management relations on the railroads.[3] In substance, the Act incorporated many practices which had been developed by the parties over a long period of time. Although certain specific amendments were adopted in 1934 at the insistence of labor organizations, and Title II of the Act, extending coverage to the air transport industry,[4] was subsequently added in 1936, "the Railway Labor Act remains, in its essentials, the same as it was enacted in 1926."[5]

Following the enactment of these amendments, and prior to the outbreak of World War II, many students of labor and various public officials extolled the virtues of the law under which railroad labor-management relations were governed. One writer, noting "the long period of unbroken peace on the railroads," stated that the success of the RLA could be ascribed to the sensitivity of both parties to public opinion, "the maturity of the industry and that of the organizations . . . ," and the fact that the employees have "fared well," compared with other industrial workers, "without having to resort to the inconvenience and expense of strikes."[6] More prominent, however, were the remarks of former Secretary of Labor, Frances Perkins, who made glowing references to the administration of the statute, as well as those of President Truman, who referred to the RLA as a "model"

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[1] 45 U.S.C. §§ 151-88 (1964).

[2] E. Witte, The Government in Labor Disputes 244 (1932).

[3] Prior legislation includes the Arbitration Act of 1888, 25 Stat. § 501; the Erdman Act of 1898, 30 Stat. § 424; the Newland Act of 1913, 38 Stat. § 103; the Adamson Act of 1916, 39 Stat. § 721; and the Transportation Act of 1920, 41 Stat. § 456.

[4] Air transport employees were protected initially by the National Labor Relations Act, 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-68 (1964) [hereinafter cited as the Wagner Act]. The Airline Pilots Association (ALPA) became concerned, however, that the Wagner Act might be declared unconstitutional as had several other pieces of New Deal legislation. Thus, although the ALPA preferred the statutory provisions of the Wagner Act, they pressured Congress for coverage under the Railway Labor Act. They achieved this goal in 1936. 49 Stat. § 1189 (1936).

[5] 1 NMB Ann. Rep. 65 (1935).

[6] H. Wolf, Railroads, How Collective Bargaining Works 359, 374-75 (1942).

to be used as a basis for enacting legislation to curb strikes in other industries.[7]

The contrast between this early sentiment and the present mounting criticism of both the Act and labor-management relations in general in the railroad industry is striking. President Nixon recently expressed his concern in a message to the Congress in which he suggested that many of the provisions of the Act should be abolished or significantly altered.[8] These far reaching proposals significantly include a request that a form of compulsory arbitration be included as one of the alternative procedures in the President's "arsenal of weapons" to avoid future work stoppages. The proposed legislation suggested by the President would be applicable initially to the railroad, airline, maritime, longshore and trucking industries. It is in these industries that "[w]ork stoppages are more likely to imperil the national health or safety . . . ."[9]

The immediate reason for the President's action was the threatened nationwide strike by four railroad shopcraft unions.[10] Although the disputes procedures of the RLA were invoked in January, 1969 when the previous contract expired, a final settlement was not achieved until April 8, 1970 when Congress enacted special legislation imposing a previously negotiated settlement on the parties. Similar protracted emergencies have occurred with increasing frequency on the railroads and the airlines in recent years. In fact, on an average of seven times annually, labor disputes in either the railroad or airline industries have necessitated the initiation of the emergency disputes procedures prescribed by the RLA.[11] Indeed, three times during the last decade Congress has had to impose a settlement. This is in contrast to the twenty-nine instances in which the disputes procedures of the Taft-Hartley Act have been invoked since 1947.

In the words of the President, RLA procedures have produced such a dismal record because "the Act actually discourages genuine bargaining."[12] The parties to the disputes have come to expect govern-

[7] Northrup, The Railway Labor Act and Railway Disputes in Wartime, 36 Am. Econ. Rev. 324 (1946).

[8] White House news release, February 27, 1970.

[9] Id.

[10] The unions include the International Association of Machinists and Aerospace Workers, the Sheet Metal Workers' International Association, the International Brotherhood of Electrical Workers, and the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers. See Report to the President by Emergency Board No. 176, November 2, 1969.

[11] When the Emergency Board was created to investigate the dispute between the carriers and the four shopcraft unions, it marked the 176th time that such boards have been created by a Presidential Executive Order issued pursuant to the provisions of the RLA. Moreover, the National Railway Labor Panel, created in 1942 with powers similar to those of the National War Labor Board, provided for an additional 58 emergency boards during its five-year existence.

[12] White House news release, supra note 8.

ment intervention to avoid threatened strikes. The recommendations forthcoming from emergency boards merely set the stage for the investigation. Members of emergency boards have frequently commented on the absence of meaningful bargaining prior to their appointment. The statement of the board created in the shopcraft dispute is illustrative of these remarks:

> Our first comment concerns the apparent absence of anything more than perfunctory bargaining between the parties prior to the creation of this Board. While we do not have detailed information, we gather from the parties that between November 1968, when the notices were filed, and October 1969, when the Nation was threatened by strikes and retaliatory lockouts that might have brought most railroad transportation to a halt, the parties met to discuss the issues on only a few occasions, and the total time they spent in face-to-face bargaining amounted to less than 15 hours. In pointing this out we do not find fault with any of the parties' representatives or discount the efforts of the National Mediation Board to mediate the dispute. It seems to us, however, that the parties have assumed from the start that this dispute would eventually be brought to a Presidential Emergency Board, that bargaining was futile prior to the creation of such a board, and that the procedures of the National Mediation Board were little more than hurdles to be cleared before an Emergency Board could be created. Indeed, we suspect that in some minds, at least, the assumption has gone further and that even the procedures of this Board have been considered merely a barrier to be cleared before the real test comes and it is discovered whether, as an alternative to a nationwide railroad stoppage, Congress will intervene and provide a machinery for final settlement. Any system of labor law and labor relations which induces the parties in an essential industry to operate on such assumptions is failing to serve the public interest, and calls for serious study and review.[18]

It is accordingly the purpose of this article to examine the major provisions of the RLA and to comment generally on the experience of the railroad and airline industries under these provisions. Initially, the focus of the article is directed to the procedures which are intended to aid in the resolution of disputes arising over the negotiation of collective bargaining agreements. The attention of the article then shifts to the frequently criticized provisions for the determination of

[18] Report to the President, supra note 10, at 5.

grievances arising from the application and interpretation of labor agreements. Finally, the provisions which govern bargaining unit determination in the rail and air transport industries are examined critically. As the emergency board in the shopcraft dispute noted, "[t]he basic structure of independent multiunion bargaining which has evolved in the railroad industry and which has shaped the major issues in this dispute" needs to be re-examined.[14]

II. Dispute Resolution under the RLA

The RLA provides procedures to aid in the resolution of disputes arising from proposed changes in a collective bargaining agreement, and for the determination of grievances arising over the interpretation or application of the agreement. Although the Act did not specifically entitle these two categories of disputes, they are commonly referred to as "major" and "minor" disputes respectively. The classic distinction between the two classifications is found in *Elgin, J. & E. Ry. v. Burley.*

> The first [major disputes] relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
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> The second class [minor disputes], however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement . . . .[15]

When a dispute between the parties arises, the initial question revolves around the designation of the issues as a major or minor dispute. The decision on this question has a critical impact on the eventual resolution of the dispute. In both types of disputes, the parties are first required to attempt a voluntary settlement, but if no agreement is reached at this stage then the settlement procedures as to each diverge. If the controversy is denoted as "major," the final recourse

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[14] Id.

[15] 325 U.S. 711, 723 (1945), aff'd on rehearing, 327 U.S. 661 (1946).

for the parties is to strike or use other self-help methods. If, however, the dispute is designated as "minor," resort to self-help is denied and the issues must be resolved finally by arbitration.

A. *Major Disputes—The Negotiation of Collective Bargaining Agreements*

1. *The Duty to Make and Maintain Agreements: Statutory Provisions*

The basic purpose of the RLA is "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein."[16] To this end, the statute provides that it is the duty of all carriers and employees to exert every reasonable effort to make and maintain collective bargaining agreements.[17] This statutory command, along with other provisions of the Act, recognizes collective bargaining as the basis for industry-labor relations, and accordingly, creates an enforceable obligation in the federal courts.[18] Yet, while the Act recognizes the need for and requires collective negotiations, there is no compulsion to reach an agreement.[19] Work stoppages are to be avoided only so long as the parties, with the assistance of the National Mediation Board and, if necessary, an emergency board, are able to resolve freely the issues in question.

Section 2, First of the RLA imposes the general duty on both parties "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions. . . ." To help the unions and the carriers carry out this duty, the Act contains elaborate machinery for negotiation, mediation, voluntary arbitration and conciliation. The Act imposes upon the parties an obligation to make every reasonable effort to reach an agreement[20] and to refrain from self-help until all statutory remedies are exhausted.[21] It is the responsibility of the National Mediation Board to aid in this resolution.[22] The critical aspect of the machinery is the power available to the parties and to public representatives to make the exhaustion of these remedies an almost interminable process. The Supreme Court

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16 45 U.S.C. § 151a (1964).

17 45 U.S.C. § 152 First (1964).

18 Brotherhood of Locomotive Eng'rs. v. Missouri-Kansas-Texas R.R., 320 U.S. 323 (1943). The Supreme Court has stated that the major objective of the Act is the "avoidance of industrial strife by conference between representatives of the employer and employee." See Brotherhood of Ry. Clerks v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650, 658 (1965).

19 Brotherhood of Ry. Clerks v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650, 658 (1965).

20 45 U.S.C. § 152 Second (1964).

21 45 U.S.C. §§ 156, 160 (1964).

22 45 U.S.C. § 155 First (1964).

has argued that the procedures are purposely long and drawn out "on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute."[23]

Central to the Act's design with respect to major disputes is the maintenance of the status quo. The immediate effect of this requirement is to prevent the union from striking and management from doing anything that would justify a strike until the statutory provisions have been exhausted.[24] The obligation to maintain the status quo extends to "those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the impending dispute arose. . . ."[25] Such conditions of employment need not be covered in an existing agreement. Common practice in negotiating new contracts under the RLA provides for the retroactive payment of wage and benefit increases to the expiration date of the expired contract, but, of course, provides no similar compensation for the imposed delay in the institution of work rules or other concessions obtained by the employer during negotiations. Thus, as in the recent prolonged shopcraft dispute with the crucial "incidental" work rule, the imposition of the status quo requirement clearly benefits the union more than it does management.

There are three status quo provisions in the Act, covering a different stage of the major dispute settlement procedures. These provisions taken together with the Section 2, First mandate to "avoid interruption to commerce" form an integrated scheme to preserve the status quo throughout the settlement process. Initially, Section 6 requires the party desiring to effect a change in the collective agreement to "give at least thirty days' written notice of an intended change" in order to impose a duty to bargain. The status quo must be maintained from the time of the notice up to and through any proceedings before the NMB. The Board is required to respond to the request of one of the parties if an impasse is reached, or alternatively, it may enter negotiations on its own motion. The RLA requires the Board to "use its best efforts, by mediation, to bring [the parties] to agreement."[26] Unilateral changes made without filing a Section 6 notice constitute a violation of the Act and may be enjoined.[27] Once

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[23] Brotherhood of Ry. Clerks v. Florida E.C. Ry., 384 U.S. 238, 246 (1966).

[24] Detroit & T.S.L. R.R. v. United Transp. Union, 396 U.S. 142, 150 (1969).

[25] Id. at 153. The term "actual, objective working conditions" was qualified by a durational requirement, but no general principle of delineation was set forth.

[26] 45 U.S.C. § 155 First (1964).

[27] See, e.g., Order of R.R. Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330 (1960); Brotherhood of Locomotive Firemen v. Chicago, N.S. & M.R.R., 147 F.2d 723, 726 (7th Cir. 1945), cert. denied, 325 U.S. 852 (1946); Burke v. Morphy, 109 F.2d 572 (2d Cir. 1940), cert. denied, 310 U.S. 635 (1941).

negotiations commence, however, without the filing of such notice, the status quo requirement is waived.[28]

If the Board concludes that no settlement will be reached through mediation, it is required to make an effort to persuade the parties to agree to voluntary arbitration. Either party may refuse to submit the disputed issues to arbitration without prejudice. If, as in the usual case, arbitration is refused, Section 5, First provides the NMB with two alternatives. If the dispute, in the opinion of the Board, threatens "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service,"[29] the Board may recommend that the President appoint an emergency board. Alternatively, the Board may withdraw officially from the dispute, in which case, the parties must maintain the status quo as to "rates of pay, rules, or working conditions or established practices"[30] for thirty days after the official withdrawal.

Emergency boards are appointed at the discretion of the President.[31] Once an emergency board has been appointed, Section 10 provides that the parties must maintain the status quo during the period the emergency board is investigating the dispute, and for a period of thirty days after the report on the dispute has been submitted to the President. The findings and recommendations developed by the emergency board are not in any way binding on the parties to the dispute. If after the thirty day period has expired a settlement has not been reached, the parties are free to resort to self-help and cannot be enjoined from doing so.[32]

Superficially, the procedures designed to prevent work stoppages appear to have worked admirably. During the ten-year period 1960-1969, an average of only 3.5 strikes involving 4,090 employees and lasting 30 days occurred annually in the railroad industry. Similarly, the air transport industry experienced 2.0 strikes involving 3,630 employees and continuing 26 days.[33] These data indicate that the percent of working time lost due to work stoppages is well below that common in general industry. The NMB offered the opinion in 1966 that while

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[28] See Flight Eng'rs. Int'l Ass'n v. Eastern Airlines, Inc., 208 F. Supp. 182, 191 (S.D.N.Y.), aff'd, 307 F.2d 510 (2d Cir. 1962), cert. denied, 372 U.S. 945 (1963).

[29] 45 U.S.C. § 160 (1964).

[30] 45 U.S.C. § 155 First (1964).

[31] 45 U.S.C. § 160 (1964).

[32] See, e.g., Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 379 (1969); Brotherhood of Locomotive Eng'rs. v. Baltimore & O.R.R. Co., 372 U.S. 284 (1963). An injunction may be available if one of the parties has failed to bargain in good faith. International Ass'n of Machinists v. National Ry. Lab. Conf., 310 F. Supp. 905 (D.C.C. 1970).

[33] Data compiled from Annual Reports of the National Mediation Board, Table 7 (1960-1969).

"there have been periods of crises under the act, . . . in the aggregate, the system has worked well—it has settled large numbers of disputes both at the local and national level with a minimum of disturbance to the public."[34] The Board has repeated its interpretation of the record in each succeeding year.

If, however, the impact of "a minimum of disturbance" on the national economy is even briefly examined, the interpretation offered by the Board becomes untenable. General work stoppages against either industry are intolerable. A study completed by the Department of Commerce pursuant to a request from the congressional committee investigating the 1963 fireman dispute determined that if the strike were allowed to continue for thirty days, 6.5 million men would be laid off. This represented an annual unemployment rate of 15 percent, based upon labor force statistics for that year. Moreover, if the strike were settled at that time, it would take another thirty days for the economy to recover its previous level. The total cost of such a strike was estimated to be in excess of $25 billion. Only 10 to 15 percent of the normal rail traffic could have been diverted to other modes of transportation after a month.[35] Similar damage would result from a national air transport work stoppage.

The emphasis on the maintenance of industrial peace must necessarily place certain limitations on the parties' freedom of contract. It has been made increasingly clear both by the federal government and by spokesmen for the public that work stoppages are no longer an acceptable economic weapon in bargaining under the RLA. The gradual abolition of the weapons available to the parties in the rail and transport industries has shifted disputes from the economic to the political arena. This new arena has imposed an untested set of criteria on the settlement process. Equity has become dependent upon the political process. Three settlements have now required direct congressional intervention. Moreover, numerous other agreements have been achieved only after political pressure has been brought to bear on the parties. The impact of this loss of freedom may be more illusory than expected but this remains to be determined. There is little question, however, that substantial progress toward industrial peace cannot be assured by requiring employers and employees to behave toward one another in a fashion deemed reasonable by the government. Such measures can postpone but not necessarily prevent crises in the railroad or air transport industries.

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[34] 32 N.M.B. Ann. Rep. 9 (1966).

[35] Hearings Before the House Comm. on Interstate and Foreign Commerce, 88th Cong., 1st Sess., 953-59 (1963).

2. *Judicial Regulation of Collective Bargaining*

Although the RLA does not require that agreement be reached by the parties,

> it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short to enter into a negotiation for the settlement of labor disputes such as is contemplated by § 2, First.[36]

"Empty motions and hollow gestures are not enough,"[37] and thus, as under the NLRA, good faith exhaustion of negotiation is necessary.[38] Actions taken in bad faith entitle the aggrieved party to injunctive relief,[39] or alternatively, prevent the acting party from obtaining judicial relief from counter measures taken by the aggrieved party.[40]

Beyond the obvious violations, such as refusal to negotiate, which can be considered a "per se" violation of the duty, the courts under the RLA have not developed extensive standards of bad faith, as have been developed by the NLRB and the courts under the NLRA, although the few cases which have discussed the requirements of good faith have relied heavily on NLRA precedents. The basic test used by the courts in determining good faith, or lack thereof, under the RLA, is "totality of circumstances"—whether, after an examination of the entire conduct surrounding a dispute, it can be said that the conduct violated the requirement of the Act to exert every reasonable effort to come to an agreement.[41] This is, of course, a factual question, one of subjective intent. To show a lack of good faith, it is necessary to establish facts from which it can be inferred that a party entered into and continued bargaining with the affirmative intent not to reach agreement.[42]

The RLA established general guidelines for the parties to follow in their negotiations. There is a duty to bargain about matters "concerning rates of pay, rules and working conditions," and about union security and dues check-off agreements. Additionally, in the air trans-

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[36] Virginian Ry. v. System Federation No. 40, 300 U.S. 515, 548 (1937).

[37] Long Island R.R. v. Brotherhood of R.R. Trainmen, 185 F. Supp. 356, 358 (E.D.N.Y. 1960).

[38] Id.

[39] Virginian Ry. v. System Federation No. 40, 300 U.S. 515 (1937).

[40] Pan American World Airways v. Brotherhood of R.R. Trainmen, 7 Av. Cas. 18,428 (E.D.N.Y. 1962).

[41] Chicago, R.I., & Pac. R.R. v. Switchmen's Union, 292 F.2d 61 (2d Cir. 1961).

[42] American Airlines, Inc. v. Airline Pilots Ass'n, 169 F. Supp. 777, 794 (S.D.N.Y. 1958).

port industry, the Act requires the establishment of system boards of adjustment. Aside from these general guidelines, the Act is silent on the subject of bargaining. There is no agency such as the NLRB to which the parties may turn to decide bargainability; thus, the courts have assumed responsibility for determining whether a subject is bargainable.[43]

The Supreme Court has indicated that determination of the proper subjects of bargaining should be left to the parties.[44] Furthermore, the Court has concluded:

> In an effort to prevent a disruption and stoppage of interstate commerce, the trend of legislation . . . has been to broaden, not narrow, the scope of subjects about which workers and railroads may or must negotiate and bargain collectively. Furthermore, the whole idea of what is bargainable has been greatly affected by the practices and customs . . . [of the parties].[45]

Although this statement involved the railroads, the general judicial mandate is applicable as well to the airlines.[46]

Generally, the subjects of bargaining under the RLA are the same as those under the NLRA. Few cases have been decided, however, in which the courts have found it necessary to comment on the proper subjects of bargaining. The Tenth Circuit Court of Appeals has indicated that the provisions of the NLRA and the RLA were intended to include substantially the same subjects.[47] The Supreme Court supported this position in an earlier case when it noted that certain provisions of the NLRA were derived from the same underlying principle, and are comparable to those of the RLA.[48] Further support for this argument can be found in a more recent decision in which the Court reiterated its belief that the two acts are similar.[49]

There is, however, one major difference in the treatment of bargaining subjects under the two acts. Under the NLRA, the courts have developed the "mandatory/permissive/illegal" classification scheme when describing subjects of bargaining.[50] This ruling provides that the parties may bargain to an impasse over mandatory subjects, but must withdraw permissive subjects before impasse is reached. Insisting to

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[43] See, e.g., Order of R.R. Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330 (1960).

[44] Id.

[45] Id. at 338.

[46] Manning v. American Airlines, Inc., 329 F.2d 32, 35 (2d Cir.), cert. denied, 379 U.S. 817 (1964).

[47] McMullans v. Kansas, O. & G. Ry., 229 F.2d 50, 55 (10th Cir.), cert. denied, 351 U.S. 918 (1956).

[48] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33-34 (1937).

[49] NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 402, n.8 (1952).

[50] See, e.g., NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).

the point of impasse that a permissive subject be included in a final agreement is an unfair labor practice under the NLRA.[51] The RLA, however, does not provide for unfair labor practices but rather allows either party to seek a judgment declaring whether or not a duty to bargain exists. Arguably, any subject is bargainable under the RLA, provided only that it has an effect on rates of pay, rules or working conditions—unless it is unlawful, i.e., contrary to FAA safety regulations or in contravention of a duty imposed by the RLA,[52] or is on a subject outside the employer-employee relationship.[53]

Once an agreement is consummated, under the RLA, there is a moratorium on change during its term.[54] The life of the contract is terminated only after the major disputes procedures have been exhausted.[55] Generally, where the union remains the recognized representative, the employer-employee relationship continues regardless of contract status. Thus, striking employees are entitled to the right of reinstatement subject to the rights of replacement workers, and further, such employees cannot be deprived of access to the previously established grievance machinery.[56] This position is in accord with the policy of the Act to maintain the status quo.

3. *The National Mediation Board*

The RLA purportedly "places prime emphasis on direct conferences between the parties as the first and most important step leading to the accomplishment of the purposes of the act."[57] The mediatory services of the NMB, therefore, should be used only where direct negotiations have exhausted all possibilities of effecting agreement. At this stage the NMB serves "to promote and extend the voluntary and democratic process of adjusting differences over labor standards by conference between and with the parties directly concerned."[58]

Government intervention in the form of mediation or voluntary arbitration has been an important part of the settlement process in the railroad industry since the Erdman Act[59] was enacted in 1898. The NMB is the last of several subsequent attempts by the Congress

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[51] Id.

[52] See, e.g., Felter v. Southern Pac. Co., 359 U.S. 326 (1959); Southern Pac. Co. v. Switchmen's Union, 356 F.2d 332 (9th Cir. 1965).

[53] Pullman Co. v. Ry. Conductors, 49 L.R.R.M. 3162 (N.D. Ill. 1962).

[54] Brotherhood of R.R. Trainmen v. Akron & B.B.R.R., 65 L.R.R.M. 2229, 2235 (C.A. D.C. 1967).

[55] FEIA v. Eastern Air Lines, Inc., 359 F.2d 303, 310 (2d Cir. 1966).

[56] Air Line Pilots Ass'n v. Southern Airways, Inc., 44 CCH Lab. L. Rep. 17,460 (M.D. Tenn. 1962).

[57] National Mediation Board, Administration of the Railway Labor Act by the National Mediation Board, 1934-1957, 12 (1958).

[58] Id.

[59] 30 Stat. 424 (1898).

to develop effective machinery to resolve disputes. There is no doubt that the Board and its staff have enjoyed the respect and confidence of the parties in the railroad industry, and to a lesser degree in the air transport industry as well. The availability of a mediation service which enjoys harmonious relations with the parties is surely an aid to peaceful settlement. Since 1934 the Board has disposed of 4,679 disputes through mediation.[60] Such statistics indicate that the Board has performed a real service in maintaining industrial peace.

On the other hand, statistics of disputes settled do not distinguish qualitatively among cases. A dispute involving a coordinated movement for wage increases by the national non-operating unions receives the same weight as a work rule dispute involving three yardmasters. Actually, few disputes which threatened to disrupt transportation service in significant portions of the country have been settled by mediation. Undoubtedly, several of these less significant disputes might have developed into major work stoppages if competent and influential mediatory services were not available. Nevertheless, the fact that mediation has been used in a seemingly large number of cases does not mean that it is the most successful or satisfactory method of resolving major disputes. The manifest failure of mediation in the important disputes of the past decade is evident.

The NMB has noted on several occasions in its annual reports that it is too frequently requested to mediate without any genuine attempt at settlement by the parties themselves.[61] The comments on this point by the emergency board in the recent shopcraft dispute have been noted.[62] If the dispute portends serious consequences to the parties and, therefore, to the nation, the parties begin preparation initially for an emergency board rather than bargaining. The mediation efforts by the Board are then accepted perfunctorily as another of the delays which must be endured.

Once the Board has decided that it is unable to resolve a dispute by mediation, it must request the parties to arbitrate. Either party may refuse to comply without prejudice. If, however, both agree,

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[60] Disposition of Mediation Cases, 1934-69.

Mediation	4,679
Arbitration	206
Withdrawn After Mediation	979
Withdrawn Before Mediation	714
Refusal to Arbitrate by:	
Carrier	518
Labor Organization	458
Both	236
Dismissal	570

Data compiled from Annual Reports of the National Mediation Board, Table 2 (1935-69).

[61] See, e.g., 26 N.M.B. Ann. Rep. 27 (1960).

[62] See text at note 13.

sections 7, 8 and 9 provide detailed provisions for the establishment of an arbitration board and for the conduct and enforcement of the arbitration. Arbitration boards are to be composed of either three or six members, evenly divided between union, carrier and public representatives. Public members are selected by the partisan members, or if they are unable to agree, the NMB makes the selection. An award issued under this procedure is filed in the nearest federal district court and becomes a court order. As such, it is final and binding on all parties.

Between 1934 and 1969, only 206 disputes were decided by voluntary arbitration, an average of less than six a year. The reluctance of the parties to accept arbitration is understandable. Less significant disputes were frequently settled by the parties or by mediation. Acceptance by the parties of this responsibility is an obvious advantage. Disputes which threaten to cause damaging work stoppages, on the other hand, have tended to go to emergency boards rather than to arbitration boards. Although the carriers refused to submit unresolved issues to arbitration boards frequently during the early period under the RLA, it has been the labor organizations which have rejected this alternative in recent years. Since 1960, the carriers have rejected arbitration in 75 cases while the unions have declined in 205 cases.[63]

4. *Emergency Boards*

When the RLA was passed by the Congress, it was assumed that emergency boards would be appointed only in rare instances of true emergencies. In those cases in which disputes were not settled by collective negotiations or mediation, it was felt that the parties would accept NMB proffered arbitration.[64] This thinking was emphasized by William M. Leiserson, chairman of the NMB for many years, when he declared that emergency boards were merely an extension of arbitration, with public opinion the force to secure compliance.[65] It was generally accepted that the major disputes procedures would virtually eliminate work stoppages.

The record of the period from 1926 to 1941 indicated that the designers of the Act had accomplished their purpose. In fact, it was during this period that the statute acquired its reputation as a "model law."[66] Emergency boards were appointed only sixteen times and strike activity, with the exception of 1937 when the strongest wage movement of the decade occurred, was negligible. The contrast between this

[63] Statistics compiled from those presented in note 60 supra.

[64] See, e.g., the comments of union spokesmen advocating passage of the 1926 statute reproduced in Kaufman, Emergency Boards Under the Railway Labor Act, 9 Lab. L.J. 910-11 (1958).

[65] Leiserson, Public Policy in Labor Relations, 36 Am. Econ. Rev. 335, 345 (1946).

[66] See text at note 7.

record and that of the early years under the NLRA is evident. Such a comparison is deceptive, however, since industry generally was involved in the difficult task of adjusting to the vigorous organizing drives and the new unionism, a cause of conflict which was absent on the railroads.

The tempered atmosphere of labor-management relations was quickly dissipated by the 1941 dispute, in which all of the national railway unions demanded substantial wage increases. An emergency board was appointed to hear the case on a national basis. The recommendations of the board did not meet the unions' desires. They appealed to President Roosevelt who reassembled the board and pressured both the carriers and the board into granting further wage increases.

Roosevelt repeatedly assisted the railroad unions in gaining additional benefits over and above emergency board recommendations. Moreover, partially in response to the necessities of war, boards were appointed with increasing frequency to hear even the most trivial disputes. The change in the attitudes of the parties toward the role of emergency boards as a result of the wartime experience is evident. The original understanding between the parties was forgotten completely after the war, and strikes began to afflict both the railroads and the rapidly developing air transport industry. The NMB described the deterioration of the situation as follows:

> Until the wage movements of 1941, the recommendations of emergency boards were commonly accepted by both sides. After the experiences of that year, the pattern changed, and it has become customary to reject, rather than accept, the recommendations of emergency boards set up to handle national wage and rule movements .... [In practically every instance] since 1941, emergency board recommendations have served only as a base to be used for securing further wage and rule concessions in a final settlement, usually made under Executive auspices.[67]

The pattern for postwar labor-management disputes was established in 1946 when the Brotherhoods of Locomotive Engineers and Railroad Trainmen called a strike against all of the nation's railroads after rejecting the emergency board's recommendations, as well as a proposal by President Truman which modified the recommended settlement upward. The strike ended after only two days, just as the President was asking Congress for a drastic strike law to deal with the crisis. In 1947, the remaining three operating unions—the locomotive firemen, conductors and switchmen—precipitated a crisis by rejecting

[67] 17 N.M.B. Ann. Rep. 33 (1951).

an emergency board's recommendation. This time, however, Truman refused to pressure the carriers for additional concessions. Utilizing his unexpired war powers, he seized the railroads in May, 1946. The three holdout unions finally settled in July for the pattern established in earlier agreements.

Labor unrest continued on the railroads throughout the early part of the 1950's. Major work stoppages occurred over the issue of firemen on diesel locomotives, and over the institution of the forty hour week in the industry. During the latter part of the decade, however, the more important cases were settled without great difficulty, although strikes resulting from the rejection of emergency board recommendations continued to occur on some railroads. Union recognition that they could not count on favorable intervention from the White House during this period may have facilitated some settlements. Moreover, as traffic and employment declined on the railroads, the carriers became more insistent on the elimination of obsolete work rules and other costly employment practices. The union's unwillingness to allow "outsiders" to resolve these issues discouraged them from invoking the emergency board procedure.[68] This reluctance lasted only until President Kennedy was inaugurated in 1961. Both he and President Johnson acted so as to diminish the importance of the emergency board's recommendations, thus encouraging the unions to prolong disputes.

If the result of an impasse in collective bargaining is the appointment of an emergency board or other form of government required status quo rather than an immediate work stoppage, the consequences of non-agreement are materially changed. The work stoppage, or threat of it, is an integral part of the collective bargaining process. A basic assumption underlying that process is that a settlement will be achieved when the costs of non-agreement become too great. If such costs are absent, there is no inducement for either of the parties to change its position. As a consequence of the need to protect the nation from the intolerable impact of a lengthy interruption in rail or air transport, the Congress has effectively eliminated the costs of non-agreement to both parties to disputes under the RLA.

If the appointment of an emergency board rather than a strike is consequent to an impasse, the approach to bargaining is altered significantly. Rather than offer concessions on the issues during bargaining prior to the commencement of emergency board proceedings, all actions and public pronouncements are directed toward the establishment of a strong position to present to the emergency board. As the history of collective bargaining under the Act has shown too often, the major dispute procedures, taken alone, accomplish little. In fact,

[68] Kaufman, supra at 913.

it is to the advantage of the party seeking change to provoke government intervention. Furthermore, the absence of bargaining prior to the appointment of an emergency board not only insures the appointment of a larger number of such boards, and therefore aids in making public opinion an ineffectual enforcement measure, but creates the real emergency after the board has issued its recommendations.

A further criticism has been raised against the conduct of the investigatory proceedings themselves. Section 10 of the Act charges emergency boards with the duty to "investigate promptly the facts as to the dispute and . . . [to] report . . . to the President within 30 days from the date of its creation." The parties, however, have shown a preference for protracted, formal hearings, of a quasi-judicial nature, in which many witnesses are called, and countless exhibits are filed by each side to the dispute. As a result, many boards have been unable to complete the investigations within the statutory period. The length of the presentations precludes the extensive examination of the evidence that is necessary in view of the complex nature of the compensation systems and operating practices. Although there is evidence that the parties have recently initiated changes in their approach to these proceedings to reduce the burden on emergency boards, the now classic comments by members of Boards No. 161, 162, and 163, a single body appointed to investigate the related disputes arising from three separate Section 6 notices, are illustrative of the frustration and felt impotence of the appointees:

> In this case the printed exhibits alone total 75, and when piled on top of one another came to a height of almost 7 feet. Even a hurried reading of these exhibits would require not less than 14 or 15 full days of a Board member's time.
>
> The attorneys for both sides have had long experience in this type of hearing, and are men of much ability, with great knowledge of every phase of the railroad industry, and a persistent determination to explore every facet of labor relations in the industry since the first steam engine made its appearance.
>
> Their principal witnesses are economists, together with railroad executives and union officials. Every witness who appeared in this proceeding had testified before many previous Boards.
>
> This Board had the distinct impression that this was, to a great extent, a repeat performance of an even longer run than "My Fair Lady," with each side knowing exactly what the other side would present and to what each witness would testify.

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

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

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

Much time is spent by the railroads in picturing the industry as a dying industry. Similarly, the unions spend a great deal of time trying to convince the Board that the railroad industry is an even better investment than General Motors. Neither argument is convincing.

These general strictures may be more meaningful if we cite some specific examples of the type of evidence which we think could profitably have been subjected to drastic pruning.

A large area of evidence concerned the comparative level of wage rates as between the railroads and other industries. This subject has been exhaustively thrashed out before prior Boards, and their careful findings on the subject might well have been cited, and brought up to date in short order, with current data. Instead, both sides presented incredibly detailed and voluminous exhibits, rehashing the entire subject *de novo*.

The attempts to reargue the findings of earlier Boards on these matters, however, was by no means the only difficulty. Even the rehashing process could have been accomplished in a fraction of the time actually spent. Hundreds of pages of exhibits were devoted to detailed breakdowns of wage statistics, often on points which were not really in dispute; these figures could have been set forth, with equal or greater effectiveness, in one or two page summaries.

But even that was not all. Witnesses were presented to explain the weighty exhibits to the Board, almost page by page. It is no exaggeration to say that on numerous occasions several hours were spent in belaboring a point which could have been made with perfect clarity in a 5-minute statement. . . . We are convinced that if the parties reform their approach to the Emergency Board procedures, it would inevitably lead to similar improvements in the handling of disputes between the parties at other stages. It need hardly be

added that any improvements in the labor relations of this critical industry would be decidedly in the public interest.[69]

B. *Minor Disputes—The Determination of Grievances Arising from the Interpretation and Application of Agreements*

1. *Statutory Provisions*

Section 2 declares that the last of the several general purposes of the RLA is "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions." To effect this purpose, the 1934 Amendments to the Act provided for the creation of the National Railroad Adjustment Board (NRAB) and empowered it to resolve by arbitration all claims by railroad employees of rights accrued under existing contracts. The NRAB replaced approximately three hundred system boards of adjustment on individual railroads and four regional boards created under the 1926 Act.

The requirement that all grievances be finally resolved is a distinctive feature of the Act.[70] The NRAB, accordingly, is a mechanism for the performance of a judicial function within the general system of industrial self-government established by congressional mandate for the railroad industry.

Section 3, First of the Act provides that the Adjustment Board should consist of thirty-six members, eighteen selected by the carriers, and eighteen selected by "labor organizations, national in scope." In the event of a dispute over the right of any labor organization to participate in the selection of labor representatives, the Secretary of Labor is to investigate and advise the NMB on the merits of the claim. A board comprised of a representative of the labor organizations on the NRAB, the claimant organization, and a neutral appointed by the NMB is then convened to decide the claimant's right to participation. The NRAB is composed of four divisions, operating independently, with jurisdiction over disputes involving designated classes of employees.[71]

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[69] Report to the President by Emergency Boards 161, 162, 163 at 3-5 (1964).

[70] The N.L.R.A. requires employers to bargain on grievance machinery and requires employees to process grievances through negotiated grievance procedures but it does not prescribe a final process, nor does it require the parties to provide such a process. 29 U.S.C. § 158(d) (1964).

[71] The First Division consists of five carrier and five union members with jurisdiction over train and yard service employees, including engineers, firemen, hostlers, hostler helpers, conductors and trainmen. The Second Division, also with ten members, has jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, helpers and apprentices of the foregoing, coach cleaners, powerhouse employees, and railroad shop laborers. The ten member Third Division en-

The Act requires that disputes growing out of grievances or concerning the interpretation or application of agreements "be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes . . . ."[72] Either or both parties can then appeal to the appropriate division of the Adjustment Board. The division can hear the case as a body or can empower two or more of its members to conduct hearings. Decisions are by majority vote of the divisions as a whole. If the division members are unable to secure a majority agreement, the division is to select a neutral referee to sit as a member of the division in making the award.

The Act specifically gives individual employees the legal right not only to file grievances individually as does the NLRA, but also the right to pursue them to finality with or without union endorsement.[73] Although an individual's efforts will presumably be less effective than that of a union, particularly since the grievance will ultimately be resolved by a board composed in part of representatives of affected unions, the individual may press his claim to a conclusion. The union in any case is subject to an obligation to represent each employee's claim fairly.[74]

The RLA was amended in 1966 to make all awards of the NRAB "final and binding"[75] and "conclusive on the parties."[76] Prior to these changes, if a carrier refused to comply with an order within the time limit established in the order, the employees for whose benefit the

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compasses station, tower and telegraph employees, train dispatchers, maintenance-of-way employees, clerical workers, frieght handlers, express, station and store employees, signalmen, sleeping car conductors, porters and maids and dining car employees. The Fourth Division has six members and concerns itself with disputes involving "employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second and third divisions." 45 U.S.C. § 153 First (h) (1964).

[72] The typical grievance procedure has been described in the following manner:

> Individual employees ordinarily first present their claims to their foremen or other immediate superiors. If the claims are granted, the case ends; if they are denied, the employee submits his case to his local union. If the local union rejects it, the case ends; otherwise, the representative of the local union takes up the question with the local superintendent of the carrier. If no settlement is reached, the case goes to the general superintendent, then to the general manager, and finally to the chief operating officer. Cases are customarily presented to carriers' national unions. The great preponderance of all disputes that arise are, of course, settled through negotiation at some one of the various levels of this hierarchy.

Preliminary Research Report of the Attorney General's Committee on Administrative Procedure 6 (February, 1940).

[73] 45 U.S.C. § 153 First (i) (1964); See Elgin, Joliet & E. Ry. v. Burley, 325 U.S. 711, 746 (1944); Pacilio v. P.R.R., 381 F.2d 570 (2d Cir. 1967).

[74] Conley v. Gibson, 355 U.S. 41, 47 (1957). See also Vaca v. Sipes, 386 U.S. 171 (1967). Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601 (1956).

[75] 45 U.S.C. § 153 First (m) (Supp. IV, 1969).

[76] 45 U.S.C. § 153 First (p) (Supp. IV, 1969).

order was made had to file suit for enforcement in a federal district court. However, if the claim of the employee was denied, he had no legal recourse. Court interference is now precluded "except for failure of the division to comply with the requirements of this chapter for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order."[77] The courts may affirm the order or set it aside, in whole or in part, or may remand the proceeding to the division for further action.

Any division of the NRAB can, at its discretion, establish supplemental boards regionally to decide cases with the same authority as the NRAB.[78] Moreover, the parties may also by agreement establish system, group or regional boards to handle their disputes in preference to the NRAB proceedings. If either party becomes dissatisfied with these special boards, it can "elect to come under the jurisdiction of the Adjustment Board" upon ninety days' notice.[79] In addition, the 1966 Amendments provide for the creation of ad hoc "Public Law (PL) Boards" at the request of either party.[80] The provisions for enforcement of awards rendered by the supplemental boards are similar to those now applicable to NRAB awards.

The railroad grievance procedures were the only provisions of the RLA which were not extended to the air transport industry by the 1936 amendments. Instead of creating an analogous national adjustment board for the airlines, Congress made it the duty of each airline or group of airlines to establish its own system or regional board of adjustment.[81] Although the only obligation placed upon airlines and unions is to establish a board with jurisdiction "not exceeding" the "jurisdiction which may be lawfully exercised by [railroad] system, group, or regional boards of adjustment . . . ,"[82] the parties have generally adopted ambiguous language similar to that of section 3 in writing airline system board agreements. The Supreme Court has held, however, that "[t]here may . . . be any number of [contractual] provisions . . . that would satisfy the requirements of § 204 . . . ."[83] Finally, while the Act does not explicitly require awards of airline systems boards to be "final and binding," the Supreme Court has stated that such awards are to have "legal effect," and to "the extent

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[77] Id.

[78] 45 U.S.C. § 153 First (x) (Supp. III, 1968).

[79] 45 U.S.C. § 153 Second (Supp. III, 1968).

[80] Id.

[81] 45 U.S.C. § 184 (1969).

[82] Id.

[83] International Ass'n of Machinists v. Central Airlines, Inc., 372 U.S. 682, 694 (1963).

that the contract imposes a duty consistent with the Act to comply with the awards, that duty is a federal requirement."[84]

Resort to self-help in minor disputes is precluded. The Supreme Court in the case of *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad*[85] held that federal district courts had jurisdiction to grant injunctive relief to a railroad against a threatened strike by employees over a minor dispute which had been submitted to, but had not been decided by, the NRAB. The Court found that the Adjustment Board provided a "reasonable alternative" offered by Congress for the temporary and limited concession of the right to strike. In contrast to the statutory provisions controlling in major disputes, there is apparently no requirement that the carrier maintain the status quo pending exhaustion of the grievance procedures.[86]

The National Railroad Adjustment Board is "the only administrative tribunal, federal or state, which has ever been set up in this country for the purpose of rendering judicially enforceable decisions in controversies arising out of the interpretation of contracts."[87] Despite the broad authority granted to the Adjustment Board and the various supplemental boards in the railroad industry, the machinery established by the RLA has not been successful in the elimination of labor strife over minor disputes. Dissatisfaction with the record of the boards has resulted in a series of work stoppages as a means of enforcing awards of the boards or as an alternative procedure entirely. While the 1966 amendments to the Act eliminated several of the legislative deficiencies responsible for the parties' discontent, the procedures are still the subject of great criticism from various sources.

The adjustment of grievances and other minor disputes would be difficult and undoubtedly less satisfactory than in industry in general under any system. Employees in both the rail and air transport industries are scattered among many locations. Thus, the processing of employee claims necessitates inordinate delays and costly travel. Moreover, each carrier must deal with an unusually large number of unions, each working under an exceedingly complex labor agreement. Initially, as a consequence of the absence of close supervision, and more recently, as a result of labor's desire for increased security, labor contracts have been expanded to include an intricate set of work rules that are frequently susceptible to more than one inter-

[84] Id. at 695.

[85] 853 U.S. 30 (1957).

[86] See, e.g., Switchmen's Union v. Central of Georgia Ry., 341 F.2d 213 (5th Cir. 1965); Hilbert v. Penn. R.R. 290 F.2d 881, 884 (7th Cir.), cert. denied, 368 U.S. 900 (1961); compare Westchester Lodge 2186 v. Railway Express Agency, Inc., 329 F.2d 748 (2d Cir. 1964).

[87] Garrison, The National Railroad Adjustment Board: A Unique Administrative Agency, 46 Yale L.J. 567 (1937).

pretation. Finally, many disputes over the interpretation or application of contract provisions involve substantial costs and benefits to the prevailing party. Each of these factors contributes to a tendency to defer attention and complete preparation until the case is to be heard by one of the several arbitration panels. Limited evidence indicates that the parties in both industries rely on arbitration to dispose of a larger proportion of grievance claims than in most other industries.[88]

2. *Procedure Before the NRAB*

The RLA directs the NRAB to establish its own rules of procedure and, accordingly, a set of general rules were issued in 1934.[89] Within these broad pronouncements and the limits established by the Act, the Adjustment Board has allowed the divisions to formulate their own rules. Although the divisions generally have adopted similar rules, they differ significantly in detail and in effect. In addition, the divisions have altered their rules according to case load and the preferences of the members.

If the grievance dispute has not been settled "on the property," the NRAB rules of procedure provide for referral to the Board either in a "joint statement" of facts or as an "ex parte submission."[90] The parties, however, have rarely been able to agree sufficiently to file a joint submission. Although the number of submissions made by the carriers has increased in recent years, nearly 80 percent of the claims docketed continue to be submitted ex parte by the unions. When an ex parte claim is submitted, a copy is furnished to the other party who then has thirty days, with the possibility of extension, to file an answer. The addition of new or supplementary evidence is generally not allowed at any time in the subsequent proceedings.

Although the Act gives employees the right to file grievances and to pursue them before the Board without union representation,[91] for many years the labor organizations successfully opposed such actions. If the unions wished to prevent an issue from coming before the Board, they needed only to vote not to hear the case. The bilateral structures of the NRAB precluded consideration of cases which the labor unions opposed. This problem was most acute concerning black employees who were ineligible for full membership in most of the organizations

88 Kahn, Airline Grievance Procedures: Some Observations and Questions, 35 J. Air L. & Com. 313, 322 (1969). The Air Transport Association estimates that 4,000 grievances (1 per 44 employees) were filed in the airline industry during 1963. Of these, 250 were ultimately determined by a system board of adjustment. In contrast, over 230,000 grievances (1 per 2 employees) were filed at General Motors under the UAW contract in 1968, with only 16 going to arbitration.

89 N.R.A.B. Organization and Rules of Procedure, Circular No. 1 (October 10, 1934).

90 45 U.S.C. § 153 First (1) (1964).

91 Id.

represented on the Adjustment Board. Similar problems frequently arose when competing unions not represented on the Board tried to submit cases. Gradually, however, with changes in the attitudes of the labor personnel and a few related court decisions, this policy was eliminated.

Once a case had been docketed, it is placed on the calendar of the division in order of the date of submission. Reinstatement cases arising out of disciplinary action or physical disqualification are placed ahead of more routine cases. Dismissal from service and reinstatement are frequent and both parties are anxious for settlement because of the hardship to the employee and the financial burden upon the carrier in those cases in which reinstatement with back-pay is ordered. Awards in such cases are typically rendered in less than a year, a marked departure from the time consumed under regular procedures.

While the Act provides that the parties "may be heard either in person, by counsel, or by other representatives, as they may respectively elect . . . ,"[92] both parties generally discourage their members from requesting an oral hearing. Such hearings are time consuming; since new evidence cannot be submitted the hearing consists of the parties reading the materials contained in the submission. Extemporaneous proceedings are ordinarily not included in the record of a case. Moreover, the divisions may delay the hearing date in those cases requiring oral argument. As a result, in the majority of cases, the oral hearing is initially waived.

Proceedings before the NRAB are informal and depart substantially from traditional trial court procedures. The parties are usually denied the privilege of calling witnesses. In fact, the case may be heard with no representatives present from the carrier or local lodge of the union. That cross-examination which is allowed is conducted almost entirely by Board members. The parties to the case are not sworn and evidence based upon hearsay is accepted. In a few cases, a division will return a submission to the parties for additional facts. The hearing may take from a few hours to several days depending upon the case.

The overwhelming majority of cases are deadlocked by the parties and require the use of a neutral referee.[93] The divisions generally assign

[92] 45 U.S.C. § 153 First (j) (1964).

[93] CASES DISPOSED OF BY THE N.R.A.B., 1935-69

	First Division				Second Division			
	1935-69		1965-69		1935-69		1965-69	
	Total Cases	Percent of Total	Total Cases	Percent of Total	Total Cases	Percent of Total	Total Cases	Percent of Total

a group of cases to one referee at a time. If, as frequently happens, the divisions are unable to agree upon a mutually acceptable referee, the NMB is requested to select and appoint a referee for a specified group of cases. The divisions are obligated to accept the NMB appointed referee.

The opinions rendered by referees are brief as compared with those in other industries. This practice began as a result of the reluctance of both parties to accept the full ramifications of the lengthy statements issued during the early years under the Act, as amended. The absence of an adequate discussion of the issues with reference to relevant precedents and agreements necessitated lengthy and costly examination of cases referred to by the parties. As a result of criticism directed toward this practice,[94] longer and more instructive awards are now written. Since they include a statement of facts and the positions of the parties in the dispute, most of these awards are now adequate for purposes of precedent.

The NRAB has been criticized both for failure to develop a usable body of precedent and for following precedent too closely.[95] Although the referees consistently rely on precedent whenever possible, the

Total Cases	39,445	100.0	3,144	100.0	5,720	100.0	1,214	100.0
Decided Without Referee	10,666	27.0	576	18.3	727	12.7	39	3.2
Decided With Referee	10,849	27.5	471	15.0	4,070	71.2	1,091	89.9
Withdrawn	17,930	45.5	2,087	66.7	923	16.2	84	6.9

	Third Division				Fourth Division			
	1935-69		1965-69		1935-69		1965-69	
	Total Cases	Percent of Total	Total Cases	Percent of Total	Total Cases	Percent of Total	Total Cases	Percent of Total
Total Cases	17,221	100.0	4,589	100.0	2,437	100.0	520	100.0
Decided Without Referee	901	5.2	30	0.6	311	12.7	11	2.1
Decided With Referee	12,886	74.8	3,766	82.5	1,626	66.5	450	77.9
Withdrawn	3,434	20.0	733	16.9	506	20.8	104	20.0

Data compiled from 35 NMB Ann. Rep., Table 9 (1969).

[94] Inquiry of Attorney General's Committee on Administrative Procedure Relating to the National Railroad Adjustment Board 18-19 (1941).

[95] Northrup and Kahn, Railroad Grievance Machinery: A Critical Analysis, 5 Ind. & Lab. Rel. Rev. 365, 378-79 (1952).

decisions rendered in over 42,000 cases are frequently found to be in conflict with one another. The incomplete records and awards of earlier decisions add to the difficulty of the problem. Referees without extensive knowledge of the industry cannot ascertain in the brief time available whether cases before them are similar to those relied upon by the parties. Indeed, the lack of confidence engendered by inexperience and incomplete information has been cited as a secondary reason for the filing of brief awards, which, of course, further compounds the problem for future referees.[96] Despite these obstacles, the parties have always used precedent and the body of accepted precedent has grown.

Even if a precedent is understood, there remains the question of what precedent is applicable. Reliance on precedent assumes both a high quality of past decisions and a similarity of conditions and rules. Some of the early decisions immediately following the establishment of the NRAB were blatantly pro-labor and, as precedents, have subjected management to the burden of inflexible and costly operating practices. Furthermore, the Adjustment Board has consistently upheld the applicability of precedent on a national basis regardless of special local conditions or variations. To ignore precedent completely introduces uncertainty into the employment relationship, but the strict adherence to the past decisions threatens the very life of the railroad industry.

3. *Case Load*

The primary problem confronting the NRAB generally continues to be the heavy case load. This problem is particularly severe in the First Division which has docketed over 60 percent of the 69,000 cases filed since 1934.[97] The First Division would be expected to have the most difficult job because agreements and rules for operating employees are much more complicated than those for nonoperating groups.[98]

The percentage of total NRAB cases docketed by the First Division has been declining steadily. From 1934 to 1946 First Division cases were 81 percent of the total while for the period 1965-69 only 28 percent of the cases were similarly filed.[99] This declining percentage

[96] Mangum, Grievance Procedures for Railroad Operating Employees, 15 Ind. & Lab. Rel. Rev. 474, 488 (1962).

[97] Data compiled from NMB Ann. Reps. (1934-69).

[98] See note 71 for breakdown of divisions.

[99] AVERAGE ANNUAL CASE LOAD OF THE NRAB, 1965-69

	First Division	Second Division	Third Division	Fourth Division
Cases Docketed	404	226	696	111
Cases Decided	209	226	763	83

does not, however, indicate a significant decrease in the number or percentage of grievance cases involving operating employees. During the latter period an average of over 2,000 cases were disposed of each year by railroad special adjustment boards, and an additional average of 1,540 cases were disposed of annually by public law boards following the 1966 amendments.[100] Nearly all of these cases would otherwise have been docketed with the First Division. While the number of cases filed with the First Division has declined, the number of cases involving operating employees has risen.

The largest number of cases are now docketed with the Third Division which averaged 710 cases each year since 1960. The First Division during this period has had an average of 588 cases submitted, down from approximately 900 cases per year in the early 1960's,[101] and the Second and Fourth Divisions have had 235 and 103 cases filed respectively. In each division the number of cases docketed has declined as the number of employees in the industry has been reduced and as precedent clarifies disputed issues.

That the number of cases submitted to the final step in the grievance procedure would be large should have been foreseen by the draftsmen of the Act. The costs of the NRAB other than the salaries of the party representatives are paid by the federal government. The salaries of the representatives are a fixed cost unaffected by the case load. Thus the marginal costs of the NRAB procedure is zero. In 1969, the Board cost taxpayers $831,000,[102] or $480 for each case disposed of by one of the divisions. Similarly, the costs of supplemental boards are borne in part by the government. Further, since these special boards meet on or near the properties rather than in Chicago, the NRAB has little control over the speed with which cases are decided, which apparently has increased the costs per case.

That the caseload remains large, however, is due in part to the democratic nature of the railroad brotherhoods. Local union officers process weak cases frequently, either because it is politically expedient, or with the hope that the claim may somehow be sustained. This is particularly true in schedule rule claims of additional pay, which account for the majority of the cases filed by operating employees. General chairmen can be expected to pass cases along for similar

Cases Withdrawn	419	17	155	21
Cases on Hand at End of Year	3,571	299	1,462	66

Statistics calculated from 35 NMB Ann. Rep., Table 9 (1969).

100 All statistics in this section were calculated from Annual Reports of the National Mediation Board (1960-69).

101 Mangum, supra note 92, at 498.

102 35 NMB Ann. Rep. 35 (1969).

reasons. The political acceptability of third-party decision making, as well as the prolonged time until a decision is rendered, diminishes the significance of the process to the union officers and to the members. Consequently, the brotherhoods can seldomly justify a refusal to press a member's claim. Attempts to speed case handling have been negated by an increased volume of submissions. Had the full responsibility of creating and administering a grievance process been imposed upon the parties, the number of cases submitted would no doubt have been fewer.

The case load before the First Division has prevented that Division from ever being current in its work. The congressional hearings preceding the enactment of the 1966 amendments found that "a backlog of approximately 7½ years" delayed all but reinstatement cases.[103] To this delay must be added one or two years of processing on the properties. This delay was extended by the failure of the Division to issue any awards from January 1969 to date. Although the Division issues nearly 250 awards each year, over 400 additional cases are docketed. Until the current deadlock developed, the "Division [was] in session five days a week, eleven months a year, and issued an average of over two awards per day."[104] The case backlog has been reduced gradually as an increasing number of cases have been withdrawn for submission to the rapidly increasing number of supplemental boards. Although there has been significantly less delay in the other three divisions, the problem remains more serious than in industry in general.

4. *Supplemental Boards of Adjustment*

The RLA authorizes the creation of special boards of adjustment by agreement between the parties and, since 1966, Public Law (PL) boards by request of either party. Since 1950, 728 special boards and 405 PL boards have been established.[105] The labor parties to these boards generally have been one or more of the operating brotherhoods. Thus far, over 55,000 cases have been decided by these boards. If these same cases remained for decision by the NRAB, that procedure would most assuredly have collapsed.

The railroad labor organizations historically opposed adjustment boards which were less than national in scope, preferring the establishment of national rules and precedents. It is evident, however, that the unions have now grown dissatisfied with the operation of the NRAB

[103] H.R. Rep. No. 1114, 89th Cong., 1st Sess. 5 (1965); S. Rep. No. 1201, 89th Cong., 1st Sess., 2 (1965).

[104] Magnum, supra note 96, at 498.

[105] Data compiled from NMB Ann. Reps. (1950-69).

and consequently more readily agree to the appointment of special boards. The advantages of mutually acceptable procedures are several. Grievance processing takes place on the properties, near to the facts of the dispute, and accessible to those persons involved in the dispute. Moreover, the parties are not required to adhere to the more formal procedures of the NRAB, but rather are free to develop machinery which will better serve the parties.

The boards usually consist of three members, representatives of the labor organization and the carrier, and a referee appointed and paid by the National Mediation Board. Although the first boards were established to decide specifically agreed upon dockets of disputes, most boards quickly became permanent when new cases were submitted as rapidly as decisions were rendered. Although several of the original boards have now been discontinued, both the unions and the NMB have expressed concern over the increased financial burden of these boards. If more of the burden of operating the adjustment machinery were shifted to the parties, it might induce the parties to employ the process more prudently.

5. *Airline System Boards of Adjustment*

Although the Act does not require any specific grievance procedure in the air transport industry, the procedures devised by the parties through negotiation bear an unmistakable resemblance to the railroad pattern. Early contract provisions in the industry were written with little or no experience in grievance processing. The well-established railroad machinery made a convenient model for the earliest pilot contracts and, in general, similar provisions were adopted as each of the other classes of employees were organized. Even today, most airline labor agreements contain language which is identical to many of the provisions contained in railroad and early airline agreements. Requirements for an "investigation and hearing," and that such proceedings be "fair and impartial," are directly traceable to railroad agreements. Similarly, the RLA requires the parties to refer unsettled grievances to an arbitration panel. Significantly, the air transport grievance machinery is the product of collective bargaining rather than of legislative mandate. While this has allowed the parties to develop procedures which generally have been more satisfactory than those leading to the NRAB, as in the railroad industry, the earlier grievance steps are neglected frequently as claims which cannot be resolved on the property and are thus passed along to the system boards.

The statutory link between airlines and railroads has a greater legal effect on airline system boards than on grievance procedures. Although privately negotiated, the boards are established under statu-

tory command as a "public agency, not a private go-between,"[106] for the peaceful and orderly resolution of unresolved grievances. Accordingly, judicial guidance is taken from decisions affecting the NRAB rather than industry in general. Airline system boards have exclusive, primary jurisdiction to determine disputes over the interpretation or application of labor agreements.

On the typical system board, each case is first heard by a four-man panel consisting of two representatives each from labor and management. To expedite the settlement process, it is becoming increasingly common to take the case directly to a five-man panel, including a referee, to avoid the delay of a possible deadlock. These hearings are relatively formal proceedings with court reporters, the swearing of witnesses, attorneys representing each party and the customary rules of evidence and procedure applicable to such occasions. In contrast to the railroad industry, a hearing at this level is considered a trial *de novo*, and it is not unusual to have evidence presented that had not been previously considered by both parties.

Cases are generally put on system board calendars and heard in chronological order, without regard to the critical importance of the case. Moreover, there is usually one board for the entire system covering a craft or class. Since systems typically involve a number of locations far removed from the home office at which the board functions, it is difficult to arrange meetings which are mutually convenient for all concerned parties. The Air Transport Association has found that the time required for the processing of a grievance before adjustment varied from four to twelve months.[107] Although this experience is significantly better than that of the NRAB, substantial improvement is needed. Nevertheless, a spokesman for the industry has indicated that "the existing system boards of adjustment procedures, or variations thereof, have proved and are proving to be satisfactory in achieving . . . prompt and orderly disposition of [grievances]."[108] This is decidedly different sentiment than that which might be expected from the parties to the NRAB.

C. *The Problem of Dispute Classification*

The consequences of classifying a dispute as either "major" or "minor" can be of crucial importance to the parties. If the dispute is considered "major," both parties are required to maintain the status quo until the provisions of the Act are exhausted. If, however, the

[106] International Ass'n of Machinists v. Central Airlines, Inc., 372 U.S. 682, 695 (1963).

[107] Hearings on H.R. 701, 704, 706 Before the Subcomm. on Trans. and Aeronautics, 89th Cong., 1st Sess., at 101 (1965).

[108] Id. at 101-02.

dispute is designated as "minor," carriers may impose unilateral changes while affected unions are precluded from attempting rejoining actions. Although most decisions are based largely upon the classic distinctions set forth in *Burley*,[109] the courts have recognized that a case may contain elements of both disputes.

Where both parties have treated the dispute similarly, it seems the courts have not questioned their construction, evidently because the issue was not raised. If, however, the carrier makes a unilateral change, and the union protests the action as a violation of an existing agreement as well as a change in working conditions, the courts will generally find a minor dispute. Conversely, if the union protests the action and files a section 6 notice not mentioning the existing agreement, then, assuming the carrier is relying on the agreement as justification, the designation will be dependent in some degree on the carrier's ability, or lack thereof, to point to contract provisions which seem to support its action. Seemingly, if the union protests actions taken by the carrier as a violation of the contract, regardless of subsequent arguments, the union has implicitly recognized that the existing agreement arguably covers the unilateral action and the dispute should, therefore, be designated as minor.

The controversy arises when the carrier has instituted a unilateral change, and the union insists that the change constitutes a change in rates of pay, rules or working conditions, and that, therefore, the carrier must bargain. The union either threatens to strike, or does strike, or goes to court seeking to compel the carrier to bargain, or to enjoin the carrier from making the change in violation of the procedures for major disputes. If the carrier brings suit, usually where the union has threatened to or actually does strike, the carrier seeks to enjoin the strike or to compel the union to submit the dispute to a system board, or to obtain a declaratory judgment on the duty to bargain. Usually the court is faced with several of the above requests for relief from both parties. It is in this posture that the courts have been faced with the necessity of determining whether a dispute is major or minor.

Generally, if the action is arguably covered by the agreement, then it must go to the system board for determination of whether the dispute is major or minor, even if there is an effect on rates of pay, rules, or working conditions.[110] If the agreement affords some basis for the action, "the question of who is right—carrier or union—is for determination by the Railroad Adjustment Board, a court having jurisdiction only to mold equitable relief to preserve the status quo

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[109] See text at note 15.

[110] See, e.g., FEIA v. American Airlines, Inc., 303 F.2d 5, 11 (5th Cir. 1962).

pending . . . decision."[111] Moreover, it generally takes a substantial and clearly apparent change in the terms of the agreement to constitute a major dispute. If this requirement were not adopted, the exclusive jurisdiction of the system boards of adjustment (or NRAB) could easily be defeated in every case of disputed interpretation, simply by labeling the disputed action of the employer or the union as a "change."

Similarly, if the collective agreement is silent on a point and no section 6 notice has been filed, the courts have held the dispute to be minor on the basis of the *Burley* distinction, that is, it is "an omitted case" or one which arises "incidentally in the course of employment," and is *"a situation in which no effort is made to bring about a formal change in terms."*[112]

If, however, the actions taken were of such an extreme nature as to effect an obvious change in the pay, rules, and working conditions, or were attempts to secure new rights, the courts have held the dispute to be major.[113] Following this reasoning, the courts have emphasized the effect of the action taken and whether the contract clauses relied upon were intended for the purpose to which they were used. If, after examination, the court could say the clauses were intended to cover the dispute, then the dispute was minor.[114]

Certain disputes, nevertheless, defy classification as either major or minor. The RLA does not by name or description refer to disputes between employees and a carrier other than their employer. Disputes involving "stranger picketing," sympathy strikes, secondary boycotts and refusals to cross picket lines are included within this statutory gap. Some courts have argued tenuously that such secondary activity is either a major or minor dispute in order to initiate the procedural machinery to resolve the dispute.[115] Similarly, one court has held that any secondary controversy has grown out of an underlying primary dispute, and therefore, the nature of the secondary dispute is deter-

[111] United Indus. Workers v. Brotherhood of Trustees of Galveston Wharves, 351 F.2d 183, 188 (5th Cir. 1963).

[112] See Illinois Cent. R.R. v. Brotherhood of Locomotive Firemen, 332 F.2d 850, 853 (7th Cir.), cert. denied, 379 U.S. 932 (1964).

[113] See, e.g., Order of Ry. Conductors v. Spokane, P. & S. Ry., 366 F.2d 99 (9th Cir. 1966); United Indus. Workers v. Board of Trustees of Galveston Wharves, 351 F.2d 183 (5th Cir. 1965); Florida E.C. Ry. v. Brotherhood of R.R. Trainmen, 336 F.2d 172 (5th Cir.), cert. denied, 379 U.S. 990 (1964).

[114] Reliance on the effect of an action as a criteria for designating a dispute as major has been criticized as specious. In Railroad Telegraphers v. Chicago & N.W.R.R., 362 U.S. 330 (1960), an attempt to eliminate selected small stations was characterized as "a major change, affecting jobs," and thus, enjoinable. The Seventh Circuit in a subsequent case caustically noted: "It would seem this use of the word 'major' is confusing as surely a major dispute does not depend on the number of people involved." Hilbert v. Pennsylvania R.R., 290 F.2d 881, 885 (7th Cir.), cert. denied, 368 U.S. 900 (1961).

[115] See International Ass'n of Machinists v. Northwestern Airlines, Inc., 304 F.2d 206 (8th Cir. 1962).

mined by the primary dispute.[116] Barring such classification, it has been held that certain provisions of the Interstate Commerce Act, requiring a carrier to provide service to the public, provide a sufficient jurisdictional basis upon which an injunction might issue.[117] It has been urged, however, that such judicial groping is unnecessary since Section 5, First provides in part that the services of the NMB may be requested in major disputes over changes in rates of pay, rules or working conditions, and in "[a]ny other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused." The concern expressed for such disputes in the NLRA and its subsequent amendments evidences the need to eliminate these apparent deficiencies in the RLA.

III. Bargaining Unit Determination

After the federal government took over the railroads in 1917, the United States Railroad Administration recognized the right of the employees to be represented by the union chosen by the majority of the craft of workers. When the railroads were returned to private ownership in 1920, the Railroad Labor Board, created by the Transportation Act of 1920,[118] attempted to pursue a similar policy. Unlike the Railroad Administration, however, the Board had no authority to enforce its policy. As a result, its decisions were very often ignored or violated by both labor and management until its usefulness was ended.

The antipathy of both parties toward the Board resulted in their collaboration on the bill which became the Railway Labor Act of 1926. While the Act in Section 2, Third provided for the designation of representatives by either party, "without interference, influence or coercion," it contained no formal machinery to effectuate this congressional mandate. If a dispute arose as to which union, if any, was the representative of a group of employees, the five-man Board of Mediation could intervene and attempt to achieve a settlement by a consent election, or a similar procedure. If either party declined to cooperate, however, the Board had no authority to make a determination, and the dispute remained unsettled. Moreover, the Act contained no provision specifying that the representative of a majority of the employees was the exclusive representative of all employees in the bargaining unit, as the National Labor Relations Act (NLRA) would do later. Finally, the RLA failed to specify penalties for carriers which

[116] Northwestern Airlines, Inc. v. Transport Workers Union, 190 F. Supp. 495, 498 (W.D. Wash. 1961).

[117] Brotherhood of R.R. Trainmen v. New York Cent. R.R., 246 F.2d 114, 122 (6th Cir.), cert. denied, 355 U.S. 877 (1957).

[118] 41 Stat. § 456 (1920).

violated proscriptions against interference with the choice of representatives by employees. In the last instance, the Supreme Court did rule that Section 2, Third conferred a right which was enforceable by resort to the injunctive process.[119]

A. *Statutory Provisions for Unit Determination—Definition of "Craft or Class"*

The 1934 Amendments to the RLA, which were adopted at the request of the unions, were in large part intended to give better effect to the policies developed under earlier legislation. The five-man Board of Mediation was replaced by a three-man National Mediation Board. While the new Board's role in labor-management disputes was similar to that of its predecessor, its duties in representation disputes were formalized and enlarged. In addition to civil actions to restrain violations of freedom of organization, criminal penalties providing for fine or imprisonment were included.

Under Section 2, Fourth of the amended Act, the representative chosen by the "majority of any craft or class of employees" was designated as the representative of all of the workers in the "craft or class." Further, employer interference with or support of the labor organizations of its employees was strictly prohibited.

If a representation dispute arose, the National Mediation Board was given the duty, under Section 2, Ninth, "to investigate such dispute and to certify to both parties . . . the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier." In the investigation, the NMB was authorized "to take a secret ballot or to utilize any other appropriate method" to determine the designated representative. The Board was given full power to establish the rules to govern the representation election and to designate those employees eligible to participate therein. The policies and procedures of the NMB in representation disputes are not subject to judicial review.

Congress thus required that the bargaining unit be a "craft or class" and hence limited the discretion of the NMB in this respect. Nowhere in the Act, however, are these terms defined, nor are criteria for determining such groupings prescribed. This is in contrast to the rather precise definitions provided for terms such as "carrier," "employee," and "representative." This also differs from the prescribed authority of the National Labor Relations Board in designating bargaining units under the NLRA, as amended.

When the NMB was first confronted with the crucial question

[119] Texas & N.O.R.R. v. Brotherhood of Ry. Clerks, 281 U.S. 548 (1930).

of delineating bargaining units, it attempted "to avoid any general ruling, but to decide each case on the basis of the facts developed by the investigation of that case."[120] After some decisions had been made, however, in which small groups of employees were ruled to be a craft or class, "insistent demands were made that the Board follow the same rulings in subsequent cases . . . ."[121]

Accordingly, the Board decided early in its history to establish generally adopted policies for designating the craft or class of each occupational grouping in the railroad industry. After one year's experience in administering the new laws, the Board declared that:

> [T]he tendency to divide and further subdivide established and recognized crafts and classes of employees has already gone too far, and threatens to defeat the main purposes of the Railway Labor Act, namely, the making and maintaining of agreements covering rates of pay, rules, and working conditions, and the avoidance of labor disputes.[122]

Rather than initiate policies which might improve the situation, the Board would henceforth be "inclined . . . to avoid unnecessary multiplication of subcrafts and subclasses, and to maintain, so far as possible, the *customary grouping of employees* into crafts and classes *as it has been established by accepted practice* over a period of years in the making of wage and rule agreements."[123] (Emphasis added.)

With few exceptions, employees in the several crafts in the railroad industry have been similarly grouped for representation purposes since this policy was adopted. Moreover, the NMB soon refused to define a craft or class smaller in scope than an entire carrier.[124] Such policies stand in virtual disregard of local variations of practices which are dominant nationally. They also provide the large national railroad labor organizations with a distinct advantage in the selection of representatives. Small local unions or those desiring only a narrow jurisdiction are compelled to compete for the wider bargaining unit "established by accepted practice." As Herbert Northrup, an early critic of the Railway Labor Act, commented, *"In effect, the Mediation Board defines the bargaining unit to suit the jurisdictional claims of the standard railway unions."*[125]

When the Congress voted in 1936 to include the air transport in-

120 National Mediation Board, Administration of the Railway Labor Act by the National Mediation Board, 1934-1957, 21 (1958).

121 Id.

122 1 NMB Ann. Rep. 21 (1935).

123 Id.

124 See, e.g., New York Cent. R.R. Case No. R-690, May 27, 1961.

125 Northrup, The Appropriate Bargaining Unit Question Under the Railway Labor Act, 60 Q. J. Econ. 254 (1946).

dustry within the purview of the RLA, the only significant labor organization in this new field was the Air Line Pilots Association. Since unionization was virtually nonexistent, it was quite natural for the NMB to apply the policies and procedures developed as a result of experience with the railroad industry. The Board had to create for the airlines, through administrative processes, what tradition and legislative experimentation had established for the railroads. Craft or class determinations were decided well before the industry and its occupations had grown out of infancy. Fortunately, the organizational desires of the airborne personnel coincided closely with the NMB's experience with rail unions. Each was accorded a separate craft designation. Similar undisputed designations were made for several of the supportive ground service occupations. On the other hand, the heterogeneous group of employees subsumed under the classification "clerical, office, stores, fleet and passenger service" were inexplicably designated as a single bargaining unit.[126] Although exceptions have been granted to the policy set forth in the latter case, the Board has yet to develop a rational structure of craft or class determinations which are consistent with the unique characteristics and operating needs of the air transport industry.

The failure of Congress to provide even a limited framework for the development of a viable collective bargaining structure would have been less important if the duties of the NMB had been restricted either to the resolution of labor-management disputes or to the designation of bargaining units. The Board has been unable to perform the adjudicatory function in unit determination and, at the same time, the conciliatory function in mediation. The primary function of the NMB under the statute is the resolution of labor-management disputes. This is clear both from the law and from repeated pronouncements of the Board.[127] The Board not only regards the determination of representation disputes as a secondary function, but it has repeatedly called attention to the disturbing effect of the latter duty on mediation work. Nor should this be surprising. The Board perforce must maintain a harmonious relationship with the parties with whom it deals. It is understandable why the Board "does not consider that the purposes of the Railway Labor Act are best served by permitting these

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[126] See, NMB Case Nos. R-1706, R-1718, R-1720, R-1721, R-1729, R-1735, and R-1744, January 31, 1947. The stated reason for the decision was the similarity between these occupations and those with comparable titles in the railroad industry. An agreement in that industry, effective January 1, 1920, between the Brotherhood of Railway Clerks and the Director General of Railroads had originally grouped these employees for representation purposes.

[127] See, e.g., Administration of the Railway Labor Act, supra note 57, at 11-12.

[representation disputes] to acquire sufficient magnitude to make it necessary to refer them to the Board for adjudication."[128]

B. *Specific Problems of Employee Placement*

The problem of designating those employees who are eligible to participate in the selection of a bargaining representative is possibly the most crucial issue in industrial relations. The inclusion or exclusion of selected groups of employees may well be the controlling factor in deciding which union, if any, is to be the certified representative. Section 2, Ninth places the responsibility for deciding these questions with the National Mediation Board. The Board's decisions in several instances have an importance which transcends the immediate bargaining relationship.

1. *Jurisdictional Disputes*

While the Board has not been completely consistent in all its actions since its inception, it has been reasonably consistent in taking a restrictive view of its powers under Section 2, Ninth. For example, in 1968, the Board was quoted as saying that its authority under this provision does not extend to a "jurisdictional dispute as such."[129] Such disputes, however, have been recurrent throughout the history of the labor movement.

The denial of this authority seems to be the desire of the Board rather than that of Congress. In general, when the Board has been confronted with serious differences between labor organizations competing for the right to represent various crafts or classes of employees, it has intervened reluctantly. As the Board has caustically noted:

> Differences of this kind have frequently made it necessary for the Board to make special investigations, hold formal hearings, prepare findings of fact, and make definite rulings, all of which has proved time consuming and diverted the efforts of the Board from the mediation of labor disputes. . . .
>
> The time consumed by the Board in disposing of these disputes, coupled with the ill-will engendered by them, as well as their bad effect on the morale of the service, has prompted the Board upon several occasions to urge that the parties involved in such disputes exert every effort to adjust them at home and among themselves instead of bringing them to the Board.[130]

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128 Id. at 26.
129 Brotherhood of Locomotive Eng'rs. v. NMB, 284 F. Supp. 344 (D.C.C. 1968).
130 Administration of the Railway Labor Act, supra note 57 at 25-26.

This sentiment disregards an opinion expressed by the Supreme Court in an early representation case. The Court remarked that "[i]t is clear from the legislative history of § 2, Ninth that it was designed . . . to resolve a wide range of jurisdictional disputes between unions or between groups of employees."[131] Immediately after finding that the Board possessed broad powers, the Court shut off future judicial review, thus limiting the possibility that the courts might clarify the precise extent of such power. The Court did reserve the question as to "[w]hether judicial power may ever be exerted to require the Mediation Board to exercise the 'duty' imposed upon it under § 2, Ninth and, if so, the type or types of situations in which it may be invoked. . . ."[132]

Thus, it is clear that the NMB may decide "the point where the authority of one craft ends and the other begins or of the zones where they have joint authority,"[133] or, more specifically, decide on the precise line of demarcation between the bargaining jurisdiction of two unions with respect to rates of pay, rules and working conditions.[134] If this type of jurisdictional dispute underlies a broader dispute in the absence of a judicial remedy, there is no orderly method for settling any of the questions presented unless the Board is willing to decide the jurisdictional issues. Either the NMB or the courts perforce must assume this responsibility.

2. *Management Unionism*

The unionization of foremen and other supervisory personnel has had a long and interesting history on the railroads. The drafters of the Act recognized the established status of minor officials by defining the term "employee" as "every person in the service of a carrier . . . who performs any work defined as that of an employee or *subordinate official* in the orders of the Interstate Commerce Commission. . . ."[135] (Emphasis added.) Such employees were granted full representation rights.

In defining crafts or classes in which foremen were involved, the NMB has pursued its usual practice of relying on "customary practice." Thus, yardmasters and train dispatchers, both of whom formed craft unions during the period of government control during World War I, have generally been placed in separate units which exclude

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131 Switchmen's Union v. NMB, 320 U.S. 297, 336 (1943).

132 Id. at 336, n.12.

133 General Comm. of Adjustment v. Missouri-Kansas-Texas R.R., 320 U.S. 323, 334-35 (1943).

134 See, e.g., Flight Eng'rs Int'l Ass'n v. Eastern Airlines, 311 F.2d 745 (2d Cir. 1962), cert. denied, 373 U.S. 924 (1963); Flight Eng'r Union v. NMB, 338 F.2d 280 (D.C. Cir. 1964).

135 45 U.S.C. § 151 Fifth (1964).

non-supervisory employees. On the other hand, minor officials in the maintenance of way and freight and station operations are generally included within the broader occupational groupings utilized in unit determinations for these employees. The Brotherhood of Maintenance of Way Employees, for example, was founded by track foremen in 1886, and did not admit other track workers until a decade later. Foremen, as permanent employees (in contrast to the sometimes casual nature of the employment relationship for track laborers), have been a dominant part of the union since its inception.

Although the Board has interpreted the term "subordinate official" to allow previous bargaining relationships, the statute does not provide any definition of the term, nor does it establish any standards or guides to aid in this determination. In general, the NMB has allowed both middle management personnel as well as first line supervisors to be included in bargaining units.[136]

The inclusion of such personnel may well be unlawful since Section 2, Fourth declares that employees are to be completely free from the carrier's interference in the selection of their representative. In those unions which have both supervisory as well as non-supervisory employees as members, foremen have been used strategically for many years to "encourage" unionization. A correspondent to the Maintenance of Way Employees Journal gave recognition to the foreman as the "best organizer we have. . . . If the foreman asks a man to join the Brotherhood, you can be sure that in most every case this man will join . . . ."[137] Such influence was clearly not intended by the Congress.

The delineation between subordinate officials and officials generally has been based on the decisions of the Interstate Commerce Commission. The original regulations of the ICC on this question date to March 1920.[138] The criteria used in this order for determining subordinate officials included the relative rank of the positions in question and whether the positions were vested with authority to employ, discipline or dismiss subordinates. A subsequent order cited the extent of discretionary power to determine duty as well as the nature of the duties performed. In later decisions, the ICC held that membership in an association of subordinate officials engaged in collective bargaining[139] and the payment of overtime, the extent of vacation, sick leave and expense allowances and even whether stenographic services were provided[140] were determinants of classification for employees.

Attempting to delimit protected employees based upon such cri-

136 See, e.g., Northeast Airlines, NMB Case No. R-2257 (1953).
137 Maintenance of Way Employees Journal, 38 (August, 1940).
138 U.S. RRLB 118.
139 22 I.C.C. 687, 688 (1937).
140 264 I.C.C. 239, 241 (1946).

teria is fatuous. Under present personnel practices, even the traditional criterion of the authority to hire and fire cannot be controlling since most actions of this nature now require the concurrence of several supervisory personnel. The range of discretion displayed in past NMB determinations involving this issue has been cause for much controversy. It is significant that such concern has arisen primarily in the air transport industry where the unionization of foremen was imposed upon, rather than produced by, the parties. The contrary provisions included in the amendments of the NLRA denying protection in organization to supervisory personnel are also noteworthy.

3. *Black Employees*

A question of great historical importance in the railroad industry has been the question of the placement of black employees.[141] The question arises because virtually every national union in the industry excluded black workers from membership or, at best, allowed them to become members only of segregated or auxiliary locals. Although several of the nonoperating unions dropped such bars following World War II, the four major operating unions (Locomotive Engineers, Firemen, Conductors and Trainmen) retained their exclusionary practices until just prior to the passage of the Civil Rights Act of 1964.[142] These labor organizations have sometimes contended that blacks should be placed in separate crafts or classes, and at other times have opposed such placement depending on the policy which would be most advantageous to them.

The Mediation Board quickly adopted the rule that:

> a craft or class of employees may not be divided into two or more on the basis of race or color for the purpose of choosing representatives. All those employed in the craft or class, regardless of race, creed or color must be given the opportunity to vote for the representatives of the whole craft or class.[143]

At first glance, this appears to be a strong statement in accord with national policy. Actually, however, the "opportunity" to vote for the representatives of the whole craft or class is an empty one indeed. The bargaining units have been defined to coincide with the jurisdictional claims of the national unions, placing any groups which are less than a majority across an entire system at an obvious disadvantage. Moreover, even though few railroad unions were willing to admit black

141 See H. Risher, The Negro in the Railroad Industry (1970); H. Northrup, Organized Labor and the Negro, Ch. I and III (1944).

142 42 U.S.C.A. § 2000e et seq.

143 2 NMB Ann. Rep. 11-12 (1936).

workers to full membership, the NMB has continually refused to provide space on the ballot to vote for "No Union."[144]

The effect of Board policies can be best seen in the tragic history of black firemen. This occupation historically was relegated to black workers; that is, until the diesel locomotive eliminated the tiresome firing function. The sudden change in the occupation's desirability induced the black firemen's "representative," the Brotherhood of Locomotive Firemen, an all white union by constitutional provision until 1963, to negotiate the heinous "Southeastern Carriers' Agreement" in 1941. This agreement was perpetrated to eliminate virtually all black firemen from the service within a few years. This blatantly discriminatory agreement was signed not only by the union and the carriers, but by members of the National Mediation Board as well.[145] Only the Supreme Court, in the classic case, *Steele v. Louisville & Nashville R.R. Co.*,[146] was able to protect the few remaining black firemen from their "representative."

The plight of black workers in similar situations might easily be recounted. The reader may imagine the effect of grouping southern black track laborers with white foremen in a single bargaining unit.

The National Labor Relations Board was quick to adopt a policy similar to the "fair representation doctrine" established in *Steele*. In a series of early decisions, the NLRB announced that if a union did not represent all employees in the bargaining unit equally and without discrimination, it would revoke its certification.[147] The NMB has never accepted this principle.

C. *Recognition of the Bargaining Representative*

The NMB has taken the position that its function under the RLA is to promote the unionization of employees. Despite the fact that one of the stated purposes of that Act is "to provide for the complete independence of carriers and of employees in the matter of self-organization . . . ,"[148] the Board has argued that "the act does not contemplate that its purposes shall be achieved, nor is it clear that they can be achieved, without employee representatives—that is to say, by carriers treating separately with each employee."[149] To accomplish this representation objective the Board has completely denied the rights of employers to participate in representation procedures, and

144 See text at notes 151-157.

145 For an excellent discussion of this agreement and other early practices of the railroad unions, see H. Northrup, supra note 141, at Ch. III.

146 323 U.S. 192 (1944).

147 See, e.g., Bethlehem-Alameda Shipyard, Inc., 53 N.L.R.B. 999 13 L.R.R.M. 139 (1944); Carter Mfg. Co., 59 N.L.R.B. 804 15 L.R.R.M. 164 (1943).

148 45 U.S.C. § 151a (1964).

149 Administration of the Railway Labor Act, supra note 57, at 15.

severely restricted the rights of employees who do not wish to be represented.

1. *Rights of the Carriers in Representation Disputes*

The Mediation Board has interpreted the reference in Section 2, Ninth to representation disputes involving "a carrier's employees" narrowly, denying the legitimate interests of the employer in the certification process. Under the NMB approach, only the employees can initiate a representation petition or be a formal party to such a hearing.

The carrier is not completely excluded from representation proceedings. Occasionally carriers have been invited to participate in public hearings at which time they are permitted to produce factual data, to cross-examine witnesses and to state positions on certain issues. Even on these occasions, however, the carrier has been forced to remain passive, taking only those actions allowed by the hearing officer. Thus, the carrier, as a nonparty must sit idly by while the union campaigns among its employees. Since there is no proscription as in section 8(b)(7)(C) of the NLRA to limit the length of the organizational campaign prior to petitioning for certification, the union's organizing efforts can continue without restriction. If two or more labor organizations attempt to organize the same group of employees, the resulting warfare may be continued without carrier initiated interruption. This again is in contrast to the provisions of the NLRA.[150]

2. *Employee Freedom of Choice*

The legislative history of the Railway Labor Act and its amendments supports the view that employees have the right to accept or reject collective representation. The 1934 House Report on Bill H.R. 9861 to amend the 1926 statute states:

> 2. It [H.R. 9861] provides that employees shall be free to join any labor union of their choice and likewise be free to refrain from joining any union if that be their desire and forbids interference by the carrier's officers with the exercise of said rights.[151]

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[150] 29 U.S.C. § 159(c)(1)(B) (1964) allows the employer to file a petition to have the NLRB clarify the representation status of unions which have requested recognition.

[151] H.R. Rep. No. 1944 to accompany H.R. Rep. No. 9861, Comm. on Interstate and Foreign Commerce, 73d Cong., 2d Sess., 2 (1934). Similarly, testimony by Commissioner Joseph P. Eastman, Federal Coordinator of Transportation and principal draftsman of the legislation, stated his view on the representation rights of workers under the Act:

> No, it does not require collective bargaining on the part of the employees. If the employees do not wish to organize, prefer to deal individually with the management with regard to these matters, why that, of course, is left open to them, or it should be.

Hearings on H.R. Rep. No. 7650 before the House Committee on Interstate and Foreign

Regrettably, the NMB has chosen to ignore the prevailing consensus at the time of the 1934 amendments and to deny to employees the full right to refrain from unionization. Although the Board has never explicitly disallowed this choice, the effect of two Board policy decisions employed in concert made this right illusory. First, the Board has chosen to certify a union on the basis of a majority of the votes cast, as opposed to a majority of those employees eligible to vote (provided that a majority of those eligible to vote did so). This policy was sanctioned by the Supreme Court in *Virginia R.R. Co. v. System Federation No. 40*,[152] wherein the carrier questioned the exact meaning of the word "majority." This, as the Fourth Circuit Court of Appeals noted, is all that is required in governmental elections in which the public participates.[153] Secondly, the Board has continually refused to include a provision on the ballot allowing employees to vote for "No Union." Ballots utilized in Board elections include spaces for voting for named unions or individuals, or for "others," but a ballot marked "no representation" is considered invalid. Employees desiring not to be represented are able to indicate their choice only by not voting. Thus, if less than a majority of the eligible votes are cast, no representative is certified.

The Supreme Court recently held in *Brotherhood of Ry. Clerks v. Association for the Benefit of Non-Contract Employees*,[154] that the choice of these election procedures did not exceed the Board's authority. While stating that the form of the ballot is a matter for Congress and the NMB rather than for the courts, and in venturing "no opinion as to whether the Board's proposed ballot will best effectuate the purpose of the Act,"[155] the Court did imply that the NMB could put an end to the confusion. In addition, in a footnote, the Court stated that those who favor no representation are, in fact, aided by the Board's policies since all votes uncast are counted as being against representation.[156]

The error in the NMB election procedures is in the implicit assumption that all the employees voting for some form of representation would prefer representation by any union rather than being unrepre-

Commerce, 73d Cong., 2d Sess., at 57 (1934). Likewise, when the bill reached the Senate, Senator Robert F. Wagner, future author of the NLRA, indicated his belief that employees retained the right to reject representation:

> I didn't understand these provisions compelled an employee to join any particular union. I thought the purpose of it was just the opposite, to see that men have absolute liberty to join or not to join any union or to remain unorganized.

Hearings on S. 3266 before the Senate, 73d Cong., 2d Sess. (1934).

152 84 F.2d 641, 652-53 (4th Cir. 1936), aff'd, 300 U.S. 515 (1937).

153 84 F.2d at 652-53 (4th Cir. 1936).

154 380 U.S. 650 (1965).

155 Id. at 671.

156 Id. at 669, n. 5.

sented. Under the Board's policies, a union obtaining 26 percent of the eligible employees will be certified so long as 51 percent of the eligible employees vote. Thus, the assumed disposition of a clear majority of the eligible voters, those not voting, will be ignored. Such an election recently occurred. In an election held to determine the representative of the employees of Aeronautical Radio, Inc., the Air Line Dispatchers Association (ALDA) received 74 votes, the International Brotherhood of Teamsters (IBT) obtained 147 votes, while 179 employees did not vote or submitted void ballots. The IBT was certified, and the company sought to set aside the certification in the district court. The action was dismissed for lack of jurisdiction. In affirming, the court of appeals stated: "[S]ince a majority of the employees obviously had voted for *some* representation, the union which became the choice of a majority of those thus voting should be certified."[157] While the Supreme Court may be correct in arguing that counting all uncast or invalid ballots as votes against representation inflates the actual sentiment for such an outcome, the NMB negates this effect by implicitly applying less weight to such votes.

The NLRB recognized the inherent inequity in such procedures soon after the *Virginia* decision by changing its ballot to allow employees to vote "No Union." In making this change the NLRB stated that "[w]e see no advantage in forcing employees who disapprove of the nominees to adopt the rather ambiguous method of expression involved in casting a blank ballot, when their choice can be clearly indicated by providing a space therefor."[158] The NMB cannot have failed to realize the full implications of their choice.

There is, of course, no legislative dictate that an election must be held in a representation dispute. The RLA states simply that the Board is authorized "to take a secret ballot . . . or to utilize any other appropriate method"[159] to ascertain the choice of the employees. The Board has chosen to grant certification based upon authorization cards solicited by the union in 21 percent of the certifications granted since 1934.[160] Although this practice is less prevalent today than it

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[157] Aeronautical Radio, Inc. v. NMB, 380 F.2d 624, 626-27 (D.C. Cir. 1967).
[158] In Re Interlake Iron Corp., 4 N.L.R.B. 55, 61-62 (1937).
[159] 45 U.S.C. § 152 Ninth (1964).
[160] Disposition of Representation Cases, 1934-69:

Certification based on election	2,612	64.2
Certification based on authorization	688	16.9
Representation recognized	63	1.5
Withdrawn before investigation	129	7.7
Withdrawn after investigation	314	3.2
Dismissal	277	5.6
Closed without certification	38	0.9
Total	4,121	100.0

was in earlier periods of greater organizational activity, it has been heavily criticized as being unreliable.[101] It is argued that the employee may not be completely cognizant of the possible uses of the authorization card, and that the union is at a distinct advantage in collecting signatures individually with a union organizer or union sympathizer present. Secret ballot elections are vulnerable to neither criticism.

Once a representative is certified, there is no way for employees to reject representation. Decertification procedures may be desirable where the employee complement has been altered over a period of time, or where extensive changes have resulted from technological change. In the air transport industry this is particularly true for those certifications which were granted when the industry was still in its infancy. The Court of Appeals for the District of Columbia expressed this view in a recent decision:

> [I]t is inconceivable that the right to reject collective representation vanishes entirely if the employees of a unit once chose collective representation. On its face, that is a most unlikely rule, specifically taking into account the inevitability of substantial turnover of personnel with the unit.[162]

The NMB has yet to give recognition to this inequity.

IV. Conclusion

Four times in the last seven years Congress has chosen to intervene directly in labor disputes under the Railway Labor Act. Three of those disputes were ended only after Congress enacted special legislation to effect an imposed settlement. The history of the fireman manning dispute indicates that even such heretofore unacceptable measures may not produce final resolutions of the labor-management conflicts. Moreover, as President Nixon stated in his message to the Congress, and as the history of labor disputes in the railroad industry so vividly illustrates, the expectation of government intervention may act to discourage or prevent meaningful collective bargaining.

The President has now proposed legislation which would allow greater government intervention. His recommendation provides that the contract dispute procedures of the RLA be discontinued and that each of the transportation industries be made subject to a new law. The new law would be based solidly on experience under the LMRA,

Data compiled from: Annual Reports of the National Mediation Board, Table 3 (1935-1969).

[161] See, e.g., A. McFarland and W. Bishop, Union Authorization Cards and the NLRB (1969); Lesnick, Establishment of Bargaining Rights Without an NLRB Election, 65 Mich. L. Rev. 851 (1967).

[162] International Bhd. of Teamsters v. Brotherhood of Ry. Clerks, 402 F.2d 196, 202 (D.C. Cir. 1968).

with an initial provision for an eighty day injunction period. If at the end of that time, the threat of a strike had not been eliminated, the President would be given the choice of three additional and quite distinct options. First, if a negotiated settlement appeared imminent, the President could extend the injunction for as long as thirty additional days. The President's second option would be to require partial operation of the industry for a period of up to six months. Partial operation requires a priority ordering for the movement of goods; such a system has been effected during war emergency periods. The purpose of such a decision, of course, is to maintain an adequate level of service to protect the public and yet retain the costs to both sides necessary to induce a settlement. The transportation industries are ideally suited to such a decision. Finally, the President has proposed the innovative procedure of "final offer selection." Under this alternative, each party formulates a final offer which is submitted to the Secretary of Labor. If, after five additional days of negotiation on the final proposals, no agreement is forthcoming, a three member panel may be appointed to hold hearings and then to select that final offer which it finds to be most reasonable as the final and binding settlement. The panel would be required to choose one of the final offers in the exact form in which it was presented without any attempt to mediate or otherwise modify the offer. It is argued that this procedure will force the parties to bargain to achieve the most complete agreement possible, leaving only the narrowest of issues to later resolution, since their final offers must be reasonable in order to avoid rejection by the panel.

Although each of these options has been suggested separately in previous articles,[163] they differ significantly from the generally proposed choice of procedures or "arsenal of weapons," including mediation, injunction, seizure, fact finding and compulsory arbitration.[164] The President's proposal is based on the premise that if some single method of government intervention is provided for, the parties may

[163] Recent advocates of procedures similar to partial operation include: McCalmont, The Semi-Strike, 15 Indus. and Lab. Rel. Rev. 191 (1962); Sosnick, Non-Stoppage Strikes: A New Approach, 18 Indus. and Lab. Rel. Rev. 73 (1964). A discussion of "final offer selection" is provided in Stevens, Is Compulsory Arbitration Compatible With Bargaining?, 5 Industrial Relations 38 (1965-66).

[164] See generally I. Bernstein, H. Enarson and R. Hemings, eds., Emergency Disputes and National Policy (1955). The most notable recent proposals are set forth in ABA Special Committee on National Strikes in the Transportation Industries, Final Report and Recommendations (1969). The ABA Special Committee would provide for options which the President might choose after an initial fact-finding period. The first option would provide for an additional sixty days of mediation, with final recommendations by the mediators. Second, the President could impose compulsory arbitration as the Congress has done in the railroad industry. The third option would provide for government seizure and continued operation of the industry. Finally, the President could discharge the fact-finding board and the parties would be free to continue the dispute.

be able to predict from experience whether the terms forthcoming after intervention will be better than a negotiated settlement. If however, a choice of procedures with dissimilar impacts on the parties is available to the President, then he may choose an alternative which seems most appropriate to a particular dispute. President Nixon's proposal, however, differs significantly from previous plans since the terms of agreement remain under each of the options within the control of the parties. Further, it is to the disadvantage of the parties not to utilize their power of settlement fully. This is in distinct contrast to the present RLA procedures which provide no impetus for settlement, and to these proposals which provide for government initiated settlement with seizure or with traditional compulsory arbitration. If, indeed, work stoppages cannot be allowed in the transportation industries, the Nixon proposal should prove to be a decided improvement over the present system.

The President has also requested that the National Railroad Adjustment Board be abolished and that the burden of grievance settlement be assumed by the parties. Several carriers have already negotiated agreements for private arbitration of certain of their grievances. The continuation of the special privilege legislation which provides for the NRAB in light of that agency's ineffective history should clearly not be necessary nor desirable in a modern collective bargaining system.

Finally, President Nixon suggested that a special commission be established to conduct a comprehensive study of labor relations in the transportation industries. This commission would be similar in purpose to that which has previously been appointed to develop constructive proposals to alleviate labor problems in the construction industry.[165] The transportation industries generally have experienced rapid economic and technological change since World War II. The impact of these developments on the industry has been more significant in understanding current labor problems than any defects in the RLA. However, other than the comprehensive analysis of labor problems among the railroad operating crafts completed in 1962 by the Presidential Railroad Commission,[166] no general studies of labor relations in these industries has been attempted. The completion of a study such as that proposed by the President may well prove to be the most significant result arising from the present interest in developing an effective alternative to the Railway Labor Act.

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165 The Construction Industry Collective Bargaining Commission. For a discussion, see 92 Monthly Lab. Rev. 72 (1969).

166 U.S. Commission to Inquire into a Controversy between Certain Carriers and Certain of Their Employees, Report of the Presidential Railroad Commission (February, 1962).