THE RAILWAY LABOR ACT— TIME FOR REPEAL?

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As a result of recent disputes involving airlines, the existence of the Railway Labor Act[1] is probably more generally known than at any time in recent history. Nevertheless, few people are familiar with the provisions of this law. Courses in industrial relations or labor law, whether in law schools, business schools, or social science departments, discuss it only cursorily, if at all, and both professional and popular journals rarely comment upon it except in connection with a particular dispute. Yet the Railway Labor Act contains the framework for the most comprehensive control of labor relations and labor disputes in the United States, thus providing an objective lesson of how such controls work in practice.

The thesis of this Article is that the Act has not worked for the general good: It has inhibited rather than helped dispute resolution; its provisions and procedures restrict change, thereby injuring the industries over which it has jurisdiction; it is administered with a remarkable bias that would not be so easily accepted if the Act were better known by, and it affected directly, a wider constituency; and these deficiencies are much more serious today than in the past because of the move toward deregulation. The Act was written to apply to heavily regulated railroads, but now railroads are much less regulated, and air carriers are both substantially deregulated and highly competitive. Yet the Act continues to be administered as it was under the previous system of regulation, thus causing serious financial consequences for the industries involved.

After a brief review of the Act's history and provisions, experiences under its various facets are discussed. In light of this evidence, the conclusion discusses whether the Act is viable in its present form and under its present administration, and if not, what changes might be in order.[2]

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1. 45 U.S.C. §§ 151-188 (1982).

2. This Article is an update and expansion of the author's previous works on this

I. Development and Summary of the Law

Following a series of laws dating back to the 1880s that neither unions nor carriers found satisfactory,[3] railway management and unions agreed upon a bill that embodied the collective bargaining system developed prior to World War I. This was enacted by Congress and signed by President Calvin Coolidge as the Railway Labor Act of 1926.[4]

A. *Summary of the 1926 Act*

This Act made it the duty of the parties to exert every reasonable effort to "make and maintain agreements concerning rates of pay [and] working conditions" and to attempt to adjust all differences by peaceful means.[5] A five-person Board of Mediation was created to attempt mediation if the parties could not agree among themselves. The board was further instructed to urge voluntary arbitration if mediation proved unsuccessful. If either party declined arbitration and the dispute would "substantially . . . interrupt interstate commerce," the Board of Mediation was instructed to notify the President, who could create an *ad-hoc* "emergency board" for the purpose of investigating and publishing findings designed to settle the dispute.[6] During the pendency of these various proceedings and until thirty days after the report of the emergency board was issued, neither party was to alter "the conditions out of which the dispute arose," except by mutual agreement.[7] The parties were, however, under no legal obligation to accept the recommendations of the emergency board.[8]

The Act of 1926 also provided that "boards of adjustment shall be created" by the parties for the purpose of handling

subject. *See* H. Northrup & G. Bloom, Government and Labor, at ch. 12 (1963); H. Northrup, Compulsory Arbitration and Government Intervention in Labor Disputes, at ch. 5 (1966); Northrup, *The Railway Labor Act: A Critical Reappraisal*, 25 Ind. & Lab. Rel. Rev. 3 (1971) [hereinafter Northrup, *Railway Labor Act*].

3. Prior legislation included the Arbitration Act of 1888, ch. 1063, 25 Stat. 501; the Erdman Act of 1898, ch. 370, 30 Stat. 424; the Newlands Act of 1913, ch. 6, 38 Stat. 103; the Adamson Act of 1916, ch. 436, 39 Stat. 721; and the Transportation Act of 1920, ch. 91, 41 Stat. 456.

4. The Railway Labor Act, 44 Stat. 577 (Part II 1926) (codified as amended at 45 U.S.C. §§ 151-188 (1982)).

5. *Id.* § 152.

6. *Id.* § 154.

7. *Id.*

8. *See id.*

disputes arising out of the interpretation of agreements.[9] Such boards had been established under previous legislation for the operating brotherhoods and continued in existence.[10] In the case of the nonoperating groups,[11] however, negotiations broke down over whether the boards should be regional or local in scope. The unions wanted the widest jurisdiction possible because many local unions had been supplanted by independent or company unions as a result of the shopmen's strike of 1922, a major union defeat. The carriers rejected this proposal and insisted upon local boards.

Some 300 adjustment boards were established, but many not until after several years of negotiations. For many classes of employees, no boards were established. Moreover, the adjustment machinery provided no means to break deadlocks, and because all such boards were bipartisan in character, deadlocks were frequent. In 1934, when these boards were abolished by amendments to the Act,[12] approximately 2,500 disputes pertaining to contract interpretations remained to be adjudicated.[13]

Section 2, third, of the 1926 Act also provided:

> Representatives, for the purpose of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence or coercion exercised by either party over the self-organization, or designation of representatives by the other.[14]

Despite this requirement, no specific machinery for determination of employee bargaining representatives was contained in the 1926 law, nor did it compel carriers to deal solely with the representatives of the majority. Furthermore, the Act did not provide penalties for interference with the free choice of representatives as guaranteed by section 2, third. The Supreme

9. *See id.* § 153.

10. These unions were organized as benevolent societies and hence are traditionally termed thus. Reference is to the unions of engineers, firemen, conductors, brakemen, and switchmen.

11. Reference here is to the clerical, maintenance of way, shop and repair personnel, and others not directly involved in moving trains.

12. *See* The Railway Labor Act, Pub. L. No. 73-442, 48 Stat. 1185 (1934) (codified as amended at 45 U.S.C. §§ 151-188 (1982)).

13. *See* W. SPENCER, THE NATIONAL RAILROAD ADJUSTMENT BOARD, 11-12 (1938).

14. Ch. 346, 44 Stat. 577 (Part II 1926) (codified as amended at 45 U.S.C. §§ 151-188 (1982)).

Court, however, ruled that such interference was subject to the injunctive process.[15]

Whatever its merits, the 1926 Act was found defective by the "standard" railway unions[16] on several counts. The unions desired the following changes in the law:

> National adjustment boards with effective machinery for breaking deadlocks and for enforcing awards;
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> Specific penalties, in addition to the injunction process, to prevent carriers from exercising influence over the choice of employee representatives;
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> Formal machinery by which bargaining agents could be selected; and
>
> Drastic changes in the personnel of the Board of Mediation, which had fallen from their favor.[17]

All these objectives were achieved by the 1934 amendments to the Railway Labor Act, which were supported by the railway unions. The unions were assisted materially in their support of the amendments by the Federal Coordinator of Transportation, Joseph B. Eastman, and his labor advisor, Dr. William M. Leiserson. The carriers bitterly opposed the amendments.

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15. *See* Texas & New Orleans R.R. Co. v. Brotherhood of Ry. and S.S. Clerks, 281 U.S. 548 (1930). This case was decided two years before the passage of the Norris-LaGuardia Anti-Injunction Act of 1932.

16. The "standard" railway unions historically included those that were loosely joined together through the Railway Labor Executives Association. Several smaller ones merged with larger ones before and after World War II, but until the 1970s, the standard unions included, in the operating end, the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors, the Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America. The nonoperating part of the railroad industry included the Brotherhood of Maintenance of Way Employees, the Order of Railroad Telegraphers, the Brotherhood of Railway and Steamship [later Airline] Clerks, Freight Handlers, Express, and Station Employees, the American Train Dispatchers Association, the Brotherhood of Railroad Signalmen, the Brotherhood of Railway Carmen, the International Association of Machinists, the International Brotherhood of Electrical Workers, the Brotherhood of Boilermakers, Iron Shipbuilders, Welders, and Helpers, and the Brotherhood of Firemen and Oilers. The last four include unions that now have only a small portion of their total membership in the railroad industry. The Machinists, as did at one time the Railway Clerks, has a large membership in the airline industry and has added "Aerospace" to its name. As technology displaced craft unions and railroad employment declined dramatically from 1920 to the present, a wave of mergers has occurred. The Locomotive Firemen, Conductors, Switchmen, and Trainmen came together under the Trainmen's aegis to form the United Transportation Union; the Carmen, Telegraphers, and a few smaller, non-standard unions merged into the Clerks, which changed its name to the Transportation and Communication Union. Earlier, the Brotherhood of Blacksmiths, Drop Forgers, and Helpers merged into the Boilermakers, which added "Blacksmiths and Drop Forgers" to its name, and dropped "Welders."

17. *See generally* Northrup, *Railway Labor Act*, *supra* note 2.

B. *The 1934 Amendments to the Railway Labor Act*

The amended Railway Labor Act maintains the basic structure of the 1926 legislation insofar as negotiating obligations, mediation, arbitration, and emergency board procedures are concerned. The main difference is that the five-person Board of Mediation was abolished and replaced by a three-person National Mediation Board (NMB). Dr. Leiserson was appointed the first chairman of the NMB.

The 1934 amendments[18] established the National Railroad Adjustment Board (NRAB), which has jurisdiction over grievances and disputes arising out of the interpretation of agreements. (These are known as "minor disputes" in the Act's terminology, as contrasted to "major disputes," which are those involving negotiations for basic contract changes.) The NRAB is a bipartisan agency, originally composed of thirty-six members (now thirty-four), one-half of whom are selected and compensated by carriers, the other half by unions "national in scope," which has been traditionally defined as the standard railway unions.[19] Small unions are unrepresented. The NRAB has four divisions, each of which has jurisdiction over certain crafts. If a division deadlocks on an issue, referees are appointed to decide the case. The NRAB division members appoint the referees, or if the division cannot agree, the NMB makes the appointments. Tax funds are the source for all expenses of the NRAB except for the salaries of the bipartisan members.

The 1934 amendments also established procedures to resolve representation disputes by vesting authority in the NMB similar to that held by the National Labor Relations Board (NLRB) under the National Labor Relations Act.[20] There are, however, considerable differences in the legislation and the administration of representation cases under the two laws, as shown by the discussion below.

Finally, the 1934 amendments proscribed a list of employer unfair labor practices[21] similar to those found in the original

18. *See* The Railway Labor Act, Pub. L. No. 73-442, 48 Stat. 1185 (1934) (codified as amended at 45 U.S.C. §§ 151-188 (1982)).

19. *See id.*

20. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 141-197 (1982)).

21. *See* The Railway Labor Act, Pub. L. No. 73-442, 48 Stat. 1185, 1187 (1934) (codified as amended at 45 U.S.C. §§ 151-188 (1982)).

National Labor Relations (Wagner) Act. (No equalizing amendments similar to those enacted in the Taft-Hartley amendments of 1947 to the National Labor Relations Act have been enacted to prohibit unfair *union* practices.) Enforcement of unfair labor practices under the two laws is quite different, however, in that violations under the Railway Labor Act are punishable by rarely utilized criminal penalties with prosecutions under the jurisdiction of the United States Department of Justice. In fact, unfair labor practices under the Railway Labor Act are handled largely by the courts, the NRAB, and the NMB, and which one has jurisdiction is often unclear, as will be discussed below.

C. *The 1936 Amendments Covering Air Transport*

In 1936, the airline industry, then on the threshold of growth and expansion, was brought under the Railway Labor Act after strong lobbying by officers of the fledgling Airline Pilots Association (ALPA).[22] The air carriers took no position on this issue. The airlines were not covered by the NRAB, the jurisdiction of which is confined to the railroad industry. Provision was made in the 1936 amendments for a National Air Transport Board to be created when the NMB deemed it to be desirable. Neither airline carriers nor unions, however, have expressed interest in industry-wide settlement of disputes arising out of contract interpretations, and there has been no significant discussion of creating such an agency. Instead, the air carriers and unions have established system-wide boards of adjustment that handle grievances and contract terminations (minor disputes) arising under their labor contracts, and the decisions of these boards are enforceable in the same manner as those of the NRAB.

D. *The 1951 Compulsory Union Amendments*

Following the failed 1922 shopmen's strike, unions in the nonoperating segments of the railroad industry had been replaced on many carriers by company-dominated and independent local organizations that were sometimes protected by agreements requiring membership as a condition of employment. The standard unions, therefore, desired that compulsory

22. *See* The Railway Labor Act, Pub. L. No. 74-487, 49 Stat. 1189 (1936) (codified as amended at 45 U.S.C. §§ 151-188 (1982)).

unionism be prohibited to undercut the power of the company-dominated unions. They had realized this desire in the provisions of section 2, fifth, of the 1934 amendments, which prohibited carriers from requiring or prohibiting union membership as a condition of employment. Because of changes heavily induced by NMB representation policies and the fact that only unions defined as "national in scope" had members on the NRAB, which had refused to hear cases presented by non-standard unions for years, non-standard unions of all types were almost eliminated from the industry by 1950. The standard rail unions and those in the airline industry then pushed for elimination of the compulsory union restriction; legislation allowing compulsory unionism was enacted during the following year.[23]

The union shop provision of the Act provides that in the operating department, the requirements of compulsory unionism are met if an employee maintains membership in any one of the organizations that are "national in scope."[24] Thus if an employee is promoted out of the jurisdiction of one union to that of another, he may retain membership in the former. Again, of course, the law discriminates against independent local unions.

Similarly to section 8(a)(3) of the Taft-Hartley Act, the Railway Labor Act provides that failure to tender dues and initiation fees shall be grounds for an employee's termination of employment. The Railway Labor Act, however, also includes a provision making failure to pay assessments to unions as grounds for termination.[25] Unlike the Taft-Hartley Act, the railway law has no procedure for de-authorizing compulsory union clauses, and it does not give power to the States, as does section 14(b) of the Taft-Hartley Act, to permit them to outlaw compulsory union agreements.

The right of unions covered under the Railway Labor Act to obtain compulsory union agreements provides that this right may not require membership of employees who are not accorded the full membership rights of other employees.[26] This language was inserted because of the invidious racial discrimination practiced by nearly all railroad unions and by the Air

23. *See* The Railway Labor Act, Pub. L. No. 81-914, 64 Stat. 1238 (1951) (codified as amended at 45 U.S.C. §§ 151-188 (1982)).
24. *Id.* § 152.
25. *See id.*
26. *See id.*

Line Pilots Association prior to the passage of state fair employment laws and Title VII of the Civil Rights Act of 1964.[27] This discrimination included union provisions that denied membership to blacks or confined them to segregated "auxiliary" organizations that had no power, and it also involved overt attempts by the Brotherhood of Locomotive Firemen and Enginemen and by the Brotherhood of Railroad Trainmen to drive blacks from jobs that they had long held.[28]

E. *The 1966 Changes in the Adjustment Board Organization*

In 1966, section 3, pertaining to the NRAB, was altered by authorizing the establishment of special boards of adjustment on individual railroads upon the written request of either the representatives of employees or the railroads. The purpose was to resolve disputes otherwise referable to the NRAB. These "Public Law Boards," named after Public Law No. 89-456,[29] the act that created them, were strongly advocated by the operating unions. The unions wanted the additional boards because the NRAB's First Division, which handles cases involving operating unions, had a backlog of 4,089 cases in March 1965, a backlog that could never be worked through.[30] The railway companies opposed this amendment on grounds that the unions referred cases to the First Division regardless of their merits and that a cessation of this irresponsible conduct would eliminate the backlog.[31] The parties had thus reversed their historic positions on carrier-wide versus national adjustment boards. Like the NRAB, the parties pay for their representatives on these Public Law Boards, but all other expenses, including compensation of referees, are paid from tax funds.

The 1966 amendments also added section 3(m), which pro-

27. Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1982)).

28. For the story of this infamous chapter, and the work of the NMB and the NRAB in furthering it, see H. NORTHRUP, ORGANIZED LABOR AND THE NEGRO, at ch. III (1971); and Risher, *The Negro in the Railroad Industry*, in NEGRO EMPLOYMENT IN LAND AND AIR TRANSPORT, Part One (H. Northrup ed. 1971). It was this discrimination, aided and abetted by government agencies, that led the author of this Article to commence his research and to become the first scholar to reappraise the effectiveness of the Railway Labor Act.

29. Act of June 20, 1966, Pub. L. No. 89-456, 80 Stat. 208 (1966) (codified as amended at 45 U.S.C. §§ 151-188 (1982)).

30. *See* Seidenberg, *Grievance Adjustment in the Railroad Industry*, in THE RAILWAY LABOR ACT AT FIFTY, 209, 229-31 (C. Rehmus ed. 1977). An analysis of the NRAB and the cause of its backlog are discussed below at text accompanying notes 113-17.

31. *See* Seidenberg, *supra* note 30, at 229-31.

vides that the awards of adjustment boards, including Public Law Boards and boards established by mutual agreement of the parties, "shall be final and binding upon both parties to the dispute." Section 3(p) gave the winning party the right to file in court for enforcement, and the courts had very limited power to overrule the board's decision. This amendment in effect gave these awards the very limited judicial review that labor arbitration awards generally receive. Prior thereto, a petition for enforcement of any award led to a trial de novo because the Act merely made the adjustment board's findings "prima facie evidence" of facts.[32]

F. *The 1981 Commuter Rail Amendments*

As part of its program to reduce government operations in business, the new Reagan administration was anxious to sell the Consolidated Railroad Corporation (Conrail), the government-controlled organization that had taken over the bankrupt Penn-Central and other northeastern railroads. To do this, it was agreed to require that Conrail dispose of its unprofitable commuter lines in Delaware, Pennsylvania, New Jersey, and New York. Amendments to the Northeast Rail Service Act, which was included in the Omnibus Budget Reconciliation Act of 1981,[33] accomplished this goal. The sale did not amend the Railway Labor Act as such, but the labor disputes arising out of the transfer of these lines from federal control to state commuter agencies required new procedures, including the appointment of emergency boards for which the NMB provided administrative services.[34]

The Omnibus Budget Reconciliation Act of 1981 also included direct amendments to the Railway Labor Act.[35] These amendments pertained to commuter railroads, employees af-

32. *See id.* at 233-35.

33. Pub. L. No. 97-35, 95 Stat. 643 (codified at 45 U.S.C. § 1101 (1982)).

34. Three boards were appointed by President Reagan, one for Pennsylvania and Delaware, one for New Jersey, and one for New York. *See generally* 50 NATIONAL MEDIATION BOARD, ANN. REP. (1984). Unlike the Railway Labor Act, this law required that the boards choose one of the last offers of the parties and recommend it. Strikes resulted in all three cases, in part because of the different wages and conditions in urban transit as compared with railroads. The Philadelphia area strike was the longest, lasting about two months, but the use of the commuter lines in that area is much more limited and considerably less significant than in the New York region. The author of this Article served as chairman of the Philadelphia area board.

35. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 681 (codified at 45 U.S.C. § 159a (1982)).

fected by the transfer of Conrail employees to new rail operations, and commuter lines operated by Amtrak, the government-owned railroad passenger operation. The amendments passed Congress without discussion.[36] One amendment created a new section 9A,[37] which greatly increased the already elaborate, time-consuming, dispute-settlement process under the Act. This, the first amendment since 1926 not initiated and supported by the unions, requires the President to appoint an emergency board on such commuter lines if a dispute is not settled and if either party to the dispute, or the governor of the state, so requests. A status quo period of 120 days is then instituted.

The emergency board must then submit its report within thirty days, and if no settlement is reached within sixty days, the NMB will conduct a public hearing at which the parties must explain their rejection of the emergency board's recommendations. If no settlement is reached by the expiration of the 120-day "cooling off" period, either party or the relevant governor may request that the President appoint a second emergency board. Each party then presents this board with its final proposal for settlement, and the second board must recommend the most reasonable proposal. During this second procedure, and for sixty days thereafter, the status quo must be maintained. This prolongs the status quo period for these commuter lines and their employees to 240 days, four times the period required by the regular procedures for the appointment of an emergency board under the Railway Labor Act.

These commuter rail amendments also provide penalties.[38] If a union rejects the recommended final offer and strikes, its members are denied unemployment benefits under the Railroad Unemployment Insurance Act.[39] If a carrier declines to

36. According to one writer, when the then-chairman of the NMB was asked about this amendment to the Railway Labor Act, he responded, "What amendment?" Rehmus, *Emergency Strikes Revisited*, 43 INDUS. & LAB. REL. REV. 175, 185 n.4 (1990) (quoting then-chairman of the National Mediation Board, Robert Harris).

37. *See* 45 U.S.C. § 159a (1982).

38. *See id.*

39. This Act provides for the payment of unemployment benefits during strikes, and thus, in effect, subsidizes strikes with carrier and public funds. *See* 45 U.S.C. § 159a (1982). Two states, New York and Rhode Island, do likewise, and many others, including Pennsylvania, pay benefits during lockouts, but define lockouts to cover what ordinarily are considered union-initiated strikes. A thorough analysis of such public and employer subsidies to strikers by the payment of unemployment compensation is long overdue.

accept the second board's settlement recommendation, it is forbidden to take advantage of any mutual aid agreement among the railroads.[40]

Finally, the 1981 Omnibus Act required the NMB to appoint neutrals to fact-finding boards for Amtrak-owned commuter lines, and it required public-owned commuter authorities to recommend changes in operating procedures and practices to improve productivity. A board was also appointed for Conrail to resolve disputes about employees' transfer to new rail operations. These actions appear to have been insignificant: Commuter lines have continued to operate at a loss, and Conrail's expansion following its sale to the public has enabled any employees who desired to stay with it to do so rather than to join a divested line.

G. *Summary of the Act's Provisions*

The Railway Labor Act is thus a comprehensive code of labor relations that (1) establishes definite provisions for the conduct of negotiations and provides for the postponement of strikes and lockouts until a variety of governmental intervention techniques have been applied; (2) provides for compulsory arbitration of railroad labor grievance and contract interpretation disputes by bipartisan national or system boards, the expenses for which are mostly paid from tax funds; (3) provides for a method of selecting bargaining representatives and determining other representation disputes; (4) proscribes employer unfair labor practices; and (5) applies the principles and practices of the Act (except for the form of compulsory arbitration of contract interpretation disputes), which were developed for the declining railroad industry, to the new and expanding air transport industry. The results of this legislation can best be determined by examining each aspect of the law separately.

II. Collective Bargaining Procedures

Section 2, first, of the Act establishes "the duty of all carriers, their officers, agents, and employees to exert every reasonable

40. The major railroads have had a mutual aid pact, but the provision in the 1981 Omnibus Act is probably irrelevant because of the major carriers' divestiture of commuter lines, either pursuant to the same Act as already noted or by sale to state authorities. In addition, because the Railway Labor Act does not forbid secondary boycotts, unions can and have retaliated strongly when the mutual aid pact was utilized.

effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes" peacefully.[41] Ensuing portions of the same section set forth a procedure for collective bargaining that includes (1) written notice thirty days before an intended change of an agreement; (2) a time and place to meet must be agreed upon within ten days after receipt of such notice, and the meeting must occur within thirty days as provided in the notice; and (3) prohibition of unilateral changes in contracts and of strikes and lockouts during this procedure and the intervention that ensues.[42]

Thus the first basic element in the Act's dispute-settlement procedure is the obligation of the parties to make and to maintain collective agreements, which by custom are written agreements. A corollary to this primary obligation is a second one: the duty to dispose of disputes quickly and peacefully.

The NMB has placed much emphasis on the policy pronouncement and the procedure for collective bargaining in the Act. The NMB and other commentators have argued that the Act's stated policy and procedures encourage collective bargaining and collective agreements and are, therefore, primarily responsible for the alleged (and as shall be shown below, not necessarily achieved) "peaceful nature" of collective bargaining in the railroad and air transport industries.[43]

The claim to a superior peace record under the Railway Labor Act is best discussed after all parts of the dispute procedure have been analyzed. It is unlikely, however, that policy pronouncements induce peaceful settlement as the NMB has claimed, but it is true that violations of the duties set forth in these provisions can be the basis for enjoining such conduct under certain circumstances.

The Act undoubtedly has encouraged the making of collective agreements, particularly in its earlier years when collective bargaining was a relatively new phenomenon. The same can be said, however, about the National Labor Relations Act or any other legislation that requires employers to recognize unions. The Railway Labor Act is distinct from other labor legislation

41. 45 U.S.C. § 151 (1982).

42. *See id.*

43. For a typical comment during the early years of the Act, and one that mirrored statements made in annual reports of the NMB, see H. KALTENBORN, GOVERNMENTAL ADJUSTMENT OF LABOR DISPUTES 52 (1943).

because it incorporates bargaining procedures already developed by the parties in the railroad industry, freezes them into law, and requires that the airline industry adopt them. Perhaps the consequences have been acceptable, but it is certainly possible that superior procedures could have been developed, especially in the airline industry, that would have better served the parties and the public interest.

There is nothing magical or especially sound in the bargaining procedures of the Act *per se* as compared with procedures developed in many other industries. What is different from other industries is that the bargaining procedures are part of a legislatively dictated series of steps that move from bargaining to government intervention, and neither party can unilaterally alter the status quo without violating the Act.[44] The intervention procedures inhibit the nongovernmental bargaining procedures and have the effect of preventing expeditious settlement in major cases. The practical effects of government intervention can best be seen by discussing the intervention steps in succession.

III. Mediation

If the parties are unable to settle a dispute by collective bargaining, either party may seek mediation by the NMB, or the Board "may proffer its services in case any labor emergency is found by it to exist at any time."[45] Because the Act requires that the status quo remain in force until the Board releases the parties to unilateral action, the Board becomes involved in disputes that are not directly settled by the parties themselves and for which one of the parties finds it advantageous to solicit intervention.

It has been fairly common through the years for the NMB and others writing about the Railway Labor Act to proclaim that mediation is by far the most important form of intervention under the Act. Among the arguments used to support this conclusion is the fact that over ninety percent of the cases docketed for mediation have been settled without further intervention.[46] Yet such statistics (and arguments based thereon) do

44. *See* Chicago & N.W. Ry. v. United Transp. Union, 402 U.S. 570 (1971).

45. 45 U.S.C. §§ 155, 183 (1982).

46. *See* Burgoon, *Mediation of Railroad and Airline Bargaining Disputes*, in The Railway Labor Act at Fifty 71, 83-85 (C. Rehmus ed. 1977) (offering this typical argument).

not distinguish qualitatively among cases. A dispute involving the standard unions and all major railroads and one involving a commuter airline receive the same weight. Although some national railroad cases have been settled with the help of mediation since 1946, many have not.

In any industry, settlements are frequently facilitated by mediation in cases that cannot be settled by the parties themselves. Under the Railway Labor Act, however, mediation is more intrusive than in industry generally because of the provisions of the Act. As a result, custom and practice have led to what is probably a greater presence of mediators at the bargaining table than is typical elsewhere. The fact that mediation is utilized more than any other form of government intervention does not mean that it is either highly successful or unsuccessful, but rather that it is useful for one or both of the parties either to obtain settlement or as a tactical maneuver, or in some cases, both.

This qualification does not mean that mediation is unimportant. Under the Railway Labor Act, as in industry generally, mediation is an excellent instrument to aid settlement by assisting the parties, by providing a means of face-saving to one of the parties, by educating inexperienced negotiators, or otherwise. Successful mediation, however, requires not only the presence of mediators but also an understanding on the part of mediators and their agencies that there is a time for intervention and a time to refrain therefrom. The statutory requirement for mediation intervention in the Railway Labor Act requires mediation at the request of either party, thereby limiting the discretion of the NMB.

Over the years, the Board has complained in its annual reports that it is too frequently requested to mediate before the parties have made genuine attempts at settlement. This failure is partially the result of the parties' expectations and preparations for the appointment of an emergency board or other form of extra-legal intervention instead of the initiation of private bargaining. In addition, the onslaught of mediation requests also stems from the parties' perceptions of the NMB as a body designed to serve them, to suit their needs, or to assist in their strategy and tactics, rather than an organization devoted simply to providing a forum for good-faith mediation.

A. *Holding Cases and the Parties to the Status Quo*

The Act not only gives the NMB the power to mediate cases; it also forces labor and management to maintain the status quo for indeterminate periods regardless of their wishes. The Act accomplishes this in two ways. First, if a request for mediation emanates from one of the parties, the Board has been known to find its staff too occupied with "more important" cases to service the requesting entity. In a Boston & Maine Railroad case, for example, the employees were on strike, but the NMB did not even acknowledge a request for a mediator until three months later. Even then it did not assign one, allegedly because of the Board's hostility toward the management. The carrier was unsuccessful in obtaining court relief.[47] In 1982, representatives of flight attendants' unions complained to Congress that it took up to three months from the date that mediation was requested to the date a mediator was assigned.[48]

Of course, the Board can argue that it has a limited staff and therefore must determine the most efficient use of its resources. There does, however, seem to be a rather marked tendency to use those resources in an unequal manner.

Much more serious in prolonging the status quo than tardiness in appointing mediators has been the tendency of the NMB, after citing what it determines to be the public good, to refuse to release the parties to engage in self-help. Prior to 1980, employers tended to applaud this policy while union officials generally deplored it. Cases instituted by unions to force the NMB to set the parties free to utilize unilateral action were unsuccessful. The courts found generally that the Board had this discretionary power: The mediation process was purposefully designed to be lengthy, "based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute."[49]

More recently, as both air and rail carriers have sought to eliminate or to modify costly collective contracts, the Board's

47. *See* Boston & Maine Corp. v. National Mediation Bd., 669 F. Supp. 1 (D.D.C. 1987), *vacated*, 695 F. Supp. 517 (D.D.C. 1987).

48. *See Statements of Flight Attendant Unions Before the Transportation Subcommittee of House Committee on Government Operations*, DAILY LAB. REP. (BNA) No. 237, at F-1 (Dec. 9, 1982).

49. Brotherhood of Ry. & S.S. Clerks v. Florida E.C. Ry., 384 U.S. 238, 246 (1966); *see also* Detroit & Toledo Shore Line R.R. v. United Transp. Union, 396 U.S. 142 (1969).

purposeful procrastination has upset management and unions both. At the same time, there have been some indications of a greater tendency on the part of the courts to examine the reasonableness of NMB policy. The stage was set for the latter by a 1970 decision of the Court of Appeals for the District of Columbia.[50] The decision emphasized the need for courts to understand that the Board "is entitled to as strong a presumption as the legislature [and] that if any state of facts might be supposed that would support its action, those facts must be presumed to exist."[51] The court also noted, however, that in a case like the one at bar, the union was asserting not merely a statutory right, but the

> basic right to use economic weapons in a labor dispute. There are constitutional as well as common law underpinnings of the rights of employees to strike, and engage in peaceful picketing, in order to improve terms and conditions of employment. Employers have correlative rights to institute changes deemed necessary for survival.
>
> The rights of self-help owned by both union and management have been deliberately preserved by Congress, albeit held in temporary abeyance. They survive, available for use when the statutory procedures to promote agreement are exhausted.[52]

The court affirmed the NMB's position on the facts in the case, but it asserted that in the "rare and unusual case where the complaint, as supported by objective facts, requires overturning the Mediation Board's judgment notwithstanding the vigorous presumption of validity, the court has jurisdiction to require termination of the mediation process."[53]

The federal district court for the District of Columbia decided a case that seemed to meet this criterion for judicial intervention in *Local 808, Building Maintenance Service and Railroad Workers v. National Mediation Board* in May 1989.[54] In this case, the NMB had ceased mediation in February 1988 but nevertheless held the parties in status quo for fifteen months. The court found that the Chairman of the NMB had done this purposefully because he did not approve of the prolonged dispute pro-

50. *See* International Ass'n of Machinists v. National Mediation Bd., 425 F.2d 527 (D.C. Cir. 1970).
51. *Id.* at 540.
52. *Id.* at 536.
53. *Id.* at 542-43.
54. 727 F. Supp. 639 (D.D.C. 1989), *rev'd*, 888 F.2d 1428 (D.C. Cir. 1989).

cedure established by the commuter railroad amendments of 1981, and the railroad was perfectly happy with the status quo because its offer had been rejected. The court asserted that the Board's action, therefore, was highly discriminatory. Accordingly, the judge ordered the Board to release the parties from mediation. Six months later, however, the Court of Appeals for the District of Columbia Circuit reversed the lower court's ruling in a split decision that found that this case was not an "extraordinary situation" in which the Board had shown "patent official bad faith."[55] The dissent stated that this was an unwarranted and unsatisfactory standard that "effectively removes such decisions from judicial review."[56]

Perhaps the most notorious case involving NMB mediation procrastination has been that of Eastern Airlines. Eastern was purchased by Texas Air Corporation in 1986 after the Machinists refused to make concessions demanded by the airline's creditors unless the Board of Directors discharged Frank Borman as chairman. All other employee groups had previously made such concessions. Many commentators predicted the serious confrontation that occurred at Eastern because of the stormy relationship Texas Air Chairman, Frank Lorenzo, had experienced with the Machinists at Continental Airlines, the other Texas Air subsidiary.[57] Mr. Lorenzo had eliminated the Machinists after a strike, and then he eliminated the Air Line Pilot's Association (ALPA) after the pilots refused to consider concessions. Continental subsequently filed for reorganization under Chapter 11 of the Bankruptcy Code and ALPA struck the airline.[58]

Eastern's new management demanded major concessions from the unions, particularly the Machinists, who responded with increased demands that they steadily raised whenever Eastern made concessions. With the parties making no progress, the Mediation Board appointed a mediator in January

55. 888 F.2d at 1430.

56. *Id.* at 1444 (Mikva, J., dissenting).

57. *See, e.g., Borman's Long Tenure Appears Near an End*, N.Y. Times, Feb. 25, 1986, at D26, col. 3.

58. *See* In Re: Continental Airlines et al., *Findings of Fact and Conclusions of Law Relating to the Rejection of the Collective Agreement with ALPA*, Case No. 83-04019-H2-5, et al., Aug. 17, 1984, Nov. 30, 1984; *Memorandum of Authorities Authorizing Rejection of Airline Pilots Association Collective Bargaining Agreement*, U.S. Bank Court; S.D. Tex., Houston Div., Case No. 83-0419-H2-5 et. al, Aug. 17, 1984.

1988.[59] Throughout 1988, there was little evidence of progress; yet the Board refused to free the parties from the status quo, despite Eastern's repeated requests.[60] Thus Eastern was forced to continue to pay the high wages from a contract that expired prior to the beginning of mediation and six months after the union requested, received, and rejected the carrier's final and best offer. Meanwhile, Eastern was losing more than one million dollars per day, and the cash position that it had hoped to maintain to weather a strike was disappearing.

Eastern sold its profitable New York-Washington and New York-Boston shuttles to the Donald Trump organization, put other assets up for sale, and abandoned its Kansas City hub as its funds declined.[61] Eastern's financial plight became worse as a result of union charges of safety violations. The charges adversely affected bookings even though an investigation by the Federal Aviation Authority (FAA) found the charges baseless.[62] After more than a year, the NMB still declined to declare an impasse. It held that Eastern was not bargaining in good faith and, therefore, had not "earned" such a declaration.[63] An editorial in the *New York Times* summed up the situation:

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59. *See Mediator is Appointed in Eastern Air's Talks with the Machinists*, Wall St. J., Jan. 15, 1988, at 33.

60. On July 18, 1988, Eastern requested a release, noting that there had been seventy-three joint meetings with the mediator, nearly as many one-party meetings with him, and Eastern had made its best offer—on July 8 Eastern had offered a no-layoff policy in return for wage decreases and offered training for lower rated employees, but the Machinists had responded with a proposal that added substantially to costs. *See Eastern Says Mediation Has Failed, Seeks Release From Talks with IAM*, DAILY LAB. REP. (BNA) No.143, at A-13 (July 26, 1988).

61. *See* Salpukas, *Eastern Airlines Will Sharply Cut Staff and Service*, N.Y. Times, July 23, 1988, at 1, col. 6; Salpukas, *Eastern Air's Head Cites Cash Problem*, N.Y. Times, Dec. 9, 1988, at D1, col. 6; Belden, *Eastern Seeks Sale of Routes; 8 Philadelphia Gates Also Offered*, Philadelphia Inquirer, Dec. 31, 1988, at 6-B, col. 1; Mckenna, *Trump Pays $365 Million for Eastern Air Shuttle*, AVIATION WEEK & SPACE TECH., Oct. 17, 1988, at 110. The unions brought legal action to prevent the sale of Eastern's assets, but an initial victory for them in district court was quickly overturned on appeal. *See* Air Line Pilots Ass'n, Int'l v. Eastern Airlines, 863 F.2d 891 (D.C. Cir. 1988).

62. *See* McGinley & Thomas, *U.S. Finds Eastern, Continental Safe, Warns of Risk of Labor Strife*, Wall St. J., June 3, 1988, at 3, col. 1. The unions again raised the safety issue after the strike began and Eastern commenced operating, and again the FAA found no basis for their claims. *See* Bradsher, *U.S. Clears Eastern Air on Safety*, N.Y. Times, Aug. 26, 1989, at 29, col. 3; Fotos, *FAA Officials Say Eastern Safety Matches That of Other Airlines*, AVIATION WEEK & SPACE TECH., Aug. 7, 1989, at 80.

63. *See* Salpukas, *Eastern and Machinists Near a Showdown*, N.Y. Times, Jan. 11, 1989, at D1, col. 3. Nowhere in the Railway Labor Act is such a concept found, nor is the author of this Article aware of any previous case where it was propounded. Moreover, why Eastern (insisting upon concessions) was guilty of bad faith bargaining and the union (equally insistent on refusing them) was not, remained unexplained.

> What's important about the shuttle transaction is what it reveals about Eastern Airlines and the obscure regulatory agency that drove it to sell off this incredibly valuable asset. Eastern is caught in a regulatory trap that makes settling its labor problems almost impossible.
>
> . . . .
>
> If airlines were governed by standard labor law, Eastern would be free, once labor contracts expired, to impose new wages and working conditions; the unions would be free to strike. One way or another, things would have been settled by now. . . .
>
> Before airlines were deregulated, they liked such delays. . . . Today, however, delay works in unions' favor, especially when they are confronting unprofitable airlines. The longer bargaining continues, the longer union members stay at their old, high wages and the less cash the airline has left to endure a work stoppage.[64]

The *Times* ended its editorial with the hope "that Walter Wallace, the chairman of the National Mediation Board, will honor the spirit of the law and declare an impasse."[65] If he did not, the suggestion was made that President Bush should remove him for "inefficiency."[66]

Finally, the impasse was declared in February 1989, and the parties were free to take action in March. The Mediation Board then proposed that President Bush appoint an emergency board to delay a strike for sixty additional days, but he declined.[67] In March the Machinists struck. The Transport Workers Union (TWU), representing the flight attendants, and ALPA chose to honor the picket line. Eastern soon thereafter filed for protection under Chapter 11 of the Bankruptcy Code, partially because it was low on cash as a result of the long delay by the NMB. It sold its Philadelphia hub and its South American route rights to raise cash.

Eastern was gradually able to increase its other operations

64. *Bureaucrats, Strangling an Airline*, N.Y. Times, Dec. 27, 1988, at A20, col. 1.

65. *Id.*

66. *Id.*

67. The excuse for the appointment of a board was the threat of the Machinists to picket and shut down other airlines and the commuter trains in New York and other cities. These events did not materialize because of no-strike contracts with many of the carriers and successful industry litigation in the courts, as will be discussed in the unfair labor practices section below. *See infra* text accompanying notes 222-64.

The Mediation Board also began a process designed to require that Continental and Eastern, both owned but separately operated by Texas Air, be designated one carrier as requested by the unions. The implications of this maneuver are discussed in the representation section below. *See infra* text accompanying notes 172-92.

with new employees and those who crossed the picket lines. In December 1989, after President Bush vetoed a bill to appoint a commission to investigate the strike, ALPA and the TWU ended their sympathy strike, leaving the Machinists to continue alone. By then, the jobs of the strikers had already been filled, which limited their right to obtain jobs to future openings. Eastern, however, was unable to attract business travelers and suffered heavy losses. This failure caused its bankruptcy judge to replace the management with a trustee.[68]

Prior to the strike, the retiring president of the Machinists stated that his union was "at war" with Eastern and "will continue fighting even if the battle ultimately causes the company to collapse."[69] The company was indeed driven into bankruptcy with the assistance of the National Mediation Board. Yet the battle has hurt the unions as well and, most of all, the employees who have remained loyal to the unions. The company, whose recovery seems doubtful, was also damaged by the severe losses it suffered during the strike.

Although Eastern provides the most dramatic example of the power of the NMB to hold parties in limbo regardless of their desire for settlement, it is certainly not the only one. World

68. *See* Bradsher, *Pilot Strike at Eastern Faltering*, N.Y. Times, Aug. 12, 1989, at 31, col. 3. Approximately 800 pilots had crossed the picket line as of October 31, 1989, and 1,800 qualified ones were hired while about 600 former Eastern pilots obtained jobs elsewhere or retired. This left about 2,200 still on strike. An ample supply of ground forces were apparently at work as of this date. (Interview, Texas Air executive, Oct. 31, 1989.) *See also* O'Brien, *Texas Air Unit May Sell Assets to AMR*, Wall St. J., Dec. 18, 1989, at A4; *Pilots and Flight Attendants End Walkout at Eastern*, AVIATION WEEK & SPACE TECH., Dec. 4, 1989, at 23; O'Brien, *Eastern Air's Trustee, Creditors Face Huge Problems in Bid to Revive Carrier*, Wall St. J., Apr. 20, 1990, at A6, col. 1. With the appointment of a trustee, the unions may have realized this objective; but the Eastern pilots have announced their intention of attempting to supplant ALPA by an independent union, and the mechanics on the former Eastern Shuttle (now Trump Shuttle) have voted out the IAM in favor of another independent union. *See Mechanics on Trump Shuttle Vote for Representation by Independent Union*, DAILY LAB. REP. (BNA) No. 62, at A-6 (Mar. 30, 1990); McKenna, *Eastern Pilots Mount Effort to Oust ALPA as Bargaining Agent*, AVIATION WEEK & SPACE TECH., Apr. 30, 1990, at 57.

69. Geewax, *IAM Chief: Fight to Go On Even If It Brings Eastern Down*, Atlanta Const., Apr. 22, 1988, at 1C, col. 2. The attitude of the Machinists is also illustrated by the action of Charles Bryan, head of the union's Eastern chapter, who opposed Scandinavian Airlines' investment in Texas Air and development of cooperative flight arrangements with Eastern, even though that could mean more jobs for his members. *See Eastern Union Official Seeks to Undo Texas Air-SAS Alliance*, Aviation Daily, Oct. 6, 1988, at 26. Machinists' officials repeatedly made it plain that their objective was to reduce the value of Eastern so that the unions could afford to acquire it, or at least Texas Air would have to dispose of its investment therein in its entirety. *See, e.g.*, Wash. Post, Mar. 20, 1988, at H1, col. 3; Wash. Post, Sept. 4, 1988, at A25, col. 6; Wash. Post, Oct. 18, 1988, at C1, col. 1; N.Y. Times, Nov. 6, 1988, § 6 (Magazine), at 36.

Airways stated that it would also be driven into bankruptcy if it were not released from mediation; the courts declined to consider its pleas, and indeed it went bankrupt.[70] Lan Chile Airlines and Iberia Airlines of Spain are other examples of airlines that sought concessions from unions. They were instead tied up in mediation for sixteen months and several years, respectively, without hope of settlement.[71] In other cases, the unions have been kept in limbo with little prospect of agreement.[72] The power of the NMB in this respect is immense, and it is clearly subject to arbitrary use.

IV. Voluntary Arbitration

If the NMB is unable to settle a dispute by mediation, the Railway Labor Act requires that it request the parties to agree to arbitrate the matters in dispute. Either may refuse to do so without penalty. If both agree, sections seven, eight, and nine of the Act provide a detailed procedure for the establishment of an arbitration board,[73] the conduct of the arbitration, and the enforcement of the award. An award issued under this procedure is final and binding on the parties; it is filed in the nearest federal district court and becomes a court order. The award is enforceable unless overturned on one or more of the following grounds: (1) either the award or the proceedings were not in conformity with the requirements of the Act; (2) the award did not conform to the stipulations of the agreement to arbitrate; or (3) fraud or corruption affected the results of the arbitration.

Interest arbitration (arbitration of new terms of agreements) under the Railway Labor Act was not utilized with great frequency during the incumbency of the original Act of 1926. Although more than five hundred disputes were settled by arbitration during this period, the bulk of these were not major dis-

70. *See* World Airways, Inc. v. National Mediation Bd. & Int'l Bhd. of Teamsters, 696 F.2d 1005 (9th Cir. 1982).

71. *See* Lan Chile Airlines v. National Mediation Bd., 115 L.R.R.M. (BNA) 3655 (S.D. Fla. 1984); Iberia Air Lines of Spain v. National Mediation Bd., 84 Civ. 4707 (E.D.N.Y. 1984).

72. *See supra* notes 54-56, 60; International Ass'n of Machinists v. National Mediation Bd. & S. Pac. Co., 725 F. Supp. 558 (D.D.C. 1989).

73. Voluntary arbitration boards may be composed of either three or six members, who are evenly divided among those members chosen by each party and one or more neutral persons who are either selected by the parties, or if they cannot agree, by the NMB. Arbitration boards may be reconvened by the NMB to interpret any section of an award on which the parties disagree as to its meaning.

putes. Rather, they were minor disputes involving such issues as contract interpretation or unsettled grievances, which since 1934 have been handled by either the NRAB, Public Law Boards, or voluntary boards.[74] During the first thirty-six years of the Amended Act, 1934-1970, with all minor disputes processed separately, only about three hundred cases of proposed contract changes were submitted to arbitration boards.[75] This is an average of less than nine per year for the railroad and airline industries combined, despite their multitude of carriers and unions during that period.

The period since 1970 has seen a similar light utilization of arbitration pursuant to the regular procedures of the Act, with an average of little more than three cases per year.[76] This excludes, however, about sixty arbitrations pursuant to special arrangements among the United Transportation Union, the Brotherhood of Locomotive Engineers, and various carriers to arbitrate disputes relating to seniority districts. Several other arbitrations are also excluded from the tabulation, such as arbitrations that occur between pilot or other airline groups to determine seniority slotting on airlines that are merging.[77] Such arbitrations, which are praiseworthy for avoiding overt conflict, more nearly resemble contract interpretations (minor disputes) than interest arbitration in its pure form.

The reasons for the small number of interest arbitrations under the Act are not difficult to discern. Railroad and airline managements and union officials share the general wariness found in other industries of submitting important decisions to outsiders who, unlike the parties, do not have to live with the results. In addition, there appears to be growing uneasiness among railroad and airline managements regarding the objectivity of some arbitrators selected by the NMB when the parties

74. Data in this section were compiled by the author from various annual reports of the National Mediation Board.

75. Based on computations by the author from the tables provided in the National Mediation Board Annual Reports, 1934-1970.

76. Based on computations by the author from the tables provided in the National Mediation Board Annual Reports, 1970-1988.

77. ALPA has a policy governing the negotiation of seniority in mergers, and airline managements have typically gone along with the pilots' agreements. Recently, ALPA has shown a tendency to ride rather roughshod over the interest of non-ALPA pilots involved in mergers, and this approach has generated several lawsuits. These arbitrations were not conducted pursuant to the Railway Labor Act but were initiated under labor-protective provisions initiated by the Civil Aeronautics Board in merger matters, and they continued voluntarily in many situations after deregulation.

cannot agree on a selection themselves.[78] Equally important, the Act permits disputes of lesser importance to be settled by the parties themselves or with the assistance of mediation. On the other hand, disputes that one or both parties regard as very important have tended to go to emergency boards rather than to arbitration. The reason for this course of action was succinctly stated by the late Professor Sumner H. Slichter more than forty years ago and remains accurate:

> [I]t is easier for the representatives of one side or both to refuse to negotiate an agreement or to submit a case to arbitration if the immediate result is, not a strike or lockout, but the appointment of an emergency board which has no authority to make a binding award.[79]

V. Emergency Boards

Between 1926 and 1934, when the Railway Labor Act was amended, only two small strikes occurred, only eleven emergency boards were appointed, and only one board recommendation was disregarded by a carrier.[80] Five of the boards were appointed during the last year of this period, a fact attributable to growing social unrest and the greater propensity of President Franklin D. Roosevelt, as compared with his predecessors, to appoint such boards. Only one of the appointed boards involved a regional case; the others pertained to disputes on small railroads.

During the period between 1933 and 1941, in which industrial relations experienced considerable upheaval as unions grew and matured in manufacturing industry, peace reigned on the railroads. In the only large dispute, the carriers requested a wage decrease, and the emergency board recommended against it.[81] In other cases, the Federal Coordinator of Transportation, not the Mediation Board, handled the disputes. Nevertheless, it was in this period that the Railway Labor Act achieved its now-tarnished reputation as a "model law."

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78. This issue is discussed below in connection with the appointment of referees under the NRAB procedure. *See infra* text accompanying notes 99-122.

79. Slichter, *The Great Question in Industrial Relations*, N.Y. Times, Apr. 27, 1947, § 6 (Magazine), at 5.

80. *See infra* note 88 and accompanying table.

81. This dispute occurred in 1938. *See* 5 National Mediation Board, Ann. Rep. 23 (1939). The carriers requested a fifteen-percent wage decrease. The emergency board report, issued in October 1938, recommended against any decrease. This disappointed the carriers who had hoped for a recommendation of at least some decrease.

A more sophisticated analysis would point to the fact that during this period the railroad unions had no major adverse decisions affecting their aims and positions. The railroad unions, therefore, had no reason to strike, and the airline unions were too weak and too new to risk major strife. In contrast, unions in manufacturing were gaining strength and fighting strong management resistance. The experience during and after World War II radically altered the prevailing perception of the Act's accomplishments.

A. *World War II to 1960*

President Roosevelt set the tone for future emergency board procedure when he intervened to avoid a strike that would have occurred on December 7, 1941—Pearl Harbor Day. The unions had rejected an emergency board recommendation; the President reassembled the board and successfully pressured the carriers to grant additional increases. Throughout Roosevelt's incumbency, this procedure was repeated.[82]

The climax came after Harry Truman became President. In 1946, the Trainmen and the Engineers rejected an emergency board recommendation and struck even after the President modified its terms to favor them. All of the nation's major railroads were shut down. President Truman broke the strike after two days by proposing drastic legislative remedies; the unions accepted his terms to avoid passage of the proposals. The airline pilots followed a similar rejection-and-strike scenario. The pilots, after rejecting the recommendations of the first emergency board assembled for that industry, shut down Trans World Airline in 1946. They subsequently agreed to arbitrate the matter and eventually obtained a much richer settlement than the board had recommended.[83]

The 1950s featured less upheaval. The railroad unions did reject some proposals, but the decline of the railroad industry in general and the loss of union membership, along with the disinclination of the Eisenhower Administration to do their bidding as had previous administrations, greatly weakened

82. *See* Northrup, *The Railway Labor Act and Railway Labor Disputes in Wartime*, 36 AM. ECON. REV. 324 (1946). During the war, emergency boards were appointed from the National Railway Labor Panel, which was established so that emergency boards could be appointed without a union strike vote. The provisions were otherwise consistent with the Railway Labor Act.

83. *See* Northrup, *Collective Bargaining by Air Line Pilots*, 61 Q.J. ECON. 533 (1947).

their bargaining power.[84] The need to replace the firemen on diesels and the extra brakemen on trains with new electronic equipment, however, did lead the unions to agree to the appointment of a Presidential Railroad Commission to recommend solutions to these difficult problems of automation.

B. *The 1960s*

The 1960s saw a reversion under Presidents Kennedy and Johnson to the interventionist policies of the 1940s. President Kennedy received the exhaustive report of the Presidential Railroad Commission,[85] but instead of endorsing it, he treated it as merely the basis for future negotiation. When the parties still failed to settle the issues regarding automation, he appointed an emergency board to hear the case all over again. Once again, however, the unions rejected and the carriers accepted recommendations that provided greater employee benefits than those proposed by the Commission. There followed other interventions by the White House, and finally an act of Congress required that the matters be submitted to arbitration.[86]

With some matters still not settled by 1964, President Johnson called the parties to Washington and, with the help of special mediators, literally imposed a settlement that gave the railroads little or no additional relief. In the meantime, the congressionally required arbitration had eliminated the firemen. The net effect of these actions and the continued attrition of railroad employment was to force four of the operating unions to merge into the United Transportation Union (UTU), which left only the Locomotive Engineers as a separate entity.

Airline labor relations also went through turmoil in the 1960s. The most significant event was a Machinists strike against five airlines that occurred after the unions rejected both the emergency board's recommendation and a more generous proposal by President Johnson. The fact that travelers expressed no anxiety over the strike led the Nixon Administration to cease appointing such boards for the airlines.[87] Boards con-

84. *See* Levinson, *Railway Labor Act—The Record of a Decade*, 3 LAB. L.J. 13 (1952); Kaufman, *Emergency Boards Under the Railway Labor Act*, 9 LAB. L.J. 910 (1958).

85. *See* PRESIDENTIAL RAILROAD COMM'N, REPORT OF THE PRESIDENTIAL RAILROAD COMM'N (1962).

86. *See* Pub. L. No. 88-108, 77 Stat. 132 (1963) (codified at 45 U.S.C. § 157).

87. This decision has been attributed to the then-Secretary of Labor, George P.

tinued to be appointed for railroad disputes, both large and small, but at a declining rate as seen in Table 1.[88]

TABLE 1. RAILWAY LABOR ACT EMERGENCY BOARDS, 1926-1989.

Years	Railroad	Airline	Public Commuter Railroad
1925-39	17	0	—
1940-49[a]	68	4	—
1950-59	33	4	—
1960-69	36	15	—
1970-79	15	1	—
1980-89[b]	8	0	18
Total[c]	177	34	18

[a] Does not include 51 boards appointed between 1942 and 1947 under Executive Order 9172. This Order created the National Railway Labor Panel, which was given wartime power to supplement Section 10 of the Railway Labor Act.

[b] Data for 1989 cover Jan.-Sept. only.

[c] The last board created in 1989 was Emergency Board No. 218. The discrepancy between this Board number and the combined total of 229 above lies in the fact that during the incumbency of the U.S. Board of Mediation, 1926-34, 11 boards were appointed. Renumbering then began after the National Mediation Board was created in 1934. Included herein are three boards appointed for commuter lines pursuant to the Northeast Rail Service Act as amended by the Omnibus Budget Reconciliation Act of 1981.

C. *The 1970s and 1980s*

The so-called "model labor law" had fallen into general disrepute by the 1970s. Consequently, in 1970 President Nixon proposed to eliminate the emergency board provisions and to have emergency matters handled through an amended version of the Taft-Hartley Act provisions.[89] Although Congress did not seriously consider the proposal, the policy behind it did result in the creation of fewer emergency boards during the

Shultz. Only one such board has been appointed since then, and that was required by a rider (section 44) placed in the Airline Deregulation Act of 1968 involving Wien Airlines of Alaska and ALPA, the members of which had struck and were replaced. *See* Northrup, *The New Employee-Relations Climate in Airlines*, 36 INDUS. & LAB. REL. REV. 167, 172-73 (1983).

88. Reproduced from Rehmus, *Emergency Strikes Revisited*, *supra* note 36, at 179 (by permission, © Cornell University). For a more thorough description of the events of the 1960s, see Northrup, *Railway Labor Act*, *supra* note 2; Cullen, *Emergency Disputes Under the Railway Labor Act*, in THE RAILWAY LABOR ACT AT FIFTY 151 (C. Rehmus ed. 1977).

89. *See* Northrup, *Railway Labor Act*, *supra* note 2.

Nixon and Ford Administrations, and the White House generally refrained from intervening during this period. There were even fewer emergency boards appointed in the 1980s than the 1970s despite the requirement of appointing boards in commuter rail cases as illustrated in Table 2 below.

Congress, on the other hand, expanded its involvement, and congressional intervention has increased since 1963, when Congress passed the country's first peacetime compulsory arbitration bill to settle the firemen dispute that had already been considered by a presidential commission and an emergency board.[90] As shown in Table 2, Congress has passed laws to delay or to settle railroad disputes no less than sixteen times.[91] In one case, Congress gave the union the wage increase recommended by the emergency board but did not impose the rule changes that the board also recommended.[92] Some of these disputes involved threatened nationwide strikes, but most affected only regional, and usually local, areas. Almost all were considered by emergency boards as part of the Act's regular procedure. The fact that Congress is expected to act in the case of a threatened strike after the rejection of an emergency board recommendation invites rejection and strike threats.[93] As Dr. Rehmus has written, "each successive case of Congressional intervention appears to have made the next more routine and acceptable."[94]

In fact, having Congress settle disputes is so ingrained that carriers and unions seem to plan on it. In April 1990, the parties agreed to refer all issues in a national dispute to an emergency board that President Bush agreed to appoint. The carriers and unions then went through a ritualistic act by coming to impasse, rejecting arbitration, and having the NMB recommend the appointment of an emergency board. The agreement to do this states that no unilateral actions or strikes will occur when Congress is not in session![95]

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90. *See* Pub. L. No. 88-108, 77 Stat. 132 (1963) (codified at 45 U.S.C. § 157).

91. Reproduced from Rehmus, *Emergency Strikes Revisited*, *supra* note 36, at 184 (by permission, © Cornell University).

92. This dispute involved the Signalmen in 1971 who received a large wage increase recommendation from the board as a "buy out" for giving up onerous work rules. *See* Northrup, *Railway Labor Act*, *supra* note 2, at 14.

93. Surprisingly, President Reagan signed five laws of this nature. *See* Table 2.

94. Rehmus, *supra* note 36, at 185 n.4.

95. *Bid Set in Motion to Solve Rail Industry Labor Rift*, Wall St. J., Apr. 4, 1990, at A26,

TABLE 2. CONGRESSIONAL ACTION IN RAILROAD DISPUTES, 1963-1989.

Parties	Year	Strike	Emergency Board Nos.	Public Law Nos.
NRLC* and Operating Crafts	1963	No	154	88-108
NRLC and Shop Crafts	1967	Yes	169	90-100 90-13 90-54
NRLC and Sheet Metal Workers International Association	1970	No	—	91-203 91-226
NRLC and United Transportation Union, Brotherhood of Railroad and Airline Clerks	1970	No	178	91-541
NRLC and Brotherhood of Railway Signalmen	1971	Yes	179	92-17
Penn Central Railroad and United Transportation Union	1973	Yes	180	93-5
Port Authority Trans-Hudson and Brotherhood of Railway Carmen	1981	Yes	193	97-35
NRLC and Brotherhood of Locomotive Engineers	1982	Yes	194	97-262
Maine Central Railroad and	1986	Yes	209	99-385
Brotherhood of Maintenance	1986	Yes	209	99-431
Long Island Railroad and	1987	Yes	210	100-2
13 Unions			212	
Chicago and North Western Railroad and United Transportation Union	1988	Yes	213	100-380 100-429

* National Railway Labor Conference.

D. *Emergency Board Procedure: Analysis*

When the emergency board procedure was developed, many thought that emergency boards would be appointed in limited circumstances and that their recommendations would be accepted by both parties. Dr. William M. Leiserson, who helped to write the 1934 amendments to the Act and who served as the NMB chairman for many years, revealed such thoughts when he declared that emergency boards were merely an extension of arbitration, with public opinion as the force to secure com-

col. 3; *Railroad, Union Negotiators Reject NMB's Arbitration Proffer*, DAILY LAB. REP. (BNA) No. 65, at A-12 (Apr. 4, 1990).

pliance.[96] In reality, recommendations since 1941 have been merely a basis for negotiations. To term emergency boards a form of arbitration is as wrong as to term them "fact-finding" boards, which is often done. The facts are rarely in dispute, and the public is rarely concerned sufficiently to force compliance.

The more emergency boards that are appointed, the less effective they are. Nevertheless, so long as the emergency board procedure is available, one side or the other will create the "emergency," and vested interests and their congressional allies will pressure for the appointment of a board. Rarely have public officials stood up against such clamor. The decision of the Nixon Administration to cease such appointments for the airline industry and the refusal of President Bush to be pressured into appointing a board for the current dispute on Eastern Airlines, and later vetoing a special commission to "investigate" that dispute, may be the only examples of refusing to yield to such pressure.[97]

The emergency board procedure, in addition to failing to resolve conflicts, has disrupted the collective bargaining process. To prepare for bargaining and to prepare for intervention require quite different approaches. If one expects intervention, as one must under the Railway Labor Act, it is often wiser to ask for more than expected and to yield nothing. Why bargain away anything that might be recommended by an emergency board? And why concede anything that might result in a higher platform from which neutrals will recommend concessions? As a result, the parties go through a ritual dance until after the emergency board has made its recommendations, and then they finally begin to bargain over increasing or altering these recommendations.

The Railway Labor Act procedure was designed to facilitate and to augment collective bargaining. Instead, it tends to stultify bargaining and to substitute a procedure that does not insure settlement. In this respect, emergency board procedure

96. *See* Leiserson, *Public Policy in Labor Relations*, 36 AM. ECON. REV. 336, 345 (1946).

97. In contrast to these actions, Congress forced the appointment of a board in O'Donnell v. Wien Air Alaska, Inc., 551 F.2d 1141 (9th Cir. 1977), by including this requirement in the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified in scattered sections of 49 U.S.C.), and the House of Representatives passed a measure ordering the President to appoint a board in the Eastern case. The Senate ceased action on the bill after the Eastern bankruptcy, but it was doubtful if passage would have occurred because of a promised presidential veto.

serves the public interest less than compulsory arbitration; both inhibit collective bargaining, as does all certain government intervention in the labor market, but compulsory arbitration at least affords a substitute method of settlement.[98] The Railway Labor Act's emergency procedure, on the other hand, not only fails to settle disputes, but it also invites further intervention. Unfortunately, Congress has regularly responded to "emergencies" with special legislation that, in turn, invites more disputes. Thus, the Act's emergency procedure has clearly failed to meet its purpose.

E. *Strike Comparisons*

Proponents of the Act may agree that all this is true, but then claim that the Act has avoided strikes. Yet this assertion belies the facts of congressional and presidential intervention as described above. Moreover, the strike record is not altogether exceptional, particularly in the present period when major strikes have, for reasons other than the Act, become increasingly infrequent. Nor is the record impressive in past periods of unrest, such as the 1940s and the 1960s, when substantial extra-legal government intervention and crisis legislation were required to prevent many more shutdowns in rail transport. Certainly, the Act has done little to ease, and probably has worsened, the upsets in air transport caused by the transformation of the industry from a regulated cartel to a competitive industry. With railroad industry employment continuing to shrink and many severe problems of labor utilization unresolved, and with the airline industry beset by numerous problems of ownership structure and control, a procedure that avoids bargaining and looks to special governmental intervention is likely to continue to create as many problems as it solves.

VI. The National Railroad Adjustment Board

Probably more than ninety-five percent of all collective agreements provide for the arbitration of disputes arising from contract interpretations. Such agreements also usually provide for the appointment of arbitrators by the parties or, if they cannot agree, selection from panels chosen either by the Federal

98. It should be noted, however, that this assumes the awards under compulsory arbitration will be enforced, something that often has not occurred in countries, such as Australia, where compulsory arbitration exists.

Mediation and Conciliation Service or a similar state agency, or by the private, nonprofit American Arbitration Association. Only in the railroad industry has Congress legislated the compulsory arbitration of such disputes and established agencies to arbitrate them, first the NRAB and later the Public Law Boards. These are the only administrative agencies in the private, federal, or state sectors that have been established "for the purpose of rendering judicially enforceable decisions in controversies arising out of the interpretation of contracts."[99]

The NRAB now consists of thirty-four members, one-half chosen by unions "national in scope," and one-half by carriers. It has four separate divisions, each of which operates as a separate board.[100] The First Division has jurisdiction over operating employees, the Second over shop employees, the Third over all nonoperating groups except shop, supervisory, and waterborne, and the Fourth over supervisory, waterborne, and miscellaneous groups. When a Division cannot agree on an interpretation, a referee is chosen to resolve the dispute, either by the parties, or if they cannot agree, by the NMB. Historically, the First Division decided about seventy percent of all cases and almost never agreed on a referee; the Second almost always agreed on a referee; the Third, occasionally agreed; and the Fourth, usually agreed. Nothing in the Act prevents the parties from arbitrating grievances before agreed-upon referees or boards, as substitutes for the NRAB or the Public Law Boards. Arbitration before alternatives to the NRAB has been done particularly when non-standard unions are involved, when commuter lines have been transferred from railroads to transit agencies, or because of the huge backlog accumulated by the First Division, which historically took a number of years before rendering its decisions.[101]

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99. Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 YALE L.J. 567 (1937).

100. Only the standard unions have representation on the NRAB, although in some cases such unions were seemingly less national, or at least no more so, than others. The Switchmen's Union of North America was declared "national in scope" although its jurisdiction was wholly within that claimed by the Trainmen, and its membership was small and concentrated on a few roads. Both these unions are now part of the United Transportation Union. The now non-existent Brotherhood of Sleeping Car Porters was for many years denied this certification by the Secretary of Labor but was finally so designated. It never succeeded in appointing an NRAB member, however, as the standard unions voted against it on this score.

101. For an analysis of the NRAB in the pre-Public Law Board era, see Northrup & Kahn, *Railroad Grievance Machinery: A Critical Analysis* (pts. 1 & 2), 5 INDUS. & LAB. REL.

Public Law Boards now have many of the submissions that were sent to the NRAB before 1966.[102] In 1970, following the merger of four operating unions to form the UTU, a dispute arose between that union and the Engineers about appointments to the First Division, which prevented any awards from being issued for sixteen months. Finally, Congress intervened. It reduced the number of First Division members from ten to eight and awarded two labor members each to the disputing unions.[103] Although the move recognized the reality of the railroads' situation, there still remains a serious question of whether the law should anoint a particular union (or carrier) as empowered to appoint personnel to a government agency.

A. *Procedure*

The bulk of contract interpretation cases are submitted to a Division of the NRAB by standard unions. Non-standard unions were historically denied the right to submit cases, despite the language of the Act.[104] The union representatives on the Board would vote not to accept cases from non-standard unions, the carriers would vote for acceptance, and a procedural deadlock would be created that originally (but no longer) was unresolvable. The Third and Fourth Divisions have eased up on this attitude toward cases from non-standard unions, but today it is of less practical importance—although not of less importance from a public policy viewpoint—because non-standard unions and carriers have established their own substitute machinery for contract interpretations.[105]

Neither notice nor a right to a hearing is given to any individual or organization that might be affected by the NRAB's interpretation other than the union or carrier involved in the dispute. This was legitimatized by the Supreme Court when it

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REV. 365 (Apr. 1952), 5 INDUS. & LAB. REL. REV. 540 (July 1952); Mangum, *Grievance Procedure for Railroad Operating Employees*, 15 INDUS. & LAB. REL. REV. 474 (1962).

102. *See infra* text accompanying notes 112-14.

103. *See* Pub. L. No. 91-234 (1970) (codified as amended at 45 U.S.C. § 152 (First) (h) (1982)).

104. The act refers to "disputes between an employee or group of employees and a carrier or carriers . . . ." 45 U.S.C. § 153 (First) (i) (1982).

105. The right of individuals to go directly to the courts where there is alleged collusion of labor or management in handling their grievances is defined in Glover v. St. Louis-San Francisco Ry., 393 U.S. 324 (1969); Czosek v. O'Mara, 397 U.S. 25 (1970); and Conley v. Gibson, 355 U.S 41 (1957). In addition, some appellate courts have expanded this right. *See* Casenotes, *Expanding Federal Court Jurisdiction of Railway-Labor Minor Disputes:* Richins v. Southern Pacific, 4 B.Y.U. L. REV. 913 (1980).

ruled that the law does not provide a right of representation at an NRAB or other minor dispute board hearing.[106]

The NRAB opinions are usually rather brief and sometimes not very instructive as to the details of the cases. Yet the divisions rely heavily on precedent, which often causes individual differences in carrier systems to be disregarded. One result of these paradoxical characteristics is an ongoing dispute, especially in the First Division, as to what constitutes precedent.

Like the NMB, the NRAB historically had little regard for the rights of black employees who were denied equal membership in most railroad unions. As a result, usually with the carrier members dissenting, awards declared jobs long held by blacks to be the "property" of unionized employees and, therefore, of white employees. Similar cases continued to be litigated in the courts for many years after the passage of the Civil Rights Act of 1964.[107]

Originally, judicial review of awards was permitted only if the losing party refused to effectuate the award. For years, the railroad unions avoided the courts and instead threatened to strike if an award was not put into effect. In addition, strike threats aimed at bypassing the NRAB altogether not only became common, but also in some years they were the leading cause of emergency boards being created. The threatening party simply invoked the Railway Labor Act's dispute resolution procedure and thus nullified the distinction between "major" and "minor" disputes.[108]

The courts, however, checked such actions by permitting the carriers to obtain injunctions against strikes over matters pending before the NRAB and by requiring that unions rely solely on NRAB procedures.[109] If the NRAB has issued a decision,

106. *See* Landers v. National Ry. Passenger Corp., 485 U.S. 652 (1988). For a list of prior cases in which NRAB decisions were collaterally attacked on due process grounds, see Northrup & Kahn, *supra* note 101, at 373-74. For an analysis of whether courts can still set aside awards on due process grounds, see Green & Rutledge, *The Federal Courts as Super-Arbitration Tribunals: Judicial Review of Non-Reviewable Railroad Labor Grievance Awards*, 37 LAB. L.J. 387 (1986). The fact that the divisions operate in secrecy without stenographic records, reporters, or other outsiders present, accentuates the problem of due process.

107. *See* H. NORTHRUP, *supra* note 28, at 66-71; Risher, *supra* note 28, at 149-163. For an ongoing case, see *Harvey v. United Transp. Union*, 878 F.2d 1235 (10th Cir. 1989) (remanded to district court for further proceedings), *cert. denied sub nom. United Transp. Union v. Blankenbaker*, 110 S. Ct. 1121 (1990).

108. *See* 16 N.M.B., ANN. REP. 24-25 (1950).

109. *See* Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30 (1957). The courts will not enjoin a strike if the case has not been submitted to the

the courts will enjoin a strike aimed at enforcing an award, making judicial review a real instead of an empty route.[110] The courts will also permit the issuance of injunctions in industry generally where a proposed strike would circumvent the arbitration process and a no-strike clause is in a labor agreement.[111]

The 1966 amendments to the Railway Labor Act make appeal to the courts a right both of the losing as well as of the winning party, and they materially reduce the ability of the courts to overturn awards. Using extra-legal methods rather than appeal to the courts is, therefore, much less desirable for the unions. The need for the courts to distinguish between major and minor disputes, however, is a difficult call for judges, as will be discussed below. Such judicial decisions determine, among other matters, management opportunities to gain injunctive relief, and in some cases they determine whether key management decisions may be made without union concurrence.

B. *Case Loads and Issues*

The case load of the NRAB, particularly the First and Third Divisions, has been exorbitant. Originally, the First Division accounted for eighty percent of the cases—70,000 between 1934 and 1970—but the Third Division caught up after so many potential First Division cases were sent to Public Law and voluntarily established boards following the 1966 amendments. The lead of the First Division in total cases, however, remains significant. As of September 1986, 86,493 cases had been docketed by the NRAB, approximately one-half by the First Division.[112]

This is, of course, not the whole story. In fiscal year 1985, 222 Public Law Boards closed 6,394 cases, and in the following year, 221 such Boards closed 4,857 cases.[113] The creation of

NRAB, a Public Law Board, or a board established by the parties, even though the matter is a minor dispute, but all the carrier has to do is to submit a case to gain this protection. *See* Manion v. Kansas City Terminal Ry., 353 U.S. 927 (1957).

110. *See* Denver and Rio Grande W. R.R. v. Brotherhood of R.R. Trainmen, 185 F. Supp. 369 (1960).

111. *See* Boys Market v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970).

112. *See* 52 N.M.B., ANN. REP. 68-69 (1986). The First Division, which had a backlog of over 4,000 cases in 1965, had reduced that backlog to 44 as of September 30, 1986. The Third Division, however, had a backlog of 1,101 cases in September, 1986 while the Second Division had a 472-case backlog then. The Fourth Division listed a backlog of 94 cases. *See id.*

113. *See id.* at 66.

these additional boards only led to many more cases,[114] a Parkinson's Law that could be defined as follows: If a board exists, sufficient cases develop to keep it more than busy. The annual number of cases received by Public Law Boards varies from four thousand to eight thousand; in addition, four hundred to one thousand cases may go to voluntarily established boards. In no other industry are there such case loads. Moreover, besides the quantity, the time to decide cases can take several years, thus exacerbating the problem.

The reasons for this tremendous grievance (minor dispute) load are several. Unions won the advantage initially, both in numbers of claims sustained[115] and in the nature of the decisions, which the late Professor Slichter termed "among the strangest in the annals of industrial relations."[116] The unions were able to establish the principle that each and every bit of work is "owned" by a craft or class of employees and that any deviation therefrom is at the carrier's risk. No matter how long a carrier had engaged in a practice of doing something differently, that carrier was liable—sometimes as far back as the 1920s—for deviating from a practice deemed correct by a referee and five union representatives who then made up a majority of the First Division. Thus through the NRAB, the unions were able to apply to the industry across the nation restrictive rules obtained on one railroad despite the wide variety of different conditions and history of bargaining that prevailed on many others. The carriers refused to concede precedential value to such restrictive rulings while the unions attempted to apply them as widely as possible, thus adding to case backlogs. Beginning in the 1960s, the carriers began to win the majority of rulings. They won partly because they had already lost on many basic issues and partly because they were better represented than heretofore; furthermore, some interpretations sought by the unions were simply beyond credibility. This, however, did not wipe out the backlog. The unions lost interest in the NRAB's First Division and won the right to force the establishment of Public Law Boards to which the backlog was transferred. Union officials still prefer sending cases to the boards

114. *See* Seidenberg, *supra* note 30, at 210-12.
115. *See* Mangum, *supra* note 101, at 490.
116. S. SLICHTER, UNION POLICIES AND INDUSTRIAL MANAGEMENT 195 n. 80 (1941).

than working to settle them; they believe that settling would disappoint some constituents.

What is required, of course, is a will to solve some of the great problems of this industry in which employment at less than 250,000 today is one-fourth of what it was in 1950 and one-eighth of the total in 1920.[117] The carriers still need relief from oppressive work rules, and unions will undoubtedly continue to shrink in size and to seek mergers to survive. Most decisions, however, continue to be made by following the path of the past and ignoring the needs of the future, or by seeking government "solutions" that often worsen the problems at hand. The failure to settle contract interpretations (minor disputes) at the local level, where most of them should be settled, is just one aspect of the total problem.

C. *Changes Required*

Two changes would significantly alter the number and character of minor disputes among the railroads, carriers, and unions: (1) establishing a method of selecting referees independent of the NMB, and (2) requiring the parties to pay for their dispute resolution.

Relieving the NMB of its duty to appoint referees when the parties cannot agree would improve the fairness of the grievance process. An examination of the lists of so-called neutrals selected by the NMB reveals that many of them are selected by the parties much, perhaps most, of the time. The NMB, however, frequently selects a few whom the parties rarely pick. Discussions with railroad executives have confirmed that these latter referees are objectionable to the carriers. Yet the NMB continues to designate them to arbitrate not only minor disputes, but also major disputes pursuant to the Act's arbitration process.

Arbitration personnel that are unacceptable to one party should not be repeatedly inflicted upon that party. It would be preferable, therefore, to give the arbitration appointment power to another government body such as the Federal Mediation and Conciliation Service. It would be better yet to privatize the arbitration by turning over the function to the private, non-

117. Railroad employment data are issued annually by the U.S. Interstate Commerce Commission. In addition, these data are now also published in convenient form by the Eno Foundation for Transportation, Inc., Westport, Conn.

profit American Arbitration Association, which performs this activity under thousands of labor agreements in private industry. Having the American Arbitration Association select arbitrators under the Act would be perfectly consistent with the second basic reform required to force the railroad unions to reduce their litigiousness.

The single most significant factor that forces unions and managements in other industries to settle their disputes over contract interpretations is absent from the railroads: fiscal responsibility. Only in the railroad industry does the taxpayer financially support grievance adjustment. "An arbitration rate of one per year for every 220 employees would bankrupt most local unions and would be a serious financial burden to most international unions and employers at the usual cost of private arbitration," commented one author in 1962.[118] Since then, employment has declined at a faster rate than grievance loads. The NRAB and Public Law Boards cost local and national unions and carriers nothing except the salaries of their representatives on the divisions and boards. All other costs are met by the taxpayers, who pay out more than one million dollars per year to support a grievance load that would surely be materially reduced if the parties paid their own way. In 1988, the NMB actually proposed that the parties pay for grievance adjustment, but it took no action to bring about this change.[119] To compel the parties to do what every other industry does is surely both equitable and sensible.[120]

D. *Airline Grievance Settlement*

The Railway Labor Act would permit the establishment of an air transport national board modeled upon the NRAB if the

118. Mangum, *supra* note 101, at 499.

119. The Board issued a release stating that it was requesting comments on this issue. Apparently nothing was done.

120. One arbitrator has advocated that the solution for the NRAB case load is more funding. *See* Vernon, *Public Funding for the Arbitration of Grievances in the Railroad Industry*, 38 ARB. J. 22 (1983). Except for increasing work for arbitrators, it is difficult to see the rationale for this, especially for taxpayers who can well ask why they should support such lack of responsibility in one industry. At the same forum, a spokesmen for the railway unions supported public funding on the grounds that otherwise it would "cause valid grievances to be abandoned." Fletcher, *Backlog Not the Issue—Public Funding Is; User Fees Questioned*, 38 ARB. J. 34 (1983). A spokesman for the carriers stated that railway management had "for many years favored the sharing of costs for grievance arbitration in lieu of public funding." Hopkins, *Public Funding Not the Issue—Backlog Is; Cost Sharing Supported*, 38 ARB. J. 38 (1983).

NMB found such an action to be supportive of the Act's purposes, but there has never been any interest by unions or carriers in this industry to support such a move. Airline unions and carriers establish their own arbitration systems, usually tripartite boards, which are called adjustment boards using the terminology of the Act, but which function generally as arbitration panels do in most industries. These boards are separate for each carrier and, within each carrier, separate for each craft or class. The decisions are final and binding, and they are subject to the same limited, judicial review as decisions of arbitration boards generally, as well as those of the NRAB and other railroad boards.[121]

In sharp contrast to the railroad situation, airline adjustment boards are financed, as well as created, by the parties. It should come as no surprise, therefore, that these boards do not have either serious backlogs or enormous delays for cases to be decided. One need look no further than the airlines to find sufficient proof that the cure for the case load deluge in railroad grievances can be obtained by forcing the parties to pay for their own excessive use of the process.

Although the adjustment of grievances in the airline industry is a privately financed process, the distinctions between major and minor disputes and the legalities affecting each have followed the lead of the railroad industry.[122] Thus, strikes involving disputes that are before an airline adjustment board, or in a case involving a board, are subject to the same injunctive process as those in the railroad industry.

VII. Representation Issues

The 1934 amendments to the Act added section 2, ninth, which requires the National Mediation Board to investigate representation disputes and to determine, by secret ballot or other means, which organization or individual, if any, represents a "craft or class."[123] By requiring that the bargaining unit be a craft or class, Congress not only limited both the discretion of the NMB to define the bargaining unit and the freedom

121. *See* 45 U.S.C. § 153(p), (q) (1982).

122. There are other major-minor dispute distinctions of importance that are reserved for discussion in the unfair labor practice section below. *See infra* text accompanying notes 233-38.

123. 48 Stat. 1185, 1188-89 (codified at 45 U.S.C. § 152 (1982)).

of employees to organize on the basis of other characteristics, but also inhibited change in many situations where technological development bypassed the status quo in industrial organization. Except for specifying that the principle of majority rule should govern, Congress left the procedure and methods for choosing bargaining agents, as well as the definition of "craft" or "class" to the NMB.

Despite the high degree of unionization both in the railroad and the airline industry, the NMB has decided about about forty to sixty cases per year involving representation matters during the last two decades. A majority of these are in the airline industry where mergers, new carriers, changes in ownership, and raiding by the Teamsters Union prior to its reaffiliation with the AFL-CIO in 1988 all contributed to the caseload. In addition, the decline of employment in the railroad industry has led to representation disputes among rail unions vying for members who are often outside their traditional jurisdictions.

A. *Defining Craft or Class*

Initially, the NMB was careful to define "craft" or "class" to suit the jurisdictional claims of the standard railway unions.[124] The more obvious and questionable example of such biased action was that the NMB placed all clerical employees, freight handlers, and station and store employees into one bargaining unit, apparently because this bargaining unit was under the jurisdiction of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, and Station and Store Employees.[125] In addition to aiding this union, then the largest of the nonoperating group, to eliminate rivals, this grouping placed the predominantly black redcaps and station porters in a union that, until the 1950s, confined blacks to auxiliary local unions with no

124. This section draws on earlier studies, including Northrup, *The Appropriate Bargaining Unit Question under the Railway Labor Act*, 60 Q. J. ECON. 250 (1946); Kaufman, *Representation in the Railroad Industry*, 6 LAB. L. J. 437 (1955); Risher, *Selection of the Bargaining Representative under the Railway Labor Act*, 17 VILL. L. REV. 246 (1971); and Eischen, *Representation Disputes and Their Resolution in the Railroad and Airline Industries*, in THE RAILWAY LABOR ACT AT FIFTY 23, 35 (C. Rehmus ed. 1977).

125. This union changed its name to the Transportation & Communication Union in 1988. Prior thereto, it also included express employees. It altered its name by eliminating "Steamship" and adding "Airline" after a successful endeavor to organize employees in the latter industry, which ended in the 1970s and 1980s as it lost bargaining rights to other unions. *See* Northrup, *supra* note 124.

rights to handle their own negotiations or to have a voice or vote in union affairs.[126]

When the airline industry was placed under the Act in 1936, the NMB was faced with determining bargaining units for which there was little organizational precedent. At first, it seemed determined to copy the units of the railroads despite clear operational differences. Thus, in an early case it set forth a unit that mirrored the jurisdiction of the Railway Clerks. The opinion in this case took a meandering course before finally arriving at a decision for which there was no other basis than railroad experience.[127]

The attempt of the NMB to group the airlines' fleet service personnel, passenger service employees, stores employees, and clerical and office employees (including reservation office employees) into one unit raised a plethora of protests in which unions, companies, and outside observers all joined. Fleet service and stores employees are associated more with ground service personnel, including mechanics, than with clerical staff. Clerical and passenger service employees are unlikely to be closely associated, and today they are often in different locations.

The NMB failed to account for these and other differences that distinguish the groups. The result was that the NMB did not have unanimous union support for determining units on the basis of union jurisdiction, as it initially did with the railroad unions, because union jurisdiction in the airlines was more fluid than in railroads. As a consequence, the Board has been modifying the original decision pertaining to clerical and other groups in the airline industry since it was first issued in 1947. It has permitted smaller groups to be certified as a class and has combined fleet service or stores with the mechanical and other ground services. Currently, the NMB will separate (upon union demand) skilled mechanics from other ground

126. Blacks were given more opportunities in the unions only after the unions were pressured by New York's anti-discrimination legislation.

During this period, the redcaps had a union of their own, the United Transport Service Employees, which was affiliated with the Congress of Industrial Organizations. *See* H. NORTHRUP, *supra* note 28, at 82-92. NMB racial policies have been defended by Charles M. Rehmus in Rehmus, *The First Fifty Years—And Then?*, in THE RAILWAY LABOR ACT AT FIFTY 241, 244-45 (C. Rehmus ed. 1977), an NMB-sponsored publication, on the grounds that it prohibited bargaining units drawn on racial lines and in general was no worse than other agencies. The record, however, indicates something different.

127. *See* National Airlines, 1 N.M.B. 423 (1947).

service employees.[128]

B. *Definition of an Employee*

Unlike the Taft-Hartley Act, the Railway Labor Act includes "subordinate officials" as employees. Many of these personnel were unionized before the Act was passed. Some, like the railroad yardmasters, have historically had unions of their own. Others, such as maintenance-of-way foremen, are included in regular craft or class unions and play a prominent role therein. As a result, such personnel are in a position to be both the supervisor and union official over a group. Prior to the enactment of civil rights legislation, the Brotherhood of Maintenance-of-Way Employees confined blacks to powerless auxiliary unions; freedom of association for blacks was severely curtailed by union officials who were also supervisors. The NMB took no cognizance of the potential for unfair treatment, however, and it has always placed supervisors and laborers of this nonoperating group in the same bargaining units.[129]

Again, unlike the Taft-Hartley Act, the Railway Labor Act provides no requirement that guards (usually termed "patrolmen" on the railroads) be designated as a separate unit or that their unions not be affiliated with unions or federations of rank-and-file workers. Guards are usually placed in separate units under the Railway Labor Act, but their largest unit, which was once independent, has merged into the clerks' organization.

Professional employees likewise enjoy no special status under the Railway Labor Act insofar as bargaining units are concerned. The published records do not indicate that significant controversies have occurred concerning these employees.

C. *Eligibility to Vote*

Unlike the NLRB, the NMB does not make economic strikers ineligible to vote in representation elections after the strike lasts one year. Rather, the NMB permits both strikers and those who replace them to vote so long as the strikers express a willingness to return to the job.

The NMB's representation manual states that its policy re-

128. *See* Trump Shuttle, Case No. R-5938, 17 N.M.B. — (1990); *see also* EISCHEN, *supra* note 124, at 61 (a good account of the NMB's stumbling approach to this problem, which has continued to date).

129. *See* H. NORTHRUP, *supra* note 28, at 92-96.

garding the eligibility to vote is to examine whether the employees have a "reasonable expectation of continued employment in a class or craft."[130] If the answer is affirmative, such absent employees are generally permitted to vote. If an employee has been discharged but is appealing the termination, the employee is permitted to vote; but if the discharge has been sustained by an arbitration panel or court, the policy is not to permit the employee to vote.[131]

The NMB, however, has varied from its stated eligibility policy in specific cases. In the USAir case described below,[132] the Board refused to count the ballots of 197 employees who transferred into the unit before the election on the ground that 197 votes were negligible in a unit of 3,700. After the Teamsters won by only four votes, the Board refused to reconsider its ruling.[133]

In a Trans World Airlines case, several unions sought to represent a passenger service while flight attendants were on strike. About 300 passenger service agents were temporarily working as flight attendants while simultaneously maintaining their passenger service seniority and planning to return to their former jobs. The Board's rules provide that only those working "*regularly* in another craft or class on the same airline will be considered ineligible to vote";[134] it nevertheless held these employees ineligible to vote as passenger service agents. The Machinists union won by eighty votes.[135] When the airline appealed to the courts, claiming that the NMB's ruling was attributable to bias against the carrier, the court stated that "there is no statutory duty of neutrality."[136]

At Virgin Atlantic Airlines, the Teamsters won an election with twelve votes in a unit of twenty-one persons, including employees who were discharged and appealing their discharges in court. Before the ballots were counted, the court sustained the discharges and the NMB was so notified. Nevertheless, the Board counted the votes of these four.[137] On appeal, a district

130. NMB REPRESENTATION MANUAL § 5.302 (1989).
131. *See id.*
132. *See infra* text accompanying notes 157, 198-200.
133. *See* USAir, Inc., 16 N.M.B. 85 (1988).
134. NMB REPRESENTATION MANUAL § 4.303 (1989) (emphasis added).
135. *See* International Ass'n of Machinists v. Trans World Airlines, Inc., 839 F.2d 809 (D.C. Cir. 1988).
136. *Id.* at 812.
137. *See* Virgin Atlantic Airlines, 15 N.M.B. 179 (1988).

court set aside the Board's certification.[138]

D. *Carrier-Wide Units Only*

From its inception, the NMB has ruled that it will find only carrier-wide units of a craft or class appropriate.[139] This rule has its advantages in that it prevents a carrier from being shut down by a strike on one of its stations or by a local group, and it limits potentially disruptive union rivalry. Yet as a result of the craft or class limitation, small units still may bring a carrier to a halt, particularly if other unionized employees respect the striking union's picket line. Moreover, the motivation for the NMB's carrier-wide rule was consistent with its policy of defining the bargaining units on the railroads to fit the jurisdictional claims of the standard unions. The failure of Congress to limit the discretion of the NMB and the almost complete divorce of NMB representation actions from court review[140] have resulted in a serious limitation on freedom of association.

All local unions were forced to compete carrier-wide against the standard unions, and as a result they were almost completely eliminated within a few years after the 1934 amendments became law. As the late Judge (later Justice) Rutledge stated in a dissenting opinion: "The result of the election is, in these circumstances, a foregone conclusion. . . . This is but a policy of compulsory liquidation of the small bargaining units."[141]

Another disadvantage of the carrier-wide determination of bargaining agents to the exclusion of all other units is that it permits one concentration of employees at one location to determine the bargaining agent for all employees in a craft or class. This carrier-wide determination is particularly disadvantageous in the airline industry. For example, the NMB places mechanics and related employees of an airline's modification center and all mechanics and related ground service personnel stationed at various airports in the same units. Once a union

138. *See* Virgin Atlantic Airways v. National Mediation Bd. and Int'l Bhd. of Teamsters, Civ. No. 88-3163 (E.D.N.Y. 1989).

139. *See* Texas & Pac. Ry., 1 N.M.B. 195 (1941). The Board reasoned in this case that it had no authority to split a carrier or to combine two or more carriers in defining a bargaining unit. It is difficult to find support for such reasoning in an Act that appears to give the NMB such wide discretion.

140. *See infra* text accompanying notes 214-21.

141. Switchmen's Union of N. Am. v. National Mediation Bd., 135 F.2d 785, 797 (D.C. Cir. 1943) (Rutledge, J., dissenting), *rev'd per curiam*, 320 U.S. 297 (1943).

has organized the center's eligible employees, and perhaps those at one airport hub, it makes no difference what those in smaller units desire.

Such policies can be defended by the NMB on the grounds that it encourages stability and, therefore, labor peace. The policy is understandable in view of the Board's prime concern as a mediation agency: the maintenance of peaceful collective bargaining. It is, nonetheless, questionable public policy to anoint a group against competition, and it fails to serve employees, who deserve much more freedom to associate with organizations of their choosing. The basic mistake of the Railway Labor Act was to give the NMB both a mediation function and an adjudication function for determining the outcome of representation disputes. The two functions are fundamentally incompatible.

This subversion of the representation of employees by the mediation function of the NMB is both illustrated and worsened by the fact "that the NMB has no specialized representation personnel and that mediators . . . [are] assigned to investigate and report to the Board in representation disputes."[142] These agents rely upon mediation if at all possible to solve problems, but the views of some key interests are not heard either formally or informally because neither non-organized employees at any time nor carrier representatives, except in merger matters, are permitted to be parties to the issues in representation matters.[143]

E. *Inequities of Craft or Class Requirement*

All this returns to the basic question of why Congress chose to institutionalize what is certainly a very unsatisfactory status quo ante in the railroad industry by confining the unit to a craft or class. The sharp decline of employment in the railroad industry and the changing character of jobs as a result of automation have greatly altered the craft and class structure since 1934. In the shops, for example, the boilermaker and blacksmith crafts have all but disappeared; yet remnants of these unions continue to exist, sometimes with one-person bargaining units, which the NMB, in contrast to the NLRB, continues to

142. Eischen, *supra* note 124, at 31.
143. *See infra* text accompanying notes 188-92.

certify.[144] Such positions as telegraphers, brakemen, and firemen on diesels have either passed from the scene, radically changed, or are substantially reduced as a proportion of the total employment. To continue such groups as separate bargaining units maintains a structure that cannot be economically justified and actually is unlikely to contribute to industrial peace.

Even more unfortunate than the practice of separating employees according to outdated distinctions has been the imposition of the railroad craft and class structure on the airlines. The NMB created bargaining units in the airline industry that often did not represent the desires of the parties. This action was foreshadowed by the manner in which the NMB obliterated the bargaining by industrial units that had been established and practiced on electric railways by the carriers and the Amalgamated Transit Union. "In these cases the Board upheld the petitions of raiding craft unions and voted the employees by traditional steam railroad crafts or classes. . . . This was an indication of what was to come after the Act was extended to cover the airline industry."[145]

F. *Mergers and Acquisitions*

Mergers and acquisitions have a significant impact on the representation of employees. Following a merger or acquisition, a determination must be made about whether one or more carriers remain in existence, and if one, which one. Mergers and acquisitions also present difficult problems in industrial relations because they can mean the elimination of some bargaining units and long-term relationships. For the NMB, these problems are especially serious because mergers can pit one union against another. Nevertheless, the manner in which the Board defines a carrier can be advantageous to a union that is dominant in one of the merger partners but lacks employee support in the other.

From its inception, the NMB has ruled that when one carrier takes over another, a new single carrier is assumed to exist unless it can be shown that the merger partners continue to oper-

144. Such bargaining units, for example, are found in shops of commuter railroads.

145. Eischen, *supra*, note 124, at 35. Most of these electric railways have disappeared (perhaps hastened by the imposition of the craft and class structure) basically because of the competition of the automobile.

ate entirely separately. This is necessary, the Board ruled in an early case, because it "has no discretion to split a single carrier or combine two or more carriers for the purpose of determining who shall be eligible to vote for a representative of a craft or class . . . ."[146] This interpretation of the Act apparently stems from the fact that Congress declined to insert a provision in the 1934 amendments *compelling* the NMB to find less than carrier-wide units appropriate. In other words, the Board's position is that because Congress did not prescribe a particular unit, it proscribed it! Justice Rutledge commented, "I think that Congress was as far from commanding that all less than carrier-wide units be ousted as it was from concreting all units in the contract mold of 1934."[147]

As the merger problems have grown more common and severe, the NMB has laid down more explicit policies. In 1987, after a public hearing and comments, the NMB issued a policy to govern "Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Airline Industry."[148] Essentially, it required that carriers should file with the Board a copy of their merger applications filed with the Department of Transportation; unions are required to file a showing of thirty-five-percent interest in a craft or class, based upon authorization cards, if there is a question of representation.[149] Moreover, in this instance, carriers were given the right to invoke the Board's services for a determination of the post-merger status of any NMB certifications, which is a right unique to mergers under the NMB procedure.

This procedure was adopted following the NMB's experience in a number of mergers, including especially the TWA-Ozark merger.[150] Where the merger partners continue to operate as separate companies, the NMB permits the certifications of craft or class on each to stand; it also permits them to remain until the operations are merged if the merged companies temporarily operate separately. When the operations are merged, however, the craft or class unit is to be designated as the entire merged company. This means that the unit in the smaller

146. New York Cent. R.R., 1 N.M.B. 197, 209 (1941).
147. Switchmen's Union of N. Am. v. National Mediation Bd., 135 F.2d 785, 797 (D.C. Cir. 1943) (Rutledge, J., dissenting), *rev'd per curiam*, 320 U.S. 297 (1943).
148. 14 N.M.B. 388 (1987).
149. *See* 29 C.F.R. § 1206.2(b) (1989).
150. *See* 14 N.M.B. 218 (1987).

merged partner is "extinguished," although an election can be held if a union challenging the result can garner authorization cards or other proof that it has the support of at least thirty-five percent of the employees in any merged unit. This policy was followed in a number of cases with the airlines,[151] including the Delta-Western merger. Because Delta operates nonunion except in the pilot and dispatcher crafts, merger meant the elimination of most unions at Western.[152]

The NMB has also adapted this merger policy to railroads in a key case in which one railroad took over another.[153] A number of railroads had complained that they were required to deal with separate bargaining units that no longer existed, and they had requested that such units be combined in the same manner as the railroad operations.[154] In such cases, union rivalries may or may not exist; the problem for carriers was primarily the continued requirement to deal with numerous union officials for what had become, through mergers and changed structures, combined bargaining units.[155] The NMB alleviated this problem by instituting the merger policy with minor changes for railroad employees on November 27, 1989.[156]

G. *The USAir-Piedmont Merger Case*[157]

The Board's new merger policy with regard to the airlines

151. *See, e.g.*, Braniff, Inc.-Florida Express, Inc., 15 N.M.B. 294 (1988); British Airways-British Caledonian Airways, 16 N.M.B. 17 (1988); Delta Airlines-Western Airlines, 14 N.M.B. 291 (1987).

152. The agreements of Western Airlines with some of its unions provided that in the event of an unfriendly takeover, Western would require the acquiring company to assume its labor contractual obligations. The Ninth Circuit enjoined the merger on the grounds that the union contracts barred Delta's merging the airlines until it either followed Western's contracts or submitted the matter to arbitration. Justice O'Connor stayed this ruling, and then the Supreme Court vacated and remanded it to the court below with instructions to consider whether the case was moot because most Western employees were offered jobs at Delta at higher wages than provided in their union contracts. Delta had appealed the Ninth Circuit decision on the grounds that Western no longer existed and that the litigation was a means of circumventing the NMB, which has exclusive jurisdiction over representation matters. *See* Delta Airlines v. International Bhd. of Teamsters, 484 U.S. 806 (1987).

153. *See* Missouri Pac. R.R. (Union Pacific), 15 N.M.B. 95 (1988).

154. *See* NMB Notice, NMB File No. C-6230 (Sep. 7, 1988) (sent to all carriers and unions on the railroads).

155. Conrail, which is not now involved in any of these cases, had 278 separate local agreements, including 42 with the Brotherhood of Railroad Trainmen (now part of the UTU). It has reduced these agreements to 17, but the UTU still has 10 general chairmen (equivalent to local union presidents) with whom Conrail must deal on its property. Interview, Conrail Labor Relations Department (Sept. 26, 1980).

156. *See* 17 N.M.B. No. 13 (1989).

157. 16 N.M.B. 412 (1989).

was not long in effect before it was modified in two cases decided in August 1989. USAir and Piedmont merged. These carriers were close in size, and the Teamsters had recently won certification as bargaining agent for some of USAir's ground-service employees in a close and questionably processed election.[158] The union had the support of less than a majority of the workers in the class. Piedmont's employees in this class were unrepresented.

Because USAir was slightly larger than Piedmont, the Teamsters requested that it be certified for the new merged class. The carrier requested an election and invoked the NMB's services pursuant to the merger policy. All other crafts were previously represented by the same unions or were nonunion except the dispatchers, who had been organized at Piedmont by the Transport Workers Union (TWU), but in an election, this craft voted not to be represented.

The NMB found that it could not ascertain a system-wide majority in the disputed classes and, therefore, ordered elections for that purpose in the merged ground-service and dispatchers units.[159] It further provided that the certifications would remain in effect until the election even though the TWU had represented the dispatchers only in the slightly smaller Piedmont unit. The decision was based upon a Federal Express-Flying Tiger opinion that was issued on the same day.[160] In the ensuing election, only 2,317 of the 8,002 ground-service employees eligible voted for the Teamsters.[161]

H. *Federal Express-Flying Tiger Case*

In late 1988, Federal Express purchased the air cargo concern, Flying Tiger, and in August 1989, merged it into its organization, at which time Flying Tiger ceased to exist as a separate entity. Federal Express operated nonunion, and it notified the NMB that, with the exception of flight attendants, the Flying Tiger unionized crafts should have their certifications extinguished as of the merger date. ALPA strongly objected and even wanted certification based upon the total number of

158. *See infra* text accompanying notes 199-201; *supra* text accompanying note 133.
159. *See* U.S.Air, Inc. and Piedmont Aviation, Inc., 16 N.M.B. 412 (1989).
160. *See* 16 N.M.B. 433 (1989).
161. *See Teamsters Fail to Win Majority Support Among U.S. Air Fleet Service Workers*, DAILY LAB. REP. (BNA) No. 21, at A-9 (Jan. 21, 1990). The NMB had not issued its determination on Teamster election protests as of mid-May 1990.

Flying Tiger pilots plus authorization cards from any Federal Express employees that it could garner. The Machinists generally supported the ALPA view. The Teamsters, representing flight attendants at Flying Tiger, wanted their certification to be maintained for the merged operation because Federal Express, prior to the merger, had no persons in this class.[162] Federal Express agreed to honor the terms of the Teamster contract. Federal Express had about 70,000 employees prior to the merger; Flying Tiger had 6,500. The pilot employment, however, was much closer: 1,064 at Federal Express and 933 at Flying Tiger. In all other crafts and classes, the pre-merger Federal Express numbers were substantially larger than those at Flying Tiger.

As a result of the merger, the Board terminated all certifications on the former Flying Tiger company except those of pilots and flight attendants. The Machinists and the Teamsters may request elections in several categories if a thirty-five-percent showing of authorization cards can be obtained. The NMB ruled, however, that the numbers in the pilot category were too close to extinguish the certification and ordered an election while simultaneously requiring that ALPA certification be maintained. Thus the NMB modified its merger policy of extinguishing the certification of the smaller group soon after its issuance.

Although there is clearly a rationale for the Board's decisions in the Federal Express and USAir cases, there seems to be little doubt that the Board did "Muddle Rules On Union Role After Mergers," as a leading industry journal headlined its story.[163] Interestingly, the Flying Tiger pilots who integrated into Federal Express were already put under the merged company's personnel policies, which included salary increases that could have been as much as forty percent above their former rates.[164] Federal Express termed the Board's decision "unprecedented." Others termed it "a back-door way to keep the pilots' union alive."[165] The NMB's response to criticism was that it was "not willing mechanically to apply this rigid principle, par-

162. Flying Tiger used flight attendants for a special contract that it had with the military to ferry forces.

163. Ott-Washington, *Board Decisions Muddle Rules on Union Role After Mergers*, AVIATION WEEK & SPACE TECH., Aug. 28, 1989, at 68.

164. *See id.*

165. *See id.*

ticularly when the numbers are in doubt."[166] In an election held on October 26, 1989, ALPA received only 709 votes, of the 2,022 eligible pilots, thereby effectively eliminating it from the merged corporation.[167]

I. *The Delta-Western Flight Attendants' Case*

The Railway Labor Act merger situation was further muddled by the decision of the Court of Appeals for the District of Columbia Circuit in *Association of Flight Attendants v. Delta Air Lines, Inc.*[168] The court ruled that if the flight attendants claimed that Delta must continue to honor Western's agreement with former Western flight attendants now working for Delta, their claim was a representation dispute not subject to appeal; but to the extent they sought only damages for breach of a successor clause, their claim could proceed to arbitration. The court suggested that a union could recover damages if it loses representation rights; yet representation rights belong to employees, not to the union per se. Other circuits have generally refused to exercise jurisdiction over contract survival questions because of the presence of representation issues.[169] Delta's appeal to the Supreme Court was denied.[170]

Because of this decision, unions will be encouraged to seek to enjoin mergers pending successorship clause arbitrations. Injunctions have been granted in several Railway Labor Act cases, but such injunctions had not been significant to date.[171]

J. *The Eastern-Continental Single Carrier Case*[172]

In early 1988, the Machinists, ALPA, and the TWU representing the ground force, pilots, and flight attendants, respec-

166. *See id.*

167. *See ALPA Fails to Gain Majority Support Among Federal Express Corp. Pilots*, DAILY LAB. REP. (BNA) No. 208, at A-6 (Oct. 30, 1989).

168. 879 F.2d 906 (D.C. Cir. 1989).

169. *See, e.g.*, Teamsters v. Texas Int'l Airlines, Inc., 717 F.2d 157 (5th Cir. 1983); Teamsters v. Western Air Lines, Inc., 854 F.2d 1178 (9th Cir. 1988).

170. *See* Association of Flight Attendants v. Delta Air Lines, 879 F.2d 906 (1989), *cert. denied*, 58 U.S.L.W. 3628 (U.S. Apr. 3, 1990) (No. 89-459).

171. For a full discussion of this issue, together with relevant case citations, see 1 RLA UPDATE 1 (Nov. 1989). This is a new publication by the law firm Akin, Gump, Strauss, Hauer & Feld, Washington, D.C. Key cases at odds with the Delta-Western merger case include Flight Eng'r Int'l Ass'n v. Pan Am. World Airways, 716 F. Supp. 110 (S.D.N.Y. 1989); and Independent Union of Flight Attendants v. Pan Am. World Airways, 664 F. Supp. 156 (S.D.N.Y. 1987), *aff'd*, 836 F.2d 130 (2d Cir. 1988).

172. 15 N.M.B. No. 40 (1988).

tively, at Eastern Airlines filed a series of cases with the NMB, asking the Board to declare that the two carriers were a single carrier within the Board's rules.[173] The net effect of an affirmative ruling prior to the Eastern strike would have been to cause the employees at Continental, where there were no union contracts, to be brought within the bargaining jurisdiction of the unions because at that time Eastern had considerably more employees in each of these classes than did Continental. The filing materials in the case, the union arguments, the NMB's procedure, and the rulings of the hearing officer were all highly unusual. In a previous case, the court had ruled that only the NMB has the authority to determine whether two subsidiaries of one holding company are to be treated as a single carrier,[174] and in doing so here, the NMB applied the same policy to this issue that it did to mergers and acquisitions.

In their filing, the unions failed to present any evidence of a thirty-five-percent showing of employee interest on Continental Airlines as required by the NMB's rules.[175] Without such a showing of interest, the NMB had dismissed cases previously[176] and the Second Circuit had ruled that the Board lacks authority to conduct an inquiry.[177] When the companies sought to dismiss the actions, the NMB either rejected the motions without explanation[178] or took them under advisement and thus far has failed to respond to them.[179] When the companies demanded to see proof of the unions' showing of interest at Continental, the hearing officer ruled that such materials were "confidential," even though no individual signature cards were requested.

The union case was built around a theory that Texas Air's control over both Eastern and Continental prevented the un-

173. *See id.* at File Nos. CR-6053-59, CR-6061, CR-6066, and CR-6067. The author had full access to the documents, transcript, briefs, etc., in this case as he served as an expert witness for Texas Air Corporation in this unresolved litigation. The transcript for this case will hereinafter be referred to as Eastern-Continental transcript.

174. *See* Air Line Pilots Ass'n v. Texas Int'l Airlines, 502 F. Supp. 423 (E.D.N.Y. 1980), *aff'd*, 656 F.2d 16 (2d Cir. 1981).

175. It is, of course, no surprise that the unions could not obtain a showing of interest on Continental because the workers there had crossed picket lines in union-called strikes in the early 1980s, and they had consistently failed to support union organizing drives since then.

176. *See* Trans-America Airlines, 12 N.M.B. 64 (1985).

177. *See* International Assn. of Machinists & Aerospace Workers v. Alitalia Airlines, 753 F.2d 3 (2d Cir. 1985).

178. *See* International Ass'n of Machinists, 15 N.M.B. 111 (1988).

179. *See id.*; International Ass'n. of Machinists, 15 N.M.B. 69 (1988).

ions from having "a level playing field" and, as a result, they were disadvantaged.[180] This theory was buttressed by claims that Texas Air was hurting Eastern by transferring routes, assets, and programs to nonunion Continental and otherwise favoring the latter carrier over the former. The unions also claimed that both airlines were effectively operated by Texas Air chairman Frank Lorenzo and that plans existed for further combinations between the two airlines in addition to combined ticket offices in some locations and combined frequent flyer plans.

To strengthen their case, the unions successfully sought and won the right to include in the record other litigation between the parties and the accompanying voluminous records. These included litigation over the closing of Eastern's Kansas City hub—which was at first enjoined by a district court but quickly reversed on appeal[181]—and litigation involving the sale of Eastern's "shuttle" to the Trump concern, in which the union position was also rejected by the courts.[182] The carriers pointed out that these matters were outside the purview of the NMB, which has no authority to remedy such wrongs even if they exist,[183] and that both the Department of Transportation and the District of Columbia Circuit Court had found the union allegations to be without foundation.[184]

When considering the question of whether two related carriers are a single entity under the Railway Labor Act, the NMB policy provides that it will examine operations policies and methods, how the carrier presents itself to the public, and the management of the two carriers, especially its labor relations.[185] Although the unions claimed that Eastern was abandoning flight operations and that Continental was then taking

180. The testimony of Harry Duffy, President of ALPA, and the post-hearing briefs of the unions all stress this point. *See* Testimony of Harry Duffy, Eastern-Continental Transcript, *supra* note 173, at 160 (May 31, 1988).

181. *See* Air Line Pilots Ass'n, v. Eastern Airlines, 863 F.2d 891 (D.C. Cir. 1988).

182. *See* Air Line Pilots Ass'n v. Eastern Airlines, 701 F. Supp. 865 (D.D.C. 1988), *aff'd without opinion*, 889 F.2d 291 (D.C. Cir.).

183. *See, e.g.*, Ruby v. American Airlines, 323 F.2d 248, 256 (2d. Cir. 1963), *cert. denied*, 376 U.S. 913 (1964); Chicago & N.W. Ry. v. United Transp. Union, 402 U.S. 570, 581 (1971); Detroit & Toledo Shore Line R.R. v. United Transp. Union, 396 U.S. 142, 158-59 (1969).

184. *See* Department of Transportation, *Preliminary Investigation of Texas Air Corporation and Its Subsidiaries: Report to the Secretary of Transportation*, Order No. 88-4-79 (Apr. 28, 1988); Department of Transportation, *Order Denying Petition of ALPA to Institute A Continuing Fitness Investigation of Eastern Airlines, Inc.*, Order No. 88-12-30 (Dec. 14, 1988).

185. *See* TWA-Ozark, 14 N.M.B. 218, 236 (1987).

them over, the record in the NMB case and the findings of both the Court of Appeals for the District of Columbia Circuit and the Department of Transportation showed little or no basis for such allegations. Eastern has been primarily a north-south carrier concentrated on the East Coast, with major hubs in Miami, Atlanta, and New York; Continental continues to be primarily an east-west carrier concentrated west of the Mississippi River with major hubs in Houston, Denver, and Los Angeles. Only about five percent of Continental's and Eastern's operations overlap in the same markets.

Each carrier is operated separately by its own management. The common owner, Texas Air, sets policy in broad terms but does not interfere in day-to-day operations, as is typical with any "double-breasted" operation.[186] Labor relations are separately conducted by the staffs of each carrier, and indeed the culture of each company is different as a result of disparate histories, managements, and experiences. There has been some interchange of personnel, but no more in top policy positions than is typical in an industry in which top personnel often move from one airline to another. Standard operational manuals, practices, and methods are all different for the two airlines.

Except for a short period in which both Continental and Eastern used the same ticket offices, and the fact that they have a joint frequent flyer program (many carriers have programs giving credit for flights on other airlines), the two carriers present themselves to the public quite differently. Their flight schedules, personnel uniforms, work forces, airport ticketing and check-in locations, credit unions, incentive plans, cargo services, ramp and aircraft services, airport plane locations, control operations, pricing, logos, and the color of their planes are all separate, as are on-board services, including different in-flight magazines and catering.

In short, the record leaves little doubt that Eastern and Continental do not conform to the single carrier criteria established by the NMB. Yet the proceeding gave every impression, especially by a procedure that seemed to violate many accepted

186. This information, and that below, is found throughout the hearings and briefs and is clearly demonstrated as well in the already cited court of appeals and Department of Transportation cases. The term "double-breasted" originated in the earthy construction industry where it has become quite common to have, and to operate separately, a unionized firm and a nonunion, or "open shop," one. *See generally*, H. NORTHRUP, OPEN SHOP CONSTRUCTION REVISITED (1984).

standards of due process, that the NMB was determined to "prove" the contrary. The chairman of ALPA's Eastern Council admitted to having been briefed by the NMB prior to the hearing as to the best approach for his case;[187] motions made by the carriers were ignored or summarily dismissed; the hearing officer, a long-time Board employee, permitted the unions to introduce considerable evidence over the carriers' objections of relevancy, some of which he read *before* its introduction,[188] and then denied the carriers the opportunity to present evidence concerning the material; extra union materials were permitted to be introduced just prior to the conclusion of the hearing while a three-page statement from the president of Continental was rejected; the unions were permitted to introduce witnesses in any order without notice or limitation; the carriers were required to provide a list of their witnesses, and then were told which ones could be heard by the hearing officer, who pared their number to a bare minimum after deleting many operational managers who could rebut union testimony concerning alleged joint operations; and, because the NMB would not permit examination of the unions' failure to show employee support for Continental, a fundamental shortcoming of the union case never appeared in the record.

Perhaps the greatest deprivation of due process in the hearing was suffered by Continental employees. An organization they formed was denied the right to testify. Yet these are the persons standing to lose the most if the NMB were to designate the two carriers as one and if the courts failed to set such a designation aside. Continental employees are younger and have less seniority than Eastern employees had prior to the strike occurring as of this writing, and the Continental pilots in particular were outnumbered by the Eastern pilots. ALPA's position has been that if a merger could have been effectuated in the pre-strike era by a single-carrier decision of the NMB, the Eastern pilots would have been able to bid for jobs held by Continental pilots and take the choice positions. The Eastern

187. *See* Testimony of Jack Bavis, Eastern-Continental Transcript, *supra* note 173, at 2567-78, 2606-08, 2703-04 (June 23, 1988); Eastern Airlines, Exhibit No. 5. Mr. Bavis was voted out of office on September 7, 1989, after he stated that the strike against Eastern was lost and urged union members to return to work to save what jobs they could. *See Eastern's Pilot Union Ousts Chief*, N.Y. Times, Sept. 9, 1989, at 29, col. 6.

188. *See* Eastern-Continental Transcript, *supra* note 173, at 7187-88. The NMB reaffirmed this and other of the hearing officer's rulings at 15 N.M.B. 343 (1988).

pilot chairman frankly admitted that the idea of merger was conceived both as part of the unions' general attack on Texas Air and its chairman, Frank Lorenzo, and as a means of giving Eastern pilots the job security that they could not achieve through collective bargaining.[189]

Not only would Continental employees be downgraded by such a merger, but more importantly from a due process standpoint, they would be disenfranchised. The Continental work force includes those employees who helped defeat the strikes of the Machinists and ALPA. Subsequent attempts of either union to organize these employees have failed. The president of ALPA argued that under his union's single carrier proposal, Continental employees would automatically become part of the bargaining group without an election, and he also stated that anyone who crossed a picket line would be subject to ALPA discipline.[190] Under the Eastern compulsory union agreement, Continental employees would have to choose between having no say whatsoever in the bargaining relationship by staying out of the union and paying so-called service fees or throwing themselves at the mercy of a union's judicial process and probably paying large fines. The manner in which ALPA members have apparently continued to harass those who crossed picket lines in the 1985 United strike,[191] as well as the age, experience, and cultural gaps between Eastern and Continental, indicate that the rights of Continental employees were derogated by the refusal to hear them as a group.[192] In addition, the re-

189. *See* Testimony of Jack Bavis, Eastern-Continental Transcript,*supra* note 173, at 2595-98, 2599-600 (June 23, 1988).

190. *See* Testimony of Harry Duffy, Eastern-Continental Transcript, *supra* note 173, at 168, 596-97, 635-36, 642, 737-39 (June 24, 1988). In fact, ALPA earlier fined Continental pilots who were members of ALPA and crossed its picket lines a minium of $10,000 each, but it has made no attempt to collect the fines. Similar fines, now being litigated, have been levied against Eastern pilots who broke rank in that strike. *See* Appellants' Master Statement of Position, before the Appeal Board of ALPA (Dec. 15, 1989)(submitted by Thompson, Mann & Hutson, counsel for the charged Eastern Pilots).

191. *See Tension Reported in United Cockpits—Nonunion Pilots Say They Are Harassed by Ex-Strikers 4 years After Dispute*, N.Y. Times, Apr. 23, 1989, § 1 at 23, col. 1.

192. Continental was able to put one of its captains on the stand. He testified that he had been subject to violence during the Continental strike, and he stated as to a forced merger of seniority: "I see that as . . . very threatening to the pilots group in . . . seniority . . . quality of life . . . forced mixing of crews into a cockpit environment. There continues to be a level of tension . . . an adversarial relationship and . . . memories of either perceived or real past injustice and abuse" on the part of those who crossed lines and those who did not. Eastern-Continental Transcript, *supra* note 173, at 5648-49, 5680 (Nov. 7, 1988).

fusal created a situation that, if effectuated, could have caused considerable unrest and possible overt strife, a result contrary to the principles upon which the Railway Labor Act was purportedly enacted.

The case has been stayed by Eastern's bankruptcy proceedings, and the replacement of the strikers has altered seniority relationships between the pilots of the two carriers. Thus it is not possible to predict the result of an NMB declaration of Eastern and Continental as a single carrier for Railway Labor Act purposes. If the NMB does make such a decision and orders an election, the outcome would not necessarily result in union victories because both Eastern strikers and replacement employees would be eligible to vote. Such a decision, nevertheless, would be litigated over a long period.

K. *Representation Disputes: General Procedure*

In its earliest years, the NMB acted very informally, as it does in mediation, and published no rules of procedure until required to do so by the Administrative Procedures Act of 1946.[193] In this early period, the Board often certified unions on the basis of authorization cards with little examination. It was lax in observing reasonable rules of conduct by its employees as well as in protecting the rights of nonunion employees, nonstandard unions, and especially black workers.[194]

1. *The NMB's Ballot*

Throughout its history, the NMB has had very different election procedures than has the NLRB. Foremost among these differences is the NMB's failure to give employees an opportunity to vote "no union" as does the NLRB. Employees who do not desire to be represented can register their views only by refraining from voting. The NMB will not certify a union if more than fifty percent of those eligible do not vote. The NLRB certifies on the basis of a majority of those voting. The NLRB procedure encourages voting; the NMB's discourages it. Moreover, the NMB's procedure results in certification of unions even if a majority of the bargaining unit opposes it. In fact, certification requirements are such that only twenty-five per-

193. Administrative Procedures Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559 (1988)).

194. *See* H. NORTHRUP, *supra* note 28; Risher, *supra* note 28.

cent of the bargaining unit plus one employee voting can cause the Board to certify a union. If, for example, fifty percent of the employees plus one votes, and one-half of these, or twenty-five percent of the bargaining unit plus one, votes for a union, it will be certified as the exclusive bargaining agent of all the employees. This is an extraordinary concept of majority rule, but one that the courts have failed to check.[195]

The NMB has defended its policy with the statement that its "ballot was drafted to permit employees to secure some form of representation."[196] Actually, the policy not only "permits" but often forces employees to accept representation. Moreover, it appears to be a rejection of congressional intent. Framers of the 1934 amendments made it quite clear that their purpose was to assure that "employees shall be free to join any union of their choice and *likewise be free to refrain from joining any union if that be their desire* . . . ."[197]

2. *The USAir-Teamster Case*[198]

An excellent example of the way in which the NMB's representation election procedure works is afforded by the recent case involving fleet service workers (mostly baggage handlers) at USAir. The Teamsters had already represented the fleet service workers at four key locations—Pittsburgh, Philadelphia, Boston, and Buffalo—as a result of organizing them in the early 1970s before USAir greatly expanded. USAir had just completed its takeover of Pacific Southwest Airlines and was scheduled to merge with Piedmont Airlines four months after the election in December 1988. The fleet service workers at Piedmont were unorganized. USAir unsuccessfully requested the Mediation Board to postpone the election until this latter

195. The Supreme Court has failed to discern the irony in this extraordinary concept of "majority" from the inception of the Act. *See* Virginian Ry. Co. v. System Fed'n No. 40, 300 U.S. 515 (1937); Brotherhood of Ry. Clerks v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650 (1965).

196. ADMINISTRATION OF THE RAILWAY LABOR ACT BY THE NATIONAL MEDIATION BOARD, 1934-1957, at 19 (1958).

197. H.R. REP. No. 1944, 73d Cong., 2d Sess. 2 (1934) (emphasis added). H.R. 9861 became the 1934 amendments to the Act. In like vein, see the comments of Joseph B. Eastman, Federal Coordinator of Transportation and author of the 1934 amendments, and of Senator Robert Wagner of New York, on S. 3266, the companion bill in the Senate, appearing in *To Amend the Railway Labor Act: Hearings on S. 3266 Before the Senate Comm. on Interstate Commerce*, 73d Cong., 2d Sess. 12 (1934).

198. 16 N.M.B. 85 (1988).

merger was effected, pointing out quite correctly that after that merger another election would undoubtedly be scheduled.

Of the 3,733 employees eligible to vote, 1,871 voted, just four more than a majority, or 50.1%. The Teamsters received 1,854 votes, 49.7% of those eligible. The other ballots included 16 for the Machinists, one write-in for an employee, and 43 that were void.[199] After refusing to permit the 197 recently added employees to have a franchise,[200] the NMB certified the Teamsters as the exclusive bargaining agent of this class on the basis of support by a minority of all the workers. If the election had been conducted under NLRB rules, the write-ins and void ballots would not, in effect, have been counted for the Teamsters. Moreover, a "no union" line would have been on the ballot. Then, depending upon how those who abstained from voting cast their ballots, and how the 197 excluded would have voted, the Teamsters would likely have been rejected, or a runoff election would have been held between that union and no union. This election stands to be voided, of course, by the second election that was held after the USAir-Piedmont merger was consummated, which the Teamsters lost as discussed above.

The courts have upheld the NMB's form of ballot while simultaneously recognizing that the "legislative history supports the view that the employees are to have the option of rejecting collective representation."[201] The majority of judges in key cases have failed to comprehend or to acknowledge how the ballot form frustrates the purpose of the Act. As former Justice Potter Stewart stated in dissent:

> This ballot form is directly attributable to the Board's view of what the bargaining pattern should be in the airline industry. The Board has stated that 'the Act does not contemplate that its purposes shall be achieved, nor is it clear that they can be achieved, without employee representatives.' . . . I believe both the language of the Act and its legislative history belie this view and, for that reason, I would order the Board to reconsider the form of its ballot.[202]

199. *See Teamsters Win Representation Rights For Fleet Service Workers at USAir*, DAILY LAB. REP. (BNA) No. 241, at A-8 (Dec. 15, 1988).

200. *See supra* text accompanying note 133.

201. Brotherhood of Ry. Clerks v. Association for Benefit of Non-Contract Employees, 380 U.S. 650, 669 n.5 (1965).

202. *See id.* at 673 (Stewart, J., dissenting).

3. *Exceptions to Standard Ballot*

The NMB has at times altered its ballot if it believes that an employer is interfering with free choice. It may then throw out an election result and order a "yes" or "no" vote to be held, with a majority of those who vote being decisive. Such votes may be ordered even when the carrier merely urged a vote against representation without overt threats or promises.

In 1989, the NMB went even farther by devising a new ballot form known as the "Key ballot," which was named after a commuter airline that was involved in a recent case. In this case, the Board charged the company with "egregious interference" and ordered a ballot in which anyone who did not vote was counted as in favor of representation.[203] Thus a union could be certified if no one voted! Remarkably, in the election held with this rigged rule, the pilots and flight engineers voted against representation while the flight attendants were counted as voting for it. This was the second time in three months and the third time in three years that the pilots and engineers voted down representation.[204]

Carriers are outraged by this procedure, but unions are delighted. It is clear that the NMB is attempting to prevent carriers from voicing their views in an election; it is equally clear that unions will demand a Key ballot at every opportunity. ALPA already did so in the Federal Express-Flying Tiger case discussed above.[205] The use of the "Key ballot" as a means of punishing a carrier makes a mockery of free elections.[206]

4. *Election Reruns*

On January 12, 1990, the NMB made a major extension of its prior case law on election conduct by setting aside an election involving flight attendants on American West Airlines on the ground that the company had interfered with the free choice of the employees.[207] Prior to the election, the company had held its annual profit-sharing party for employees, at which time it distributed checks owed to employees under the plan. The

203. *See* 16 N.M.B. 296 (1989).

204. *See Use of New NMB Ballot in Elections at Key Airlines Creates Controversy*, DAILY LAB. REP. (BNA) No. 173, at C-1, C-2 (Sept. 9, 1989).

205. *See supra* text accompanying notes 162-67.

206. For a discussion of the issues involved and the views of carriers and union, see *Use of New NMB Ballot*, *supra* note 204.

207. *See* 17 N.M.B. 79 (1990).

NMB found the meeting was not improperly scheduled, nor were company communications coercive. Rather, it found that the carrier's "totality of conduct" required a new election. The NMB reached this conclusion without a hearing, and cited no previous NMB case as precedent. Instead, it relied on an NLRB case which had been affirmed by the Supreme Court in 1964.[208] Unlike the NLRB, however, the NMB has no statutory authority to adjudicate unfair labor practices, it has no procedure for formal hearings before administrative law judges, and it is not subject to judicial review. It would seem that if the NMB pursues the path indicated by the American West case, the law should be amended to provide an appropriate procedure, and above all judicial review

5. *Carriers Not a Party*

The NMB does not permit employers to be a party to representation matters. Carriers are called upon to supply information and otherwise cooperate, and in merger matters the carriers now have the privilege of petitioning for a carrier-wide unit. Generally, however, Board policy effectively denies carriers a voice in handling cases, in determining bargaining units, or in petitioning for an election; these are all rights that employers take for granted under the Taft-Hartley Act.[209] Because choice of unit can have a profound impact on a carrier's operations and profits, there is no basis for this rule either in logic or equity. Moreover, any propensity of the employer to bring to the Board the views of employees that are inconsistent with those of the unions involved is, thus, effectively checked. (Such employees are, as far as it can be determined, never accorded a hearing by the Board.) Yet the courts have declared this policy to be solely within the Board's discretion.[210]

6. *Decertification*

The Act contains no formal decertification procedure. One way for employees to rid themselves of an unwanted union is, of course, for them to choose another union. This is very diffi-

208. *See* NLRB v. Exchange Parts Co., 375 U.S. 405 (1964).

209. *See* J. ABODEELY, R. HAMMER & A. SANDLER, THE NLRB AND THE APPROPRIATE BARGAINING UNIT (rev. ed. 1981) (thorough analysis of NLRB election procedure).

210. *See* International Bhd. of Teamsters v. Brotherhood of Ry. Clerks, 402 F.2d 196 (D.C. Cir. 1968).

cult on a carrier-wide basis, however, and especially so since 1988 when the Teamsters, which had been consistently raiding AFL-CIO unions in air transport since the 1960s, re-affiliated with the Federation and became a party to its no-raiding pact.

Another way employees can decertify a union is by selecting someone to represent them, supporting the individual to defeat the union in an election, and then having the individual advise the NMB that he no longer will represent the employees. Although this has been accomplished in a few cases, the Board works hard to prevent it from happening; one court likened the procedure to a cross between Orwell and Kafka in its complications and NMB obfuscation.[211]

As a result of *Russell v. National Mediation Board*,[212] a key court decision relating to the problems of decertification, the Chamber of Commerce of the United States petitioned the NMB to adopt a decertification procedure. The Board, however, declined to consider changing its procedures so that decertification could be easily effected. It dismissed the petition on the grounds that the law did not provide for it.[213] The lack of such a procedure obviously exacerbates the seriousness of the NMB's many failures in handling representation disputes in a manner that is fair and reasonable for achieving a fundamental purpose of the Act—namely, providing employees with the right to select unions of their own choosing and to reject representation as well.

7. *Judicial Review of Representation Matters*

A basic reason that the NMB can continue to operate with so many procedural shortcomings in the representation area is that the Supreme Court has severely restricted judicial review. In *Switchmen's Union v. National Mediation Board*,[214] the Supreme Court made Board determinations, and most other aspects of the representation procedure, virtually unreviewable. A long line of cases thereafter tended to close gaps that might have been opened to question judicially the Board's procedure.[215]

211. *See* Russell v. National Mediation Bd., 714 F.2d 1332, 1342 nn. 11 & 12 (5th Cir. 1983).

212. 714 F.2d 1332 (5th Cir. 1983).

213. *See* Petition of the Chamber of Commerce of the United States, 14 N.M.B. 347 (1987).

214. 320 U.S. 297 (1943).

215. An excellent list of these cases is found in Eischen, *supra* note 124, at 68-69.

Even an appeal to the courts on the grounds that the carrier refuses to recognize an NMB certification runs into the Board's extraordinary exemption from judicial review.

Nevertheless, three situations exist in which Board decisions and procedures may be brought before the courts: (1) when constitutional questions exist; (2) when "judicial power may . . . be exerted to exercise the 'duty' imposed upon it by Section 2, Ninth,"[216] or when Board action is "in excess of its delegated powers and contrary to a specific prohibition in the Act;"[217] and (3) where the issue involves a question of "international urgency."[218]

Two cases demonstrate that it is sometimes possible to obtain judicial review. In one case, which illustrates the second category, the NMB refused to process a case in which a majority in a class of railway patrolmen signed authorizations for an individual to represent them with the plan of then disbanding the group and becoming unrepresented. The patrolmen had become dissatisfied with representation by the Brotherhood of Railway Clerks, with which their union had merged. The Mediation Board, however, declined to process their case because it claimed that if the individual did not intend to represent the group, no representation dispute existed![219] The Court found that the Board's reasoning was insupportable and ordered the Board to process the case.[220]

In an earlier case, the Teamsters lost an election and then one year later, after authorization cards requesting an election had been signed, the Board certified the union without an election. The courts enjoined enforcement of the Board's certification on the ground that it had not fulfilled its duty to investigate the representation matter because "cards signed by

216. General Comm. of Adjustment of Bd. of Locomotive Eng'rs for the Missouri-Kansas-Texas R.R. v. Missouri-Kansas-Texas R.R., 320 U.S. 323, 336 n.12 (1943). This was a companion case to Switchmen's Union v. National Mediation Bd., 320 U.S. 297 (1943).

217. Leedom v. Kyne, 358 U.S. 184, 188 (1958) (injunction against the NLRB for constructing a bargaining unit specifically prohibited by the Taft-Hartley Act).

218. United States v. Feaster, 410 F.2d 1354, 1365 (5th Cir. 1969), *cert. denied*, 396 U.S. 962 (1969).

219. This Board action was noteworthy also because there had been other cases of this nature processed. J. Gohmann noted in discussing the lack of formal decertification provisions in the Act, that "change can be accomplished by the employees, albeit awkwardly." J. GOHMANN, ARBITRATION AND REPRESENTATION: APPLICATIONS IN AIR AND RAIL LABOR RELATIONS 29 (1981).

220. *See* Russell v. National Mediation Bd., 714 F.2d 1332 (5th Cir. 1983).

the employees only called for an election and were not votes for representation without an election."[221]

In spite of the successful review of these two cases, they are very much in the minority. It remains extremely difficult to obtain judicial review of NMB actions in representation matters; thus, the Board has broad discretion to administer this portion of the Act.

VIII. Unfair Labor Practices

The Railway Labor Act does not contain a list of specific unfair labor practices as does the Taft-Hartley Act, but it does include a number of prohibitions of carrier conduct that are generally similar to those in the Taft-Hartley Act. The Act provides for the choice of representatives by either party without interference, influence, or coercion by the other,[222] and it prohibits carriers from questioning the right of their employees "to join, organize, or assist in organizing the labor organization of their choice . . . ."[223] The Act further states that a carrier shall not change the terms of agreements without exhausting the bargaining procedures of the Act.[224]

The Act provides penalties for violating these provisions:

> [The] willful failure or refusal of any carrier, its officers or agents to comply . . . [with these proscriptions] shall be subject to a fine of not less than $1,000, nor more then $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer or agent shall willfully fail or refuse to comply with the . . . [proscriptions] shall constitute a separate offense.[225]

Enforcement of this section of the law is vested in the Attorney General of the United States.

Except perhaps as a behavior bar, the unfair labor practice provisions of the Act have not played a significant role in the Act's history. From the unions' perspective, they have not been needed. The bargaining unit determinations of the NMB have eliminated the local and company unions on the railroads, and

221. International In-Flight Catering Co. v. National Mediation Bd., 555 F.2d 712, 718 (9th Cir. 1977).
222. *See* 45 U.S.C. § 152 (1982).
223. *Id.*
224. *See id.*
225. *Id.*

they have made it very difficult for small organizations to compete with national unions on the airline. Furthermore, NMB procedure has facilitated easier organization for the larger unions in both industries. Because both railroads and airlines are engaged in a service industry, strikes are very costly to them. Especially when they were under regulation and did not compete as to price (although they did compete in that regard with other forms of transport), they were willing to meet union demands in most cases to avoid loss of business that cannot be warehoused and the loss of customers to rival carriers or industries. Until deregulation, carriers' incentives to control costs were muted because routes were cartelized by the regulators, and rates were set on the basis of the high-cost operator.[226]

Only two cases were found in which the criminal penalties of the Railway Labor Act were invoked. In one, two officials of a Salvadoran airline were charged with coercing and interfering with attempts to organize ground crew personnel seeking to join the Machinists union. They pleaded *nolo contendere* and were fined $1,000 on each of two counts.[227] The second case involved the owner of a small commuter airline who was convicted after a jury trial, but the conviction was overturned on appeal. The Second Circuit, in the only such case decided at that level, found that the district judge erred in instructing the jury to follow NLRB administrative precedents because "willful" violations of the Railway Labor Act require much more stringent proof.[228]

The use of criminal penalties has thus been unproductive because convictions are not likely to be obtained. Willful intent is not easily proved generally, and it would be more difficult to demonstrate in unfair labor practice situations in which subtle

226. *See generally* Northrup, *The New Employee-Relations Climate in Airlines*, 36 INDUS. & LAB. REL. REV. 167 (1983).

227. *See* United States v. TACA Airways Agency, Inc., Civ. No. 24270 (E.D. La. 1952). The Machinists eventually won bargaining rights for these personnel.

ALPA later pursued a civil suit that successfully enjoined this airline's plans to eliminate its pilots' union chapter and move its headquarters to San Salvador. *See* Ruby v. TACA Int'l Airlines, S.A., 439 F.2d 1359 (5th Cir. 1971). TACA tried again after a United States-Salvador civil aviation agreement was negotiated, but the courts ruled that this agreement was not meant to counter domestic legislation. Air Line Pilots Ass'n, Int'l, v. TACA Int'l Airlines, S.A., 748 F.2d 965 (5th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985).

228. *See* United States v. Winston, 558 F.2d 105 (2d Cir. 1977), *rev'g and remanding* Civ. No. 75-CR-83 (N.D.N.Y. 1976). The owner of the airline, Winston, died before the case could be retried, and it was dropped.

actions play a significant role. Criminal penalties also require trial by jury. The average layman is unlikely to be able to comprehend easily what constitutes an unfair labor practice; and even if this is understood, a juror is likely to be at least hesitant to agree that the matter is sufficiently serious to merit fine or imprisonment.

Even if willful intent is proven, there remains the problem of placing the responsibility. It is no easy task to demonstrate under criminal law to a jury that a supervisor acted on orders in discriminating against a union member. Moreover, the punishment does not fit the crime. If an officer of a carrier is convicted of committing an unfair labor practice and jailed or fined, that does not provide affirmative relief for employees who may have been discriminated against or even discharged because of union activity. Effective remedial action requires making the employee whole, not fining or jailing the employer or his subordinates.

A. *Other Methods of Proscribing Carrier Unfair Labor Practice*

For all of the above reasons, when unions have felt transgressed by carrier actions, they have usually sought relief either (1) by taking their cases to the compulsory arbitration boards provided under the Act for minor disputes, (2) by filing civil actions seeking to enjoin carrier action, or (3) by requesting the NMB to set aside elections or to take other remedial action. Although sometimes the case can be lost because of the lack of precise methods by which it can be handled, direct appeal to the courts has been relatively successful. One such union appeal to enjoin unfair carrier action was initiated even prior to the 1934 amendments to the Act,[229] and it was followed by a victory for unions in a key case dealing with the 1934 amendments.[230] In effect, the court system is utilized as a substitute for an administrative agency such as the NLRB[231] because the NMB has no authority to handle unfair labor practices

229. *See* Texas & New Orleans R.R. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548 (1930).

230. *See* Virginian Ry. v. System Fed'n No. 40, 300 U.S. 515 (1937).

231. *See, e.g.*, O'Donnell v. Wien, 551 F.2d 1141 (9th Cir. 1977); Piedmont Airlines v. Air Line Pilots Ass'n, Int'l, 347 F. Supp. 363 (M.D.N.C 1972). The latter cases both deal with crew size as a major dispute, and, therefore, changes could not be unilaterally made without following the dispute procedure. These are just a few of the many such issues that have come before the courts involving managerial attempts to alter conditions of employment without negotiations pursuant to the Act.

(although it certainly attempts to restrict employer action in representation cases).

The cases involving alleged carrier unfair labor practices cover a wide variety of issues, including charges of refusal to bargain, failure to follow the Act's procedure for negotiations and intervention, and acting contrary to other requirements of the Act. The duty to bargain is generally enforced by injunctions preventing a carrier from implementing changes to the status quo before the Act's lengthy bargaining procedures have been exhausted.[232]

Such controversies usually center around whether the term that the carrier intends to implement gives rise to a "major" dispute entailing a change in contractual rights or to a "minor" dispute involving only the interpretation of established rights. If the latter, a carrier may proceed to act upon its interpretation while the matter is litigated before an adjustment board, and a court will enjoin a strike. In contrast, if a major dispute is involved, the carrier may be enjoined from making any change in conditions, or alternatively, a union may strike in protest against the carrier's action. "The cases generally reveal that courts are determined to defer to the RLA procedures, preferring to characterize a dispute as 'minor' whenever possible and thus to leave jurisdiction to the appropriate System Board of Adjustment."[233] Recently, the Supreme Court affirmed the general rule that a dispute is minor if the carrier's interpretation of the contract "even arguably" supports its right to take the disputed action.[234]

In a major dispute, carriers may institute self-help measures following the legal end of the Act's bargaining and disputes resolution procedures, so long as the Act is not violated in other respects.[235] Carriers may refuse to reinstate full-term strikers to jobs occupied either by permanent replacements

232. The courts have ruled that the status quo includes accepted practices even if they are not specifically covered by an agreement provision. *See* Detroit & Toledo Shore Line R.R. v. United Transp. Union, 396 U.S. 142, 153 (1969).

233. *See* Comment, *Deregulation in the Airline Industry: Toward a New Judicial Interpretation of the Railway Labor Act*, 80 NW. U.L. REV. 1003, 1026 (1986) (citing cases involving various alleged unfair labor practices).

234. *See* Consolidated Rail Corp. v. Railway Lab. Executives Ass'n, 109 S. Ct. 2477, 2482 (1989).

235. *See* Burlington N. R.R. v. Brotherhood of Maintenance of Way Employees, 793 F.2d 795, 799 (7th Cir. 1986); Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 378 (1969); Florida E.C. Ry. v. Brotherhood of R.R. Trainmen, 336 F.2d 172, 181 (5th Cir. 1964), *cert. denied*, 379 U.S. 990 (1965); Air Line Pilots Ass'n,

hired during the strike or less senior employees who crossed picket lines during a strike.[236] Unless otherwise barred by law, self-help can involve the formation of mutual aid pacts among carriers.[237] If, however, the self-help appears to be directed more by anti-union animus than by operational needs, it may be enjoined.[238]

B. *Union Unfair Labor Practices*

Unlike the Taft-Hartley Act, the Railway Labor Act contains no list of union unfair labor practices. Unions, therefore, are not subject to administrative action for failing to bargain in good faith, nor are they to criminal action for discriminating against an employee because of union membership or lack thereof. We have noted above instances in which employees who are also supervisors may have used coercive methods in their dual role.[239] If a union's unfair labor practice involved an election, the National Mediation Board could set the elections aside.[240] The Board is only likely to do so if a union, rather than an individual, complains because censure of a union, except in a battle between unions, could endanger its paramount mediation function. There is thus no effective remedy under the Act for the individual claimant in such cases, and there have been no cases in which individuals successfully prosecuted a case against unfair discrimination. Employees who feel aggrieved, however, may pursue unfair representation cases against unions, but such cases are difficult to win.[241] Nevertheless, such cases are fairly numerous in the airline industry, par-

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Int'l v. United Airlines, Inc., 802 F.2d 886, 895 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987).

236. *See* Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants, 109 S. Ct. 1225 (1989).

237. *See* Kennedy v. Long Island R.R., 319 F.2d 366 (2d Cir. 1963), *cert. denied*, 375 U.S. 839 (1963); Air Line Pilots Ass'n, Int'l, v. Civil Aeronautics Bd., 502 F.2d 453 (D.C. Cir. 1974). The airlines mutual aid pact was effectively abolished by the Airline Deregulation Act of 1978. *See* Northrup, *The New Employee-Relations Climate in Airlines*, 36 IND. & LAB. REL. REV. 167, 168 (1983). The railroad pact is probably dormant because of the union use of secondary boycotts against carriers that support another carrier on strike.

238. *See* National Airlines v. International Ass'n of Machinists, 416 F.2d 998 (5th Cir. 1969); Air Line Pilots Ass'n, Int'l v. United Airlines, Inc., 802 F.2d 886, 899 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987).

239. *See supra* text accompanying note 129.

240. *See* International Bhd. of Teamsters v. Brotherhood of Ry., Airline, & S.S. Clerks, 402 F.2d 196 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 848 (1968).

241. *See* T. BOYCE & R. TURNER, FAIR REPRESENTATION, THE NLRB, AND THE COURTS (rev. ed. 1984).

ticularly as a result of strikes and seniority integration after mergers among pilot groups.

Because union unfair labor practices are absent from the Act, the Supreme Court has ruled that the unions may engage in secondary boycotts in major disputes.[242] The Machinists attempted to engage in such actions in March 1988 after Eastern was struck, but they were frustrated in the courts because judges ruled, in effect, that although the striking union could picket other airline and railroad carriers, employees of the other carriers could not refrain from work because doing so would be a violation of their labor agreements.[243]

Such sympathy actions can be directly subject to court restriction. If the parties' collective agreement has a no-strike clause, the courts will enjoin the action. In *Long Island Railroad v. International Association of Machinists*,[244] a case affirming the injunction against the proposed Machinists' pickets that were attempting to widen the Eastern strike, the Second Circuit noted that the parties' agreements did not contain specific no-strike clauses, but did "contain a variety of affirmative obligations of the employer and the union employees involved, which assume a regular and on-going working relationship."[245] The Court, therefore, concluded that despite the absence of a no-strike clause, "the collective bargaining agreements are reasonably susceptible . . . to the . . . interpretation that there is no right . . . to the contemplated sympathetic action."[246] The Court determined that the issue was a minor dispute and had to be referred to arbitration under the Act.

Nevertheless, sympathy and secondary action under the Act is by no means proscribed. ALPA, for example, does not have no-strike clauses in its contracts, so it has been free to engage in sympathy walkouts.[247] The fact that the secondary boycott is

242. *See* Burlington N. R.R. v. Brotherhood of Maintenance of Way Employees, 481 U.S. 429 (1987).

243. *See* International Ass'n of Machinists & Aerospace Workers v. Airline Indus. Relations Conference, No. 89-0514, (D.D.C. Mar. 16, 1989); South E. Pa. Transp. Auth. v. International Ass'n of Machinists & Aerospace Workers, 708 F. Supp. 659 (E.D. Pa. 1989), *aff'd*, 882 F.2d 778 (3d Cir. 1989); Long Island R.R. v. International Ass'n of Machinists, 709 F. Supp. 376 (S.D.N.Y. 1989), *aff'd*, 874 F.2d 901 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 840 (1990); Northwest Airlines v. International Ass'n of Machinists & Aerospace Workers, 712 F. Supp. 732 (D. Minn. 1989).

244. 874 F.2d 901 (2d Cir. 1989).

245. *Id.* at 907.

246. *Id.* at 911.

247. Its strike against Eastern was such an event, and it was found legal. *See* Eastern

not proscribed under the Railway Labor Act permits unions to injure third parties as a means of pressuring the carrier with which there is a dispute. Thus rail and airline unions have a weapon not available to other unions.

The courts, however, have ruled that "sick outs," slowdowns, and other such direct actions are strikes within the meaning of the Act, and can be enjoined if the Act's procedure is violated. Union conduct that has the consequences of a strike is considered to violate the status quo provisions of the Act.[248] The problem in such cases is not whether slowdowns or other such actions can be enjoined, but whether their existence can be proved as employees "work to rule."[249] If the union is proved to be responsible, its conduct for illegal strikes or related action can not only be enjoined, but also the union is subject to suits for damages for any losses sustained by the carrier.[250]

Illegal strikes or related actions have also been ruled to include attempts to circumvent the representation procedure under the Act. In one case, for example, the Teamsters struck one facility of a small airline and also began a secondary boycott of the company. The object was to force union recognition by the facility, thereby circumventing the NMB rule of carrier-wide units only. The action was enjoined, indicating that organizational picketing is illegal under the Act.[251]

C. *Court Prohibitions for Union Unfair Practices*

The Act states that "[r]epresentatives . . . shall be designated *by the respective parties* without interference, influence, or coercion *by either party* over the designation of representatives by the other; and *neither party* shall in any way interfere with, influence,

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Airlines v. Air Line Pilots Ass'n, Int'l, 710 F. Supp. 1342 (S.D. Fla. 1989); *see also* Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Int'l, 325 F. Supp. 994 (D. Minn. 1970).

248. *See* Texas Int'l Airlines v. Air Line Pilots Ass'n, Int'l, 518 F. Supp. 203 (S.D. Tex. 1981); Pan Am. World Airways v. Transport Workers Union, 117 L.R.R.M. (BNA) 3350 (E.D.N.Y. 1984); Piedmont Aviation, Inc. v. Air Line Pilots Ass'n, Int'l, 71 L.R.R.M. (BNA) 3216 (M.D.N.C. 1969); Long Island R.R. v. System Fed'n No. 156, 289 F. Supp 119 (E.D.N.Y. 1968).

249. *See* McDonald & Asher, *Airline Employee Slowdowns and Sickouts as Unlawful Self Help: A Legal and Statistical Analysis*, 55 J. AIR L. & COM. 349 (1989).

250. *See* Denver and Rio Grande W. R.R. v. Brotherhood of R.R. Trainmen, 58 L.R.R.M. (BNA) 2568 (D. Col. 1965); *see also* Arouca, *Damages for Unlawful Strikes under the Railway Labor Act*, 32 HASTINGS L.J. 779 (1981).

251. *See* Summit Airlines, Inc. v. Teamsters Local No. 275, 628 F.2d 787 (2d Cir. 1980).

or coerce the other in his choice of representatives."[252] In several instances, ALPA and the Machinists have attempted to force changes in management, and, therefore, the selection of representatives of carriers. The current United case is an extreme example with ALPA and other unions attempting to buy control of the airline to do so.[253]

At Eastern, the unions made the departure of the Lorenzo management a condition of any settlement. They even scuttled a deal favorable to them for the sale of the airline because the management would not relinquish control of the airline *before* the deal was consummated. It would seem that these cases could be found to be interference within the meaning of the Act, and, therefore, should be subject to the injunctive process and a court order to cease and desist from the offensive conduct.

It is clear that unions subject to the Railway Labor Act can be ordered to bargain. The quoted portion of the Act above, combined with the requirement that "it shall be the duty of all carriers, agents, and *employees* to exert every reasonable effort to make and maintain agreements,"[254] and that "all disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute"[255] may be construed to require unions to bargain in good faith.[256]

Although bargaining in good faith means an effort to agree, questions have developed about whether that duty also includes maintaining agreements. The Second Circuit has held that it does and has enjoined union conduct; in contrast, the Ninth Circuit has held that where union conduct clearly violates a contract provision, there is no issue of contract interpretation on which an adjustment board may base a minor dispute

252. 45 U.S.C. § 152 (1982) (emphasis added).

253. In the proposed United takeover situation, it would appear that a situation is developing that could raise both serious conflicts of interest and interference of one side of the bargaining table with the other. For example, would the union owners favor themselves in negotiations at the expense of other employees? Will United unions, as a result, give better deals to United than to its competitors? Will unions now be on both sides of the table at United, and is that not interference with one side?

254. 45 U.S.C. § 152 (1982) (emphasis added).

255. *Id.*

256. *See* Chicago & N.W. Ry. v. United Transp. Union, 402 U.S. 570 (1971).

strike injunction.[257]

D. *Management Prerogatives and Bargainable Issues*

The issue of management rights has developed more slowly under the Railway Labor Act than under the Taft-Hartley Act, but it has by no means been absent in recent years.[258] Moreover, the Supreme Court has noted that "[t]he mandatory scope of bargaining under the Railway Labor Act and the extent of the prohibition against injunctive relief contained in Norris-LaGuardia are not coextensive with the National Labor Relations Act and the Board's [NLRB] jurisdiction over unfair labor practices."[259] Court decisions, however, have adapted the distinctions among types of bargaining—required bargaining, permissive bargaining, and non-bargaining—that were developed under the Taft-Hartley Act by the Supreme Court in the late 1950s.[260] Thus, the courts have ruled that the Railway Labor Act requires bargaining only of issues pertaining to "rates of pay, rules, and working conditions,"[261] and that clearly there are limits on management's obligation to bargain about items not arguably within that gambit.[262] Bargaining to impasse and threatening to strike over an item not included in required bargaining, therefore, can be enjoined.[263]

Such determinations under the Railway Labor Act are also involved in the distinction between major and minor disputes. Thus, the courts have ruled that a carrier may dispose of assets without first bargaining with unions, but questions of the effects are minor disputes subject to the grievance procedure and compulsory arbitration.[264]

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257. *See* Seaboard World Airlines, Inc. v. Transport Workers Union, 425 F.2d 1086 (2d Cir.1970); Trans Int'l Airlines, Inc. v. International Bhd. of Teamsters, Local 2707, 103 L.R.R.M. (BNA) 2669 (9th Cir. 1980). For a discussion of this issue, see Note, *Enforcement of a No-Strike Clause under Section 2, First, of the Railway Labor Act*, 17 WAKE FOREST L. REV. 659 (1981).

258. For an excellent discussion of this issue, see McDonald, *Airline Management Prerogative in the Deregulation Era*, 52 J. AIR L. & COM. 869 (1987).

259. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 687 n.23 (1981).

260. *See* NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342 (1958).

261. 45 U.S.C. § 152 (1982).

262. *See* Elgin, Joliet & E. Ry. v. Brotherhood of R.R. Trainmen, 302 F.2d 540 (7th Cir. 1962); Japan Airlines Co. v. International Ass'n of Machinists, 538 F.2d 46 (2d Cir. 1976); Air Line Pilots Ass'n, Int'l v. United Airlines, 802 F.2d 886, 902 (7th Cir. 1986).

263. *See* Japan Airlines Co. v. International Ass'n of Machinists, 538 F.2d 46 (2d Cir. 1976).

264. *See* Pittsburgh and Lake Erie R.R. v. Railway Lab. Executives Ass'n, 109 S. Ct.

IX. CONCLUSION

The clear purpose of the Railway Labor Act is to encourage industrial peace and to assure that covered employees have the right to unions of their own choosing if they desire representation. To accomplish these laudable purposes, the Act established the most complete form of government control of collective bargaining that has been developed for American private, for-profit industry in peace time. It is noteworthy that when the basic framework of the Act was enacted and amended, the industries covered were also regulated in a variety of other ways. These included pricing, business routes and location, safety practices, and rights to initiate or to abandon service. In recent years, non-labor relations regulation of the airline and railroad industries, except in safety matters, has been either eliminated or considerably lessened, but no basic change has occurred in the labor field.

The experience of the Railway Labor Act indicates that such government control leads to results that are considerably less salutary than its creators claimed for it. Mediation has been perverted into a system whereby unions and companies can be left in limbo for months or even years while being forced to accept a status quo that is either unsatisfactory to employees or, as in the Eastern case, employers. Although in the Eastern case the NMB policy was overtly a partisan action designed to aid the unions, it appears to have damaged the unions and, sadly, the employees most of all. Moreover, under deregulation the costs of such policies are greatly increased for all parties. Carriers' routes are no longer protected, and fares are not regulated so that the marginal carrier achieves a rate of return deemed appropriate by regulators. Thus, the NMB can inflict great loss by purposeful procrastination.

The elaborate post-mediation disputes procedure has caused the parties to cease bargaining for the purpose of waiting out the intervention steps. Moreover, the unions have repeatedly fomented a crisis *after* an emergency board has been appointed and reported to utilize the board's report as a stepping stone to a richer settlement. For the railroads, this perverted procedure has resulted in congressional micro-management of disputes

2584 (1989); Air Line Pilots Ass'n, Int'l v. Eastern Airlines, Inc., 863 F.2d 891 (D.C. Cir. 1988).

by the enactment of special, compulsory arbitration legislation no less than eleven times since 1963. Thus, the Act has not kept the peace.

By paying for grievance settlement and contract interpretations on the railroads with tax funds, the Act has encouraged the parties to avoid settlement at the local level, creating the largest number of such cases in any industry. Moreover, the decisions have tended to maintain uneconomical practices in an industry that greatly needs change.

The representation procedure under the Act is perhaps its worst feature. Freedom of association has been subverted to the promotion of union status by permitting unions to win bargaining rights without support of the majority of employees involved and by constructing bargaining units that preclude challenge to unions favored by the NMB. Moreover, the Board seems to change its policies quite often, and without due notice, to achieve its purpose of frustrating attempts to overcome the obstacles that it has placed in the way of free choice. The absence of a decertification procedure in the Act, and the refusal of the NMB to provide procedures that permit employees easily to refrain from collective representation or to exit therefrom, are inherently contradictory to what the courts have repeatedly found to be the purposes of the Act. Yet the courts have largely turned their backs upon the excesses and questionable interpretations of the NMB. Thus the covered employees remain subject to the Board's substantially unreviewable decisionmaking.

By requiring that the bargaining unit be a craft or class, by enhancing the power of favored unions, and by promoting bargaining representation on a minority basis, the Act and its administration encourage narrow rather than broad interests and discourage adjustment to change. At a time when transportation policy requires cost reduction and managerial flexibility, goals that have been encouraged by deregulation, the Railway Labor Act and its administration encourage adherence to old, costly ways of operations. This adherence saddles an expanding industry with the mistakes of an older, declining past.

The subjection of collective bargaining in the airline industry to the rigidities and inhibitions built into the Act can only be termed a most unfortunate error of public policy. The industry and its unions have wisely avoided establishing the railroad in-

dustry's poor method of handling and financing grievance and contract (minor) disputes. Additionally, the decision of the Nixon Administration to cease appointing emergency boards in airline disputes has proved wise and pushed settlement to where it belongs—at the parties' doors. Nevertheless, the structure and problems of the airline industry require a collective bargaining system more attuned to change rather than one rigidly patterned after a different industry, especially because deregulation is much more advanced in the airline than in the railroad industry.

The Railway Labor Act is, in effect, special privilege legislation. It confers rights and duties dissimilar to those conferred on parties in other industries. The railroad industry, its employees, and its unions are specially treated in most other legislation, including social security, unemployment, and workers' compensation. The claim has always been that problems in this industry, and more recently the airline industry as well, are so different as to deserve special treatment. Yet each industry has its special conditions. Do only the industries under the Railway Labor Act deserve special privilege?

The question undoubtedly arises as to why the Act has stood so long and been administered as it has been without public outcry and calls for reform. The answer seems to be that the Act is of such little concern and so unknown to a broad public that obvious inequities in the Act and its administration do not lead to pressures for change.[265] Moreover, on the political front, legislators would probably gain little or no support for pushing critical change or repeal of the Act but instead have the support of the unions involved for maintaining the status quo, or for enacting further special privilege legislation.[266] Yet transportation affects us all and plays a big role in the success or failure of all business. The evidence presented here, there-

265. Interestingly, the same conclusion was reached concerning Title VII of the Civil Service Reform Act of 1978 and the Federal Labor Relations Authority, the law and the administrative agency for labor relations involving employees of the federal government. *See* H. NORTHRUP & A. THORNTON, THE FEDERAL GOVERNMENT AS EMPLOYER: THE FEDERAL LABOR RELATIONS AUTHORITY AND THE PATCO CHALLENGE (1988).

266. Besides the laws that put settlements into effect in the railroad industry, Congress seems determined to do the same in the airlines. Thus, Congress forced the appointment of an emergency board in the Wien Air case by adding a clause to the 1978 Deregulation Act, thereby bailing out a losing ALPA strike. Then a congressional attempt was made to force the appointment of an emergency board in the Eastern dispute. When that failed, Congress passed a bill setting up a special commission to investigate it, but President Bush vetoed it.

fore, surely seems to support nothing less than the total repeal of the Act and the assumption of its functions by the Federal Mediation and Conciliation Service and the National Labor Relations Board.

If political considerations do not permit repeal, at least the Act should be amended. Among the necessary changes are providing mechanisms for review of the Mediation Board's extraordinary freedom from court review. These include limiting the Board's discretion by requiring it to appoint mediators within thirty days of a request, and freeing the parties from the status quo after sixty days of the commencement of mediation, or whenever a final offer is rejected, if that occurs sooner.

Because of its primary mediation duties, there is no justification for the NMB to handle representation disputes. That function should be transferred to the NLRB. If it is not transferred, appeal from the NMB's representation decisions should be provided in the same way that exists under the Taft-Hartley Act. This potential review would permit a carrier to refuse to bargain on the basis of the NMB certification, and then the appeal to the courts would include an examination of the representation matter.

Public funding for the National Railroad Adjustment Board and Public Law Boards should cease at once so that the parties would be forced to pay for not settling grievances. The Mediation Board's authority to appoint arbitrators both for major and minor disputes should be transferred to the American Arbitration Association to ensure appointments that are more acceptable to both parties.

Future presidents should follow the leads of Presidents Nixon and Bush and decline requests for appointment of emergency boards in disputes that clearly are not emergencies. This would force the Mediation Board to cease advocating such appointments and discourage the creation of artificial emergencies.

Finally, the purpose of the Act should include a statement of government neutrality so that no court in the future could again dismiss a case with a comment that "there is no statutory duty of neutrality."