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TRANSPORTATION STRIKE CONTROL LEGISLATION: A CONGRESSIONAL CHALLENGE

*Arthur M. Wischart**

LIKE Banquo's ghost, the problem of transportation strikes has haunted Congress with unsettling regularity in recent years. The persistence of this troublesome specter was poignantly pictured by Congressman Staggers in his introduction to the hearings on the 1967 railroad shopcraft dispute:

As I was going up the stair
I met a man who wasn't there.
He wasn't there again today.
Oh, how I wish he'd go away.¹

This "blood-bolter'd Banquo" has "smiled upon" Congress three times within the past five years. In each case the visitation took the form of a dispute arising under the Railway Labor Act (RLA).² In 1963, it was the railroad work rules dispute; in 1966, the five-carrier airline strike; and in 1967, the railroad shopcraft dispute.

In each case Congress has reacted with obvious distaste and has achieved little. Advocates of permanent reform, unable even to secure hearings on the subject during nonemergency periods,³ have been brushed aside in the atmosphere of urgency surrounding each successive transportation crisis with the admonition that stopgap measures must receive top priority.⁴ The result of months of legislative activity has been only ad hoc measures for arbitration of the

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1. *Hearings on H.R.J. Res. 559 Before the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 1st Sess., ser. 90, pt. 7, at 1 (1967).

2. 45 U.S.C. §§ 151-88 (1964).

3. See S. REP. NO. 292, 90th Cong., 1st Sess. 14 (1967) (statement of Senator Javits); 113 CONG. REC. 7215 (daily ed. June 14, 1967) (remarks of Congressman Pickle). Senator Javits also expressed his frustration in 113 CONG. REC. 6099 (daily ed. May 1, 1967). More recently, however, hearings on S. 176 were scheduled by the Senate Judiciary Subcommittee on Improvements in Judicial Machinery (Senator Tydings, Chairman) for Oct. 17-19, 1967. S. 176, introduced by Senator Smathers on Jan. 11, 1967, would establish a five-member court of Labor-Management Relations which could make final determinations in disputes which adversely affect "the public interest of the Nation to a substantial degree."

4. This has been called the "band aid" approach to labor crises. Statement of Congressman Pickle before the Aeronautics Committee of the Association of the Bar of the City of New York, May 17, 1967, at 3. On February 16, 1967, Congressman Pickle introduced H.R. 5638 which would provide for permanent procedures which are somewhat similar to Pub. L. No. 90-54, 81 Stat. 122 (1967).

1963 and 1967 railroad disputes.⁵ Increasing public sentiment in favor of permanent reform⁶ and a presidential request⁷ for corrective legislation following the New York City transit strike have apparently gone unheeded.⁸

With the recurrence of such situations, it is apparent that we are faced with a failure of government in its most fundamental sense. James Madison wrote: "A political system that does not provide for a peaceable and authoritative termination of occurring controversies, would not be more than the shadow of a government; the object and end of a real government being the substitution of law and order, for uncertainty, confusion, and violence."⁹

The necessity of protecting the public interest in continuity of transportation services while at the same time preserving the institution of collective bargaining presents a serious dilemma which the statutory framework devised during the first third of this century now seems inadequate to resolve. Indeed, most crippling strikes have occurred after statutory mechanisms for dispute resolution have been exhausted. This Article will trace the history of transportation labor legislation, outline the shortcomings of present procedures for dispute resolution, evaluate various alternatives for statutory reform, and propose permanent corrective legislation which would

5. 77 Stat. 132 (1963); 81 Stat. 122 (1967).

6. A 1963 survey by the Opinion Research Corporation indicated that 60% of the public favored compulsory arbitration of transportation strikes. A 1966 Gallup poll on the same subject asked the following question: "If a strike continues for seven days, with no agreement reached, would you favor or oppose the idea of a Government-appointed committee deciding the issue and compelling both sides to accept the terms?" Of those polled, 54% were in favor, 36% were opposed, and 10% had no opinion. U.S. NEWS & WORLD REPORT, Sept. 5, 1966, at 8. A more recent Gallup poll used a slightly different question: "It has been suggested that no strike be permitted to go on for more than 21 days. If after 21 days, the union and the employer cannot reach an agreement, the courts would appoint a committee that would decide the issue and both would be compelled to accept the terms. Would you favor or oppose this idea?" Of those responding, 68% were in favor, 22% opposed, and 10% had no opinion. World Journal Tribune, April 26, 1967, p. 7, col. 1.

7. President's State of the Union Message, N.Y. Times, Jan. 13, 1966, at 14, col. 3: "I also intend to ask the Congress to consider measures which, without improperly invading state and local authority, will enable us to effectively deal with strikes which threaten irreparable damage to the national interest."

8. Recently Senator Mansfield, the Senate Democratic Leader, reported that the President had referred the matter back to Congress. N.Y. Times, June 21, 1967, at 20, col. 3.

9. THE COMPLETE MADISON 153 (Padover ed. 1953).

In a lecture last year, Professor Arthur Goodhart, now Scholar-in-Residence of the Association of the Bar of the City of New York, singled out strikes as one of the most serious problems facing the development of the law at the present time. Professor Goodhart does not regard the outlook as hopeless, however; he predicts that in time the present inadequate procedures for dealing with strikes will seem as outlandish as procedures in the thirteenth century now appear. Address by Arthur L. Goodhart to the Association of the Bar of the City of New York, Jan. 18, 1966.

avoid the necessity of submitting each dispute for congressional resolution on an ad hoc basis.

I. STATUTORY BACKGROUND

The evolution of labor relations in the major transportation industries has been characterized by an increased reliance on the institution of collective bargaining. When an accumulation of employee complaints and grievances caused a breakdown in transportation services, the parties were told to bargain collectively. When they refused to do so voluntarily, a duty to bargain was imposed by law. To protect the integrity of the bargaining process, other compulsions were legislated: prohibition of employer interference with unions, and compulsory third-party determination of disputes involving selection of a bargaining agent. To safeguard the fruits of bargaining, collective bargaining agreements were made enforceable at law, and when grievances still resulted in strikes, third-party determination was made compulsory.

In "major" disputes involving the formation of new contracts, the statutory requirements for notice of change, conferences, status quo and cooling-off periods, and mediation were added to give collective bargaining the greatest opportunity to function effectively. Labor and management, aware of the strong public interest in preventing transportation strikes, agreed upon a final backstop: if the parties were unable to settle after following all of the procedures designed to safeguard collective bargaining, a presidential emergency board would be created to inquire into the dispute, find out who was at fault, and recommend a settlement. Acceptance of the settlement was to be virtually compulsory (1) because of the moral commitments by labor and management in agreeing to the legislation in the first place, and (2) because of the supposedly coercive effect of public opinion. The failure of this procedure to function as originally intended has contributed significantly to the recurrence of major transportation strikes.

A. *Weaknesses of the Early Statutes*

The earliest railway labor legislation, enacted in 1888, followed a decade of labor strife.¹⁰ This statute, which authorized voluntary

10. 25 Stat. 501 (1888). The Act followed one year after passage of the Interstate Commerce Act, 24 Stat. 379 (1887). The strikes of that period are reviewed in detail in G. EGGERT, *RAILROAD LABOR DISPUTES: THE BEGINNINGS OF FEDERAL STRIKE POLICY* (1967).

arbitration and investigations by ad hoc commissions, was little used¹¹ and was replaced ten years later by the Erdman Act,¹² which permitted mediation and voluntary arbitration. The Newlands Act,¹³ enacted in 1913 in response to a dispute involving Eastern trainmen and conductors,¹⁴ established a permanent Board of Mediation and Conciliation which was authorized to intervene in railway disputes on its own initiative. The Act specified that an arbitration award was to be confined to "questions specifically submitted or [to] matters directly bearing thereon." But procedures for interpreting mediated agreements and arbitration awards were rudimentary in form, and unions complained that management had assumed the prerogative of interpreting them.¹⁵ Although the Newlands Act remained in effect until superseded by the Transportation Act of 1920, two significant developments intervened which decreased its practical importance: the enactment of the Adamson Act in 1916, and federal seizure and operation of the railroads during World War I.

The Adamson Act¹⁶ was an experiment in the use of congressional power "to compulsorily arbitrate the dispute between the parties"¹⁷ by legislatively fixing the terms of settlement in a particular labor controversy. The Act, which Congress consciously designed to favor the unions directly involved in the dispute, was criticized as a capitulation to the demands of labor and as a submission to expediency.¹⁸ President Wilson would have preferred arbitration—which the railroads had offered to accept—and so stated: "I yield to no man in firm adherence, alike of conviction and purpose, to the principle of arbitration in industrial disputes"¹⁹ Other railway unions wanted to share in the concessions granted,²⁰ and the labor unrest resulting from the Adamson Act contributed to government seizure of the railroads within a few months after American entry into World War I.

11. See L. LECHT, *EXPERIENCE UNDER RAILWAY LABOR LEGISLATION* 16 (1955).

12. 30 Stat. 424 (1898).

13. 38 Stat. 103 (1913).

14. See L. LECHT, *supra* note 11, at 25.

15. *ADMINISTRATION OF THE RAILWAY LABOR ACT BY THE NATIONAL MEDIATION BOARD, 1934-1957*, at 80 (1958).

16. 39 Stat. 721 (1916).

17. *Wilson v. New*, 243 U.S. 332, 351 (1917).

18. See E. BERMAN, *LABOR DISPUTES AND THE PRESIDENT OF THE UNITED STATES* (1924), reprinted for the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess., in Library of Congress LEGISLATIVE REFERENCE SERVICE, *Federal Legislation To End Strikes: A Documentary History* (pt. 1) 63, 77 (1967).

19. E. BERMAN, *supra* note 18, at 72.

20. See W. HINES, *WAR HISTORY OF AMERICAN RAILROADS* 18 (1923).

Railway unions were generally enthusiastic about the results of government operation.²¹ During the period of seizure, national agreements were established, adjustment boards were created for grievances, pay rates went up, and union representation increased. From other points of view, however, the results were less desirable. One Senator recently commented that government operation of the railroads created "the most tangled mess that could possibly be imagined."²² His investigations revealed that thirty years after the date of seizure a sizeable government office was still engaged in trying to unravel the legal intricacies of government operation and the numerous damage suits which followed.²³ Moreover, the most troublesome labor disputes during the decade following restoration to private operation by the Transportation Act of 1920²⁴ were inherited from the period of government control.

The Transportation Act of 1920 contained its own labor relations provisions which virtually supplanted the Newlands Act. The 1920 statute relied primarily upon determinations by a Railroad Labor Board comprised of three management representatives, three labor representatives, and three public representatives. The Board's effectiveness, however, was severely restricted by the Supreme Court's narrow interpretations of its authority. The Court held that the Board was intended to act as an arbitral agency whose decisions were enforceable only by public opinion,²⁵ and that the statute did not require the railroads to recognize or deal with labor unions.²⁶ The Court later ruled that Congress had not intended to forbid activities whose prohibition would be taken for granted today: refusal to confer or bargain, interference with organizational activities, refusal to comply with a Railroad Labor Board election, and coercion or discrimination against employees because of union membership.²⁷ Other causes of dissatisfaction developed, and the unions eventually boycotted the Railroad Labor Board.²⁸

Thus, prior to the passage of the RLA, peaceful settlement of transportation labor controversies was hampered by weak statutes affording few alternatives to the strike for resolution of disputes. The Newlands Act had provided for mediation, and the Transportation Act of 1920 included a procedure for compulsory fact-finding;

21. See L. LECHT, *supra* note 11, at 37.

22. 113 CONG. REC. 7806 (daily ed. June 7, 1967) (statement of Senator Holland).

23. *Id.*

24. 41 Stat. 456, 469 (1920).

25. *Pennsylvania R.R. v. United States R.R. Labor Bd.*, 261 U.S. 72, 80 (1923).

26. 261 U.S. at 85.

27. *Pennsylvania R.R. Sys. v. Pennsylvania R.R.*, 267 U.S. 203, 217 (1925).

28. See L. LECHT, *supra* note 11, at 43.

but an enforceable duty to bargain, third-party determination of disputes involving bargaining units and representatives, a prohibition against interference by employers, status quo periods, procedures for enforcement of bargaining agreements, and mandatory grievance arbitration had not been incorporated in any of the early statutes.²⁹ These shortcomings and the practical ineffectiveness of the Transportation Act highlighted the need for congressional action.

B. Experience Under the RLA

The labor relations of the railroads (and of the airlines since 1936) have been governed by the RLA,³⁰ which was passed in 1926

29. A comparison of the various pieces of legislation is set out below:

COMPARISON OF RAILROAD LABOR LAWS

	Act of 1888	Erdman Act (1898)	New- lands Act (1913)	Transpor- tation Act (1920)	Rail- way Labor Act (1926, as amend- ed in 1934)
Provisions outlawing blacklisting, yellow-dog contracts, and anti-union discrimination	No	No ^a	No	No	Yes
Enforceable duty to bargain	No	No	No	No ^b	Yes
Noninterference with choice of bargaining representative	No	No	No	No	Yes
Designation of bargaining representative	No	No	No	No	Yes
Determination of bargaining unit	No	No	No	No	Yes
Mediation	No	Yes	Yes	No ^c	Yes
Compulsory fact-finding	Yes	No	No	Yes	Yes
Status quo periods	No	Limited	No	No	Yes
Enforcement of bargaining agreements; grievance arbitration	No	No	No	Nonenforce- able deter- minations	Yes
Arbitration of terms of new contracts	Volun- tary	Volun- tary	Volun- tary	Nonenforce- able deter- minations	Volun- tary

^a Provisions outlawing blacklists and yellow-dog contracts were held unconstitutional in *Adair v. United States*, 208 U.S. 161 (1908).

^b See *Pennsylvania R.R. v. United States R.R. Labor Bd.*, 261 U.S. 72 (1923).

^c The Board of Mediation and Conciliation established under the Newlands Act was still in existence.

30. 44 Stat. 577 (1926), 45 U.S.C. §§ 151-88 (1964).

after months of intensive negotiations resulted in an agreement between representatives of labor and management.³¹ To "insure to the public continuity and efficiency of interstate transportation service,"³² the RLA relied upon the parties' sense of moral obligation and the ostensibly coercive effect of public opinion rather than upon enforceable obligations. Since the bill was the product of an agreement between labor and management,³³ it was assumed that the parties would be under a "moral obligation to see that their agreement accomplishes its purpose."³⁴ If a sense of moral obligation proved insufficient, the backers of the RLA expected that public opinion would force the parties to accept the recommendations of a presidential emergency board appointed to report the situation to the public.³⁵ A union spokesman commented that if the parties "stand out for unreasonable conditions, if they take an unreasonable or unfair position, and that blocks the settlement . . . then this board, with all its power and prestige, can go to the public and crystallize public opinion against the parties responsible for not maintaining peace."³⁶

The RLA has been instrumental in preventing certain kinds of labor disputes from developing into strikes.

1. *Interference with the Bargaining Representative*

Before the passage of the RLA, direct employer interference with unions led to many railroad strikes.³⁷ Management sidetracked the

31. U.S. COMMISSION ON INDUSTRIAL RELATIONS, FINAL REPORT 80-91 (1915). Mr. Donald A. Richberg, labor's representative in drafting the Railway Labor Act (RLA), has written in retrospect:

The fight for the Railway Labor Act, which was inaugurated in 1923, was one of the most critical battles over labor legislation ever waged in Congress. At the time such fundamental questions as the right of labor to organize, to be recognized by management, to engage in collective bargaining, and to establish trade agreements binding throughout a trade or industry were all bitterly in dispute. The country had just experienced the first and only nationwide strike of railroad employees, and tremendous public antagonism and much fear of any increased power in organized labor had been aroused. The American people were just coming out of the first post-war depression and in no mood to be tolerant of labor disputes which interrupted production or distribution. Indeed, the strongest argument which the railroad employees had was that they were voluntarily making proposals designed for the unusual purpose of preventing, rather than abetting strikes.

D. RICHBERG, LABOR UNION MONOPOLY 17-18 (1957).

32. H.R. REP. NO. 328, 69th Cong., 1st Sess. 1 (1926). See also 44 Stat. 577 (1926), 45 U.S.C. § 151(a) (1964) for a statement of the Act's purpose.

33. *Hearings on S. 2306 Before the Senate Comm. on Interstate Commerce*, 69th Cong., 1st Sess. 37 (1926).

34. *Hearings on H.R. 7180 Before the House Comm. on Interstate and Foreign Commerce*, 69th Cong., 1st Sess. 21 (1926).

35. *Hearings, supra* note 34, at 18. See also 22 N.M.B. ANN. REP. 18 (1956); 17 N.M.B. ANN. REP. 33 (1951).

36. *Hearings, supra* note 34, at 19.

37. E.g., *Pennsylvania R.R. Sys. v. Pennsylvania R.R.*, 267 U.S. 203 (1925); *Pennsylvania R.R. v. United States R.R. Labor Bd.*, 261 U.S. 72 (1923).

Railroad Labor Board's established election procedures by conducting its own elections; votes for the union were not counted, and only ballots cast for individual employees were considered valid. As a result, often on the strength of a minority of votes cast, the railroads recognized individuals as bargaining representatives, paid their salaries and expenses, and negotiated agreements with them. The consequence was frequently a strike. Yet, as has been noted, the Supreme Court had held that the Transportation Act did not prohibit this kind of direct interference with union representation.³⁸

The RLA removed such activities by management as a source of friction. Upholding an injunction against a railroad, the Supreme Court in *Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks*³⁹ accepted the union's argument that "the major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes.'"⁴⁰ Although the RLA looked toward "amicable adjustments," the Court insisted that "freedom of choice in the selection of representatives on each side of the dispute is the essential foundation of the statutory scheme."⁴¹

2. Refusal To Bargain

None of the prior statutes had imposed a duty to bargain, and even the requirement in section 301 of the Transportation Act⁴² that the parties confer was held unenforceable by the Court.⁴³ However, in *Virginian Railway Company v. System Federation No. 40*,⁴⁴ the Court decided that the RLA (as amended in 1934)⁴⁵ placed an affirmative, enforceable duty upon carriers to recognize and deal with unions in collective bargaining. With this development, another source of strikes was eliminated. As Justice Douglas stated in an excellent analysis of the legislative development: "Thus what had long been a 'right' of employees enforceable only by strikes and other methods of industrial warfare emerged as a 'right' enforceable

38. See text accompanying notes 26-27 *supra*.

39. 281 U.S. 548 (1930).

40. 281 U.S. at 565.

41. 281 U.S. at 569.

42. 41 Stat. 469 (1920).

43. 281 U.S. at 565.

44. 300 U.S. 515 (1937).

45. 48 Stat. 1185 (1934). Among the amendments was a provision correcting a deficiency which troubled (but did not deter) the Court in *Texas & New Orleans Railroad*: the absence of a statutory penalty for interference. Section 2, 10th, making it a crime to interfere with bargaining representatives, was added in 1934. 48 Stat. 1189 (1934), 45 U.S.C. § 152, 10th (1964).

by judicial decree. The right of collective bargaining was no longer dependent on economic power alone."⁴⁶

3. Selection of a Bargaining Representative

Prior to passage of the RLA, carriers were permitted to deal with company unions representing only a minority of the employees,⁴⁷ but the resulting disputes stymied bargaining and led to numerous strikes. Under the RLA, railroads were no longer free to interfere with employee organization.⁴⁸ However, the original version of the RLA contained no enforceable procedures for determining who the bargaining representative would be. To fill this void, the 1934 amendments created the National Mediation Board.⁴⁹ Section 2, 9th, of the amended act was aimed specifically at the practice of refusing to recognize employee-elected representatives while maintaining company unions. It provided a means for ascertaining the employee representatives through intervention and certification by the Mediation Board and required the carriers to deal with the bargaining agent so certified.⁵⁰ The 1934 amendments also gave the National Mediation Board responsibility for determining the proper "craft or class" of employees for bargaining purposes⁵¹—a question which had been another cause of strikes. These determinations have been held to be virtually immune from judicial review.⁵²

4. Grievances

The RLA, like the Transportation Act of 1920, provided for the establishment of adjustment boards for grievances. Resort to these boards originally depended upon voluntary agreement, and "minor" disputes involving grievances and issues of contract interpretation and application continued to be a serious source of friction.⁵³ In 1934, the Federal Coordinator of Transportation reported to Congress that "[g]rievances on a number of roads in the past few years have accumulated to such an extent that the only remedy the

46. *General Comm. v. Missouri-Kansas-Texas R.R.*, 320 U.S. 323, 330 (1943).

47. *Pennsylvania R.R. Sys. v. Pennsylvania R.R.*, 267 U.S. 203, 217 (1925).

48. *Texas & N.O. R.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 557 (1930).

49. 45 U.S.C. § 152, 9th (1964). 48 Stat. 1185 (1934).

50. *Virginian Ry. v. System Fed'n No. 40*, 300 U.S. 515, 545-46 (1937).

51. 45 U.S.C. § 152, 9th (1964).

52. See *Brotherhood of Ry. & S.S. Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965); *Switchmen's Union v. NMB*, 320 U.S. 297 (1943).

53. See L. LECHT, *supra* note 11, at 74-75.

men could see was to threaten a strike and thus secure appointment by the President of a fact finding board which could go into the whole situation."⁵⁴ To solve this problem, the 1934 amendments changed the adjustment board provisions into a form of compulsory arbitration later characterized by the Supreme Court as a "reasonable alternative" to economic warfare.⁵⁵ Other deficiencies of adjustment board procedures became apparent, and in 1966 Congress acted⁵⁶ to expedite adjustment board determinations and give them greater binding effect.⁵⁷ As a result, another cause of work stoppages was eliminated.

C. Shortcomings of the RLA: Formation of New Agreements

Strikes during the formation of new agreements are to be averted under the RLA by imposition of an enforceable duty to bargain, noninterference with the bargaining agent, mediation services, cooling-off periods, and possible appointment of a presidential emergency board. A detailed dispute resolution mechanism is provided: notice of an intent to change the contract terms is to be given by one or both of the parties followed by direct negotiations, mediation by the National Mediation Board, a proffer of voluntary arbitration, a thirty-day cooling-off period, and if a strike threat results in the appointment of a presidential emergency board, a report by the board and another thirty-day cooling-off period. During this process, the existing terms of employment must be maintained⁵⁸ and resort to "self-help" is prohibited.⁵⁹ Once these procedures have been completed, however, the parties are free to engage in economic warfare.⁶⁰ It is at this point that the RLA has too often failed to accomplish its stated objectives.

Early experience under the RLA was favorable, however, and almost invariably both parties accepted the emergency board recommendations as the basis for dispute settlement.⁶¹ In an eight-year

54. *Hearings on H.R. 9861 Before the House Rules Comm.*, 73d Cong., 2d Sess. 25 (1934).

55. *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R. Co.*, 353 U.S. 30, 41 (1957). The legislative history is also discussed in *Union Pac. R.R. v. Price*, 360 U.S. 601, 608-16 (1959).

56. 45 U.S.C. § 153 (Supp. II 1965-1966).

57. See Note, *Adjusting the Adjustment Board: Jurisdictional and Judicial Review Amendments to Section 3 of the Railway Labor Act*, 42 IND. L.J. 109 (1966).

58. *Manning v. American Airlines, Inc.*, 329 F.2d 32 (2d Cir.), cert. denied, 379 U.S. 817 (1964).

59. Cf. *Brotherhood of Ry. & S.S. Clerks v. Florida E.C. Ry.*, 384 U.S. 238 (1966).

60. *Brotherhood of Locomotive Eng'rs v. B. & O. R.R.*, 372 U.S. 284 (1963).

61. See 17 N.M.B. ANN. REP. 32 (1951).

period following the passage of the RLA, there were only three inconsequential railroad strikes.⁶² Apparently on the assumption that transportation strikes had become outmoded, the RLA was extended in 1936 to include the airlines.⁶³ However, with the railroad wage movements of 1941 the pattern changed dramatically. It has since become customary for the unions to reject emergency board recommendations, using them instead only as a basis "for securing further wage and rule concessions in a final settlement, usually made under Executive auspices."⁶⁴ As one commentator explained: "The award . . . serves as a baseline measuring the minimum changes to be incorporated in the new contract. Employee organizations have sought to extend their gain through further negotiations in which the carriers may also offer additional counter proposals."⁶⁵

Many commentators have become concerned that automatic rejection of emergency board recommendations by unions is the principal reason that this procedure has not had its intended effect in recent years.⁶⁶ One labor historian observed that "the significant collective bargaining development has usually occurred after the report was issued and found unacceptable. *The unions have been the active group in rejecting board reports.*"⁶⁷ In the airline industry, for instance, there have been thirty-three emergency boards, most of which made specific recommendations for the settlement of existing controversies over wages. One airline personnel vice president has commented that "[w]e can recall no instance in which the unions ever accepted such a recommendation; in every case the carriers have

62. See *Virginian Ry. v. System Fed'n* No. 40, 300 U.S. 515, 553 n.7 (1937).

COMPARISON OF MAN-DAYS LOST DUE TO STRIKES

	1933	1934	1935	1936 (Jan.-May)
Water Transportation	32,752	1,068,867	749,534	119,820
Motor Transportation	155,565	859,657	202,393	46,054
Railroads	0	0	56	0

63. 49 Stat. 1189 (1936), as amended, 45 U.S.C. §§ 181-88 (1964). See Kahn, *Settlement of Airline Labor Disputes*, 37 PAPER OF THE MICHIGAN ACADEMY OF SCIENCE, ARTS AND LETTERS 289 (1952) for an analysis of the airlines' early experience under the Railway Labor Act. Later developments are covered in Wischart, *The Airlines' Recent Experience Under the Railway Labor Act*, 25 LAW & CONTEMP. PROB. 22 (1960).

64. 17 N.M.B. ANN. REP. 33 (1951).

65. L. LECHT, EXPERIENCE UNDER RAILWAY LABOR LEGISLATION 15 (1955). See also KAUFMAN, COLLECTIVE BARGAINING IN THE RAILROAD INDUSTRY 154-55 (1954); E. MCNATT, LABOR RELATIONS IN THE AIR TRANSPORT INDUSTRY, 1947-1957, at 29 (1958).

66. See 17 N.M.B. ANN. REP. 32 (1951).

67. L. LECHT, *supra* note 65, at 6 (footnote omitted, emphasis added).

been required to pay more than this independent agency has thought proper to pay."⁶⁸

The three major transportation labor crises which have required congressional attention in the past four years arose after the statutory procedures for dealing with the formation of new contracts had been completed. In each case, the dispute had been submitted to a presidential emergency board⁶⁹ whose recommendations were accepted by the carriers but rejected by the union or unions involved. After non-statutory intervention of various types proved ineffective, each dispute required congressional attention for a protracted period.

In the two railroad disputes, ad hoc legislation was enacted⁷⁰ to end the strikes. In the airline strike, an ad hoc bill passed the Senate but the dispute was settled before the House completed action.⁷¹ Before the settlement was achieved, however, more than seventy cities in the United States were deprived of all trunkline air service for forty-three days, and 230 cities lost more than seventy per cent of such service during the same period.⁷² The strike grounded millions of would-be passengers,⁷³ caused 135,000 employees (including 100,000 not involved in the dispute) to lose earnings,⁷⁴ cost the airline industry eighty-two million dollars in net income (the struck carriers lost 103 million dollars),⁷⁵ and violated the presidential wage guidelines, thus contributing to a series of inflationary settlements.⁷⁶

Senator Morse, who chaired the presidential emergency board which investigated and reported on the dispute, stated on the Senate floor that employees of a regulated industry characterized by a high degree of public investment should not be permitted to injure the public interest by crippling air transportation:

68. Statement by Everett M. Goulard, Vice President, Industrial Relations, Pan American World Airways, on behalf of American Airlines, Eastern Air Lines, National Airlines, Pan American World Airways, and Trans World Airlines, before the Special Committee on National Strikes in the Transportation Industries of the American Bar Association, May 5, 1967, at 18 [hereinafter Goulard Statement]. Reasons for the failure of emergency board recommendations in airline disputes are discussed in Kahn, *supra* note 63, at 297-98.

69. Emergency Boards No. 154 (1963), No. 166 (1966), and No. 169 (1967).

70. 77 Stat. 132 (1963); 81 Stat. 122 (1967).

71. S.J. Res. 186, 89th Cong., 2d Sess. (1966). See Curtin, *National Emergency Disputes Legislation: Its Need and Its Prospects in the Transportation Industries*, 55 GEO. L.J. 786, 790 (1967).

72. See *Hearings on H.R.J. Res. 186 Before the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 2d Sess., at 167 (1967).

73. See Goulard Statement 7.

74. *Id.*

75. See CIVIL AERONAUTICS BOARD, *STUDY OF THE FINANCIAL IMPACT ON THE AIRLINE INDUSTRY OF THE IAM STRIKE 2* (1967).

76. See Curtin, *supra* note 71, at 790.

They should not be allowed to use their naked economic power to force out of the carriers—and, not so indirectly, out of the taxpayers, in the long run—a settlement in this case that will be highly inflationary in nature. Their action can be used as the bellwether for additional inflationary settlements from the major industries that are waiting in the wings to have their disputes settled.⁷⁷

Among the major unions “waiting in the wings” were those representing the railroad workers. The International Association of Machinists (IAM), the union which was responsible for the airline strike, also made a railroad settlement impossible. Senator Morse commented that “the irresponsible action of the machinists is having a deleterious effect upon the concept of collective bargaining and may well be bringing all regulated industry closer to permanent legislation providing for compulsory arbitration of their labor disputes.”⁷⁸

As damaging as the tactics of the IAM were to the public interest, they should not have surprised students of collective bargaining. The IAM has an obvious interest in retaining its position as bargaining representative and in acquiring new members. To accomplish these objectives, a union must negotiate a settlement which is not only fair, but one which its members believe to be as good as or better than any other bargaining representative could have achieved. The IAM’s actions in the airline dispute were attributable at least in part to a challenge from rival unions.⁷⁹ After negotiating a spectacular settlement for its airline members, the IAM had to convince its railroad members that they were no less favored.

Public opinion has not functioned as originally planned in compelling acceptance of emergency board recommendations. Unions have rejected those recommendations in hope of achieving higher settlements, while management, subject to the pressures of being in a regulated industry, has continued to accept them. These recommendations have thus become a one-sided form of arbitration: binding on management but not on labor; simply escalating the award rather than settling the dispute.

77. 112 CONG. REC. 17,491 (1966).

78. 113 CONG. REC. S7791 (daily ed. June 7, 1967).

79. The Transport Workers Union represents employees of a number of airlines, and within the last three years organizational efforts by the Teamsters and the Airline Mechanics Fraternal Association have sought to dislodge International Association of Machinists (IAM) representation. See Landauer, *Teamsters and an Audacious Leader*, Wall Street Journal, Aug. 19, 1966, at 6, col. 3.

II. ALTERNATIVES TO THE PRESENT SYSTEM

Action must be taken to avoid frustration of the RLA's original purpose—the avoidance of “any interruption to commerce or to the operation of any carrier engaged therein.”⁸⁰ If public opinion does not have the expected coercive effect, something must be substituted to secure acceptance of emergency board recommendations. Even before the airline and railroad episodes described above, the National Mediation Board warned: “The present situation, if it continues, can result only in a complete breakdown of the machinery for the settlement of wage and rules disputes which was so carefully and hopefully constructed by the legislators and sponsors of the Railway Labor Act in 1926.”⁸¹

As previously indicated, Congress has not hesitated to provide a remedy when the purposes of the Railway Labor Act could not be achieved through voluntary action. When “free” collective bargaining would not work, Congress made it compulsory; when carriers would not stop interfering with unions, penalties were added; when quarrels over the identity of the bargaining agent and the scope of the bargaining unit blocked negotiations, Congress provided for independent determination of such issues; and, when the parties were unable to settle grievances, Congress provided for the mandatory resort to adjustment boards. Similar corrective action should now be taken.⁸² Several alternative courses of action which have been suggested for dealing with the present situation are considered below.

A. *Maintain the Status Quo*

One alternative would be to continue to rely on the force of moral obligation and public pressure to enforce emergency board recommendations. However, recent experience indicates that their combined force is not strong enough to have the effect originally intended. The National Mediation Board has suggested that “in practice . . . the varied and oftentimes technical issues involved in such cases receive so little publicity, and are so difficult of understanding by the general public, that the effect anticipated when the law was passed has been entirely lost.”⁸³ Whatever the reason, public opinion has not played its anticipated coercive role with respect

80. 48 Stat. 1186 (1934), 45 U.S.C. § 151a (1964). Only recently the National Mediation Board docketed a petition by the Airline Mechanics' Fraternal Association to supplant the IAM on United Airlines.

81. 17 N.M.B. ANN. REP. 33 (1951).

82. See 19 N.M.B. ANN. REP. 7 (1953).

83. 17 N.M.B. ANN. REP. 33 (1951).

to emergency board recommendations, and the original commitment to a moral obligation appears to have been forgotten.

In any event, the assumption that the status quo is being preserved simply because the laws on the statute books remain the same is far from realistic. Serious strike threats result in a great variety of nonstatutory improvisation which may include White House mediation, implicit or overt threats of cancellation of government contracts, adverse determinations with respect to routes, fares, or future contracts, punitive legislation, tax reviews, antitrust investigations, the sale of stockpiled commodities on the open market, or the appointment of a nonstatutory board to make higher recommendations.⁸⁴ When such pressures succeed, the result is paradoxically hailed as another triumph of "free" collective bargaining; success is also advanced as another reason why statutory change is unnecessary. In fact, such extra-statutory activity demonstrates that legislative change is urgently needed. As in every form of governmental activity, public policy requires that intervention in labor disputes, when essential, be a civilized exercise of power. The forms and procedures employed when government is forced to intervene in labor disputes must be such as to inspire public confidence in the fundamental fairness of the government's action.

As the railroad and airline disputes illustrate, intervention outside the present statutory framework has usually taken the form of ad hoc legislation when all other forms of improvisation have failed. Advocates of this approach argue that such legislation can be tailored to fit the particular controversy, and that the lack of control over the content of a legislated settlement will impel the parties to bar-

84. See Sloane, *National Emergency Strikes: The Danger of Extralegal Success*, BUSINESS HORIZONS, Summer 1967, at 91. In the railroad shopcraft dispute, Emergency Board No. 169 (1967) made recommendations for a settlement which the railroads accepted but the unions rejected. The subsequent nonstatutory Fahy Board recommended a settlement more favorable to labor. See History of the Railroad Shopcraft Dispute in *Hearings on S.J. Res. 81 Before the Subcomm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 441-43 (1967). It took little imagination to foresee that the Special Board established under Pub. L. 90-54 [81 Stat. 122 (1967)] would add even more sweeteners. See Raskin, *That "Slave Labor Law" Twenty Years Later*, N.Y. Times, Aug. 21, 1967, at 30, col. 5. In its final determination, the Special Board adopted the Fahy Board's recommendations for the eighteen months covered thereby and added a five per cent increase and a five cent skill differential for an additional six months. The Report of the Special Board, Senator Morse's explanatory statement, and the critical individual statement of Board Member Frederick R. Kappel are set forth in 113 CONG. REC. 13,077-82 (daily ed. Sept. 18, 1967).

Under the Taft-Hartley Act, Presidential boards are forbidden to make recommendations on the merits. But the President is completely free to appoint nonstatutory boards at will, which are subject to no such limitation. An example is the Morse board appointed by President Kennedy in connection with the 1963 East Coast longshoremen's strike.

gain.⁸⁵ There are, however, a number of serious disadvantages to this approach.⁸⁶ A legislative solution to each serious dispute consumes a great deal of congressional time and attention. Congress is not designed to rule in individual cases; such functions are more sensibly delegated to administrative agencies better equipped to tailor their actions to particular situations. Perhaps the greatest disadvantage is that, as the railroad and airline controversies demonstrate, ad hoc legislative efforts tend to stifle collective bargaining.

B. *End Government Intervention*

It has been proposed that all government intervention be eliminated, with a reversion to a laissez-faire system in which dispute resolution depends solely upon the parties' economic muscle.⁸⁷ But it is clear that government intervention in one form or another is inevitable when a labor dispute threatens the general welfare of any segment of society. Government cannot sit idly by when the nation's rail or air transportation is disrupted, when New York City's subways are shut down, or even when a needed hospital is closed.

Every aspect of collective bargaining as we know it rests upon some form of government intervention. By imposing a duty to recognize unions, deal with them fairly, and bargain in good faith, "government intervention" provides the equality of power upon which collective bargaining depends. Government is also responsible for protecting arbitration, making mediation available, and determining the proper representatives in jurisdictional disputes. It seems obvious that some form of governmental intervention will persist in virtually all labor disputes. The questions in each case must be (1) whether such intervention is fair, (2) whether it takes a form approved by our society, and (3) whether it is effective. Governmental intervention in serious transportation strikes has too often failed on all three counts.

C. *Include the Airlines and Railroads Under the Taft-Hartley Act*⁸⁸

Another frequently suggested change is that the airlines and railroads be brought under the Taft-Hartley Act.⁸⁹ Some forms of

85. See Dunlop, *The Social Utility of Collective Bargaining*, in AMERICAN ASSEMBLY, CHALLENGES TO COLLECTIVE BARGAINING 168, 177-78 (1967).

86. The clumsiness of ad hoc legislation for dealing with an individual situation is exemplified by the Adamson Act, discussed in text accompanying notes 16-20 *supra*.

87. See H. NORTHRUP, COMPULSORY ARBITRATION AND GOVERNMENT INTERVENTION IN LABOR DISPUTES 211 (1966). See also *U.S. Intervention Kills Collective Bargaining*, NATION'S BUSINESS, March 1962, at 38 (interview with Mr. David L. Cole).

88. 29 U.S.C. §§ 141-87 (1964).

89. See Fleming, *Collective Bargaining Revisited*, a paper presented to the Labor

transportation—notably the trucking and maritime industries—are already subject to Taft-Hartley coverage, but their experience hardly suggests that the airlines and railroads should also be included.⁹⁰

From the standpoint of transportation, the Taft-Hartley Act offers few advantages and contains some positive disadvantages: grievance disputes can still be a source of strikes;⁹¹ status quo and cooling-off periods are not as widely available; mediation has less power and flexibility; and there is no requirement that unions be organized on a system-wide basis. Moreover, the fact that presidential boards have no power to make recommendations on the merits of disputes has been long criticized as a defect.⁹² The RLA, on the other hand, was developed solely as a transportation measure and it has been successful in narrowing the causes of economic warfare. The only remaining difficulty with the RLA is how to handle “major” disputes after the statutory procedures have failed, and this problem also exists under the Taft-Hartley Act.

D. Seizure

Seizure is frequently advocated by unions for an obvious reason: the history of governmental seizure as a means of settling labor disputes indicates that after seizure the workers have usually been given some or all of the benefits which they could not get from their employer.⁹³ When the strike emergency has ended and the business is returned to private management, management in effect has been required to accept a settlement it would not otherwise have accepted.⁹⁴

The chief disadvantage of seizure is that it does nothing to resolve a dispute unless it is accompanied by an executive decree fixing the terms of employment. However, the issuance of such a decree is tantamount to compulsory arbitration of the worst kind. Moreover,

Management Institute of the American Arbitration Association, Nov. 1966, at 23. Cf. Aaron, *Emergency Dispute Settlement*, in LABOR LAW DEVELOPMENTS 1967: PROCEEDINGS OF THE THIRTEENTH ANNUAL INSTITUTE ON LABOR LAW 185, 200 (1967).

90. Nine of the twenty-six Presidential Boards of Inquiry appointed under the Taft-Hartley Act have involved maritime disputes. See Federal Mediation and Conciliation Service, *Emergency Disputes Under the Taft-Hartley Act*, reprinted for the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess., in LIBRARY OF CONGRESS, LEGISLATIVE REFERENCE SERVICE, FEDERAL LEGISLATION TO END STRIKES: A DOCUMENTARY HISTORY, pt. 1, at 575 (Comm. Print 1967).

91. E.g., see *Sinclair Refinery Co. v. Atkinson*, 370 U.S. 195 (1962).

92. See Seidman, *National Emergency Strike Legislation*, in SYMPOSIUM ON LABOR RELATIONS LAW 473, 478, 491 (1961).

93. See *Hearings*, *supra* note 84, at 136 (statement of G. E. Leighty, Chairman, Railway Labor Executives Association).

94. See FEDERAL LEGISLATION TO END STRIKES, *supra* note 90, at 379.

unless the demands of the union are met, the effectiveness of seizure in controlling strikes is questionable.⁹⁵ Government operation in New York City and elsewhere has been no guarantee against strikes. The heavy administrative burden which seizure places on the government and the lengthy legal proceedings which are likely to result⁹⁶ are other disadvantages. Therefore, an expedient so alien to our economic system does not seem to be a supportable alternative.

E. *Compulsory Arbitration*

It is perhaps too much to hope for objective consideration of compulsory arbitration. The subject has frequently been treated as one for unsophisticated argument;⁹⁷ discussion tends to proceed in simplistic "pro" and "con" terms. The emotional overtones carried by the word "compulsory" further obstruct careful analysis. We should not, however, allow our attention to be diverted by this epithet. As demonstrated earlier, other once-controversial forms of compulsion are incorporated in the RLA and are now accepted as a matter of course.

Compulsory arbitration is the subject of many common beliefs which either have no application to transportation enterprises or are of doubtful validity. One such belief is that compulsory arbitration will not be effective in controlling strikes. Grievance and contract interpretation disputes have already been subjected to compulsory arbitration, however, and strikes are no longer a problem in these areas.⁹⁸ Third-party determination has also been effective in preventing jurisdictional disputes and controversies over the choice of bargaining representatives from developing into strikes. Finally, ad hoc congressional provisions for compulsory arbitration ended the national railroad strikes in 1963 and 1967. Whether compulsory arbitration would be effective in preventing strikes if used regularly in other "major" disputes would depend upon the fairness and neutrality of the procedures employed. But the use of compulsory arbitration in proper cases could provide a constructive device to enable workers in vital public service industries to achieve wage

95. "Between 1945 and 1953 seizure proved ineffective to prevent a stoppage on numerous occasions." *Cox, Seizure in Emergency Disputes*, in *EMERGENCY DISPUTES AND NATIONAL POLICY* 227 (1955). See also Katz, *Emergency Dispute Settlement*, in *LABOR LAW DEVELOPMENTS* 1967, at 223, 237.

96. See statement of Senator Holland in text accompanying note 22 *supra*.

97. See "The Pros and Cons of Compulsory Arbitration" published in 1965 by the Brotherhood of Railroad Trainmen as a high school debate manual.

98. *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30 (1957).

equality without having to resort to strikes endangering public health and safety.⁹⁹

Compulsory arbitration has been used extensively in Australia and New Zealand. While it has not eliminated strikes in those countries, it seems to have reduced their impact. In testimony before a Senate subcommittee, Samuel J. Rosenman stated on the basis of his visits with labor union leaders in Australia, that "[t]he arguments usually advanced in this country against any form of compulsory arbitration were dismissed by them as contrary to their experience with labor courts."¹⁰⁰ Closer to home, compulsory arbitration for public utilities in New Jersey and Pennsylvania has either eliminated strikes or materially reduced them.¹⁰¹ Thus, the evidence seems to indicate that compulsory arbitration has been at least partially effective in controlling strikes.

Although some believe that compulsory arbitration would lead to price control, government control of transportation "prices" has existed since 1887. Even as to unregulated industries, the assertion that compulsory arbitration would lead to price fixing is too categorical.¹⁰²

A third myth is that compulsory arbitration would interfere with the collective bargaining process. It is sometimes argued that under compulsory arbitration the parties might tend to slight the bargaining process in order to present their strongest positions to the arbitrator. However, the experience in Australia and New Zealand indicates that compulsory arbitration has not destroyed collective bargaining. In New Zealand, for instance, the Secretary of Labour has estimated that 80 per cent of the disputes subject to arbitration are settled by bargaining.¹⁰³ In the United States, com-

99. See N.Y. Times, Dec. 30, 1966, at 9, col. 3.

100. Statement by Samuel I. Rosenman in *Hearings on S. 176 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess., 26-27 (1967); Sykes, *Labor Arbitration in Australia*, 13 AM. J. COMP. L. 216, 248 (1964). The Goulard Statement, at 20, indicates that the figures for man-days lost due to strikes per 1,000 employees in New Zealand and Australia were 72 and 191, respectively, compared with 318 for the United States.

101. R. FRANCE & R. LESTER, *COMPULSORY ARBITRATION OF UTILITY DISPUTES IN NEW JERSEY AND PENNSYLVANIA* 83 (1951). Soon after this study the Supreme Court held that such statutes were pre-empted by federal law to the extent that interstate commerce is affected [*Amalgamated Ass'n v. Wisconsin Employee Relations Bd.*, 340 U.S. 383 (1951)], and, as a result, they have fallen into disuse.

102. See Williams, *Settlement of Labor Disputes in Industries Affected with a National Interest*, 49 A.B.A.J. 862, 868 (1963).

103. N. S. Woods, *The Practical Working of the Industrial Conciliation and Arbitration System* (unpublished paper). See also Tyndall, *The New Zealand System of Industrial Conciliation and Arbitration*, 82 INTERNATIONAL LABOUR REVIEW 138, 144 (1960).

pulsory arbitration under the RLA of "minor" disputes involving the airlines and railroads has not precluded settlement of the vast majority of those disputes before reaching the arbitration stage. Many employers and unions under the Taft-Hartley Act provide by agreement for arbitration of grievances; and, while it may be of little relevance to the settlement of "major" disputes involving formation of new contracts, most grievance and "minor disputes" are settled short of arbitration.¹⁰⁴

Of more relevance, Pan American World Airways and five unions have agreements requiring the terms of new contracts to be arbitrated if not settled privately. To date, all such disputes have been settled by collective bargaining.¹⁰⁵ The experience of the railroads under Public Law 88-108¹⁰⁶ also indicates that compulsory arbitration and collective bargaining can coexist. An arbitration board acting under this enactment established a series of guidelines to be used by the parties in connection with the size of train and yard crews. The parties were first to seek a settlement by negotiation; if that failed, the disputes were to be referred to local arbitration boards. The railroads reported that 111 agreements were reached by bargaining under this procedure in a two-year period.¹⁰⁷ In addition, an authoritative study of compulsory arbitration for public utilities in New Jersey and Pennsylvania concluded that "bargaining relationships which were functioning successfully before the enactment of the laws were not greatly disrupted by the statutes."¹⁰⁸

Another prevalent misconception is that compulsory arbitration is pro-management. However, management traditionally has not only refused to seek compulsory arbitration, but has actively opposed it.¹⁰⁹ As one student of the labor movement noted, "arbitration remains the recourse sought by the party which judges itself the

104. For the experience under the RLA, see Goulard Statement 14. See also *Vaca v. Sipes*, 386 U.S. 171, 192 n.15 (1967).

105. Goulard Statement 14.

106. 77 Stat. 132 (1963).

107. Statement by the Association of American Railroads Before ABA Special Committee on National Strikes in the Transportation Industries, May 3, 1967, at 17.

108. R. FRANCE & R. LESTER, *supra* note 132, at 87.

109. The National Association of Manufacturers' Subcommittee on Emergency Disputes of the Industrial Relations Committee has recently taken a strong position against compulsory arbitration. *BIG LABOR AND BIG STRIKES: ANALYSIS AND RECOMMENDATIONS* 11-12 (undated pamphlet). In his article, Mr. Rosenman said:

Opposition to compulsory arbitration has come with equal intensity from widely diverse ends of the political and economic spectrum. The subject has made as incredible a set of bedfellows as can be imagined: Wayne Morse and Barry Goldwater; the AFL-CIO and the National Association of Manufacturers.

113 CONG. REC. A3609 (daily ed. July 18, 1967).

weaker side in a labor dispute."¹¹⁰ The changing positions of labor and management in the transportation industry support this statement. During the early days of union organization, the railroads were in the ascendancy and opposed compulsory arbitration. The unions, then on the weaker side, generally favored it. Many spokesmen for labor testified in favor of compulsory arbitration at the hearings before the Senate Committee on Education and Labor in 1883. The Knights of Labor, with a membership of 67,000 the most powerful labor organization during the 1880's, had a preamble of organization setting forth as one of its primary purposes "[t]he substitution of arbitration for strikes, whenever and wherever employers and employees are willing to meet on equitable grounds."¹¹¹ Today, after a turnabout in the relative bargaining strength of labor and management in the transportation industry, positions on compulsory arbitration have been reversed—railroads favor compulsory arbitration, as do several airlines, and the unions are opposed. One reason for this change of position is that transportation "is the industry least equipped to withstand a strike."¹¹² The imbalance in bargaining power is caused by the nature of transportation: output cannot be inventoried or stockpiled, demand cannot be deferred, licensed employees cannot be replaced, and partial operations cannot be conducted.¹¹³ Another distinction is that the lockout, one of management's primary weapons in other industries, is unavailable to transportation management because of public service considerations.¹¹⁴

Thus, the arguments of labor and management on the issue of compulsory arbitration reveal more about their relative power positions than about correct principle. With the disparity in bargaining power that exists in transportation, muscle has become the ultimate determinant—at the expense of collective bargaining.¹¹⁵ The unions

110. Pitzele, Book Review, 8 LABOR HISTORY 101, 102 (1967).

111. SENATE COMM. ON EDUCATION AND LABOR, REPORT UPON THE RELATIONS BETWEEN CAPITAL AND LABOR 2 (1885). See also E. WITTE, HISTORICAL SURVEY OF LABOR ARBITRATION 6-10 (1952).

112. Statement by Samuel I. Rosenman in *Hearings on S. 176 Before Subcomm. on Improvements in Judicial Machinery, Senate Comm. on the Judiciary, 90th Cong., 1st Sess.*, 16 (1967).

113. Goulard Statement 7-8.

114. See *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965); *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965). See also *Michaelson v. United States*, 291 F. 940, 944 (7th Cir. 1923) *rev'd on other grounds*, 266 U.S. 42 (1924). Cf. *Brotherhood of Ry. & S.S. Clerks v. Florida E. C. Ry.*, 384 U.S. 238, 245 (1966).

115. Collective bargaining is premised upon equality of bargaining power. See COX, *The Duty To Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1403-09; G. TAYLOR, GOVERNMENTAL REGULATION OF INDUSTRIAL RELATIONS (1948).

argue against compulsory arbitration because they seek to retain the advantage which their muscle confers. From the standpoint of the public, however, an assertion that settlements engendered by sheer muscle are productive of economic wisdom is no less ludicrous than the medieval assumption that trial by battle was productive of moral wisdom.

Despite all this, the political opposition which a compulsory arbitration proposal would engender from the unions may well be overwhelming.¹¹⁶

F. *Arsenal of Weapons*

The "arsenal of weapons," or choice-of-procedures, proposal stems from a desire to maintain the flexibility which ad hoc legislation provides while avoiding the undesirable side effects of such legislation.¹¹⁷ The premise is that all of the possible techniques for resolving a dispute are known or knowable in advance. Therefore, would it not be desirable for Congress to forearm a specialized agency to apply the most appropriate of these techniques in individual cases?

The use of the techniques or procedures authorized by arsenal of weapons legislation would be discretionary. Some of the weapons would be distasteful. But a doctor preparing to go out on an emergency call packs his bag full of instruments and medicines not because he expects to use all of them, but because he wants to be prepared to provide whatever treatment is needed without going back to his office. Hopefully, some of the procedures in the arsenal of weapons, like the castor oil in the doctor's bag, will not be needed. When they *are* needed, however, failure to use them could produce even more unpleasant consequences. Indeed, one of the arguments in favor of the arsenal of weapons approach is that the presence of distasteful alternatives will induce the parties to bargain rather than risk their application.¹¹⁸

The RLA already provides part of an effective arsenal of weapons. One of the weapons is the emergency board, whose appointment by

116. See Curtin, *supra* note 71, at 803, 810 (1967).

117. Adlai Stevenson was among the earliest and most eloquent advocates of the choice of procedures approach: "Congress should give to the President, a choice of procedure when voluntary agreement proves impossible: seizure provisions geared to the circumstances; or arbitration; or a detailed hearing and a recommendation of settlement terms; or a return of the dispute to the parties." N.Y. Times, Dec. 9, 1959, at 51, col. 2. See also Wirtz, *The "Choice-of-Procedures" Approach to National Emergency Disputes*, in EMERGENCY DISPUTES AND NATIONAL POLICY 149-65 (1955).

118. See Raskin, *Collision Course on the Labor Front*, SAT. REV., Feb. 25, 1967, at 32, 70.

the President is largely discretionary. Some contend that the probable appointment of an emergency board in certain types of disputes merely defers bargaining.¹¹⁹ Undoubtedly this is true when the emergency board's recommendations can be ignored with impunity by one party or the other. However, if the emergency board's powers were strengthened, the parties might be induced to bargain to avoid undesirable alternatives.¹²⁰

III. A PROPOSAL FOR RESTORING THE EFFECTIVENESS OF EMERGENCY BOARDS

As shown above, recent experience has not confirmed the original expectation of labor and management that acceptance of emergency board recommendations would be virtually mandatory. The refusal of unions to accept these recommendations reflects labor's commanding bargaining power rather than its dissatisfaction with the composition of presidential boards. Emergency board members have generally been disinterested, distinguished, capable, and expert in the process of collective bargaining—characteristics relied upon in the proposal for permanent reform set forth below. Under this proposal, the responsibility for determining whether a dispute—or any part of it—should be submitted to arbitration would be transferred from Congress to the emergency boards. In deciding whether a dispute should be arbitrated, the emergency board would be guided by two important criteria: the effect of the threatened strike on the public and the prospect for settlement by collective bargaining. If an emergency board were to determine that a dispute should be arbitrated, the parties would be given a reasonable period of time to agree upon acceptable arbitrators and procedures. If the parties should fail to do so, the emergency board itself would prescribe the terms of arbitration. Thus, it should be possible to restore emergency boards to the effectiveness originally contemplated, and to eliminate what has been described as one-sided compulsory arbitra-

119. See Curtin, *supra* note 71, at 810.

120. In addition, several miscellaneous proposals deserve some consideration. The restructuring of collective bargaining, continuous bargaining, and peace and harmony committees—while desirable—do not solve the underlying problem of protecting the public in those cases when such procedures simply do not work. "Nonstoppage strikes" would be unfair to one side or other unless the penalties are in exact equilibrium—which is a practical impossibility. Making unions subject to the antitrust laws seems to offer little hope of reducing transportation strikes; because of the nature of transportation, a relatively small group of employees can shut down an entire system. Indeed, one might be tempted to conclude that undue proliferation of unions is one of the major problems in transportation.

tion in which the carriers, regulated by the government, are virtually compelled to accept emergency board recommendations which the unions can ignore with impunity.¹²¹

One advantage of this proposal is that issues not susceptible to collective bargaining could be sorted out so that the proper functioning of bargaining on other issues would not be impaired. An example of such an issue is the airline crew complement dispute. That dispute was not really a labor-management controversy at all, but a work assignment and jurisdictional conflict between two competing unions. The pilot and flight engineer unions each argued that, from the standpoint of safety, it should have the third seat on jet aircraft.¹²² To expect collective bargaining to resolve this kind of dispute is to expect too much, since a concession to one union would bring only increased antagonism from the other. The crew complement dispute sired a "feather-bird"—an unneeded additional crew member on jet aircraft.¹²³ Despite the settlement efforts of ten emergency boards,¹²⁴ the controversy produced thirteen airline strikes totalling 510 days¹²⁵ and upset collective bargaining relationships for a period of years. Had the emergency boards been given the authority proposed herein, their participation in the dispute would have been more meaningful and collective bargaining would not have been hampered by the stresses and strains engendered by conflict over a nonbargainable issue.

Collective bargaining also fails to function well in settling issues involving technological change. The complexities of a proposed technological change may not be fully understood, or the change in the nature of jobs may threaten traditional bargaining relationships. As demonstrated by the railroad work rules dispute, a union threat-

121. In *Hearings on S.J. Res. 81 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 119-20 (1967), J. E. Wolfe, Chairman of the National Railway Labor Conference, testified:

I remember not too long ago when Arthur Goldberg was Secretary of Labor we had an Emergency Board recommendation that the carriers felt could hardly be accepted without almost ruinous results. We called on the Secretary. I remember his words. "It would be intolerable for the railroads to refuse to accept these recommendations." And we knew it would be intolerable. We knew pretty well what the outcome would be. It would not only be intolerable, it would be extremely unpleasant. We accepted the recommendations.

So we have what is tantamount to finality as far as we are concerned, but absolutely nothing where the unions are concerned.

122. See Feinsinger Commission Report, May 24, 1961, at 22.

123. Jacobs, *Dead Horse and the Featherbird—The Specter of Useless Work*, HARPER'S, Sept. 1962, at 47.

124. See the Reports of Emergency Boards, No. 120, No. 121, No. 123, No. 124 (1958), No. 135, No. 136, No. 142, No. 143 (1961), No. 144, No. 146 (1962) and the two Feinsinger Commission Reports of May 24, 1961 and Oct. 17, 1961.

125. See Goulard Statement 26-27.

ened with extinction or a substantial loss of membership is unlikely to agree to a technological improvement, even though guaranteed liberal benefits for individual employees.¹²⁶ Still, the public interest requires that technological improvement not be subject to a veto by a powerful union.¹²⁷

Other factors which have caused collective bargaining to falter too often, particularly when there is an imbalance of bargaining power, are the personalities, competence, or ambitions of the individuals at the bargaining table. As a prominent labor specialist observed, "There is usually one key individual on each side of the bargaining table, and the nature of the given negotiations depends largely on the character of these individuals and on what is motivating them at the time."¹²⁸ Incompetence poses special threats to the bargaining process. As one commentator stated:

People need licenses to drive a taxicab, practice medicine, install plumbing or crop corns. Yet I have watched labor-management negotiators, who ought not to be allowed to cross the street without a seeing-eye dog, inflict hardship on millions of their fellow-citizens through sheer incompetence at the bargaining table—and there is not one thing anyone in the community can do to arrest them for reckless use of a dangerous economic weapon. No remotest relationship exists between the capacity or social responsibility of the bargainers and the degree of damage their status enables them to visit on the economy.¹²⁹

Whenever such impediments to collective bargaining threaten to inflict more injury on the public than on the parties, the emergency board—under this proposal—would be able to step into the bargaining process.

This proposal also allows an emergency board considerable flexibility to determine what action *short of arbitration* should be used to bring about agreement between the parties. Thus, intransigence on either side during the bargaining process could be countered by the board's power to call in a referee in the name of the public. This discretionary power would certainly strengthen the board's ability to mediate a dispute.¹³⁰

The fact that the RLA applies to a limited part of the economy

126. See Landis, *The Dynamics of Emergency Disputes*, in LABOR LAW DEVELOPMENTS 1967: PROCEEDINGS OF THE THIRTEENTH ANNUAL INSTITUTE ON LABOR LAW 209, 213 (1967).

127. See Wischart, *Comment*, in SYMPOSIUM, *supra* note 92, at 37.

128. D. Cole, *THE QUEST FOR INDUSTRIAL PEACE* 9 (1963).

129. Raskin, *Collective Bargaining and the Public Interest*, in CHALLENGES TO COLLECTIVE BARGAINING 155 (1967).

130. Seidman, *supra* note 92, at 491.

makes it possible to adopt this proposal without affecting the general practice of collective bargaining. All that is involved is a change in the locus of determination from Congress to the emergency board; the flexibility of being able to tailor the action taken to fit each dispute would be preserved. Such a change would restore to emergency boards the status originally intended, give collective bargaining a last chance by strengthening mediation, and place in the hands of disinterested experts the delicate question of whether the nature of the dispute and the public interest are such as to require third-party determination.