Collective Bargaining Under the Railway Labor Act[1]

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Our first national labor law, the Railway Labor Act (RLA)[2] has governed labor-management relations on the airlines and common-carrier railroads since 1926. Although significantly different in its approach from the National Labor Relations Act (NLRA),[3] the RLA is predominantly concerned with settlement of labor disputes through collective bargaining, an ongoing process involving unions and management. The RLA establishes clear statutory guidelines for bargaining between carriers and unions to establish new contracts. The Act compels labor and management to meet and confer about wages, hours, and terms and conditions of employment. There also is a duty to bargain in good faith.

I. THE RAILWAY LABOR ACT NEGOTIATING PROCESS

A. REQUIREMENTS OF THE RAILWAY LABOR ACT

The duty to bargain is expressed by the Railway Labor Act, which views collective bargaining as essential to its statutory scheme. The RLA requires that carriers and employee representatives meet and confer

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1. Adapted, in part, from WM. THOMS & F. DOOLEY, AIRLINE LABOR LAW 57-117 (1990).
2. 45 U.S.C. § 151 (1990).
3. 29 U.S.C. § 151 (1986).

about wages, hours, and terms and conditions of employment. Both sides have a duty to bargain and to reach agreement.[4] However, the law does not compel either side to reach a compromise or make a concession. At some point, impasse may be reached and the parties are then free to seek economic self-help.

The purposes of the RLA, as set forth in Section 2, are:

> 1. to avoid any interruption to commerce or to the operation of any carrier engaged therein;
>
> 2. to forbid any limitation upon freedom of association among employees or any denial as a condition of employment or otherwise, of the right of employees to join a labor organization;
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> 3. to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act;
>
> 4. to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions;
>
> 5. to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation of application of agreements covering rates of pay, rules, or working conditions.[5]

These terms of art have developed special meanings. The phrase "avoid any interruption to commerce" means a statutory basis has been established to reduce the threat of unannounced strikes that would disrupt passenger travel and freight shipments.[6] "Freedom of association of employees" means rail and airline employees are free to self-organize, to form, join, or assist labor organizations.[7] Alternatively, employees are free to refrain from bargaining collectively if a union is rejected. " A 'major dispute' is one which arises over the formation of collective agreements or where there is no such agreement. A 'minor dispute' contemplates the existence of a collective agreement. . . the dispute arises over the meaning of the agreement or the proper application of the agreement."[8]

In regards to the fourth and fifth purposes of the RLA, the Act requires certain procedures be followed in resolving major and minor disputes. The law does not in itself settle major disputes or contract issues. Rather, "its underlying philosophy is almost total reliance upon collective bargaining for major dispute settlement."[9] Thus the parties are expected

4. 45 U.S.C. § 152 (1990).

5. 45 U.S.C. § 151 (a) (1990).

6. Detroit & Toledo Shore Line R.R. v. United Transp. Union, 396 U.S. 142, 148 (1969).

7. 45 U.S.C. § 152 (1982).

8. Piedmont Aviation, Inc. v. Air Line Pilots' Ass'n, Int'l, 347 F.Supp. 363, 365 (M.D.N.C. 1972).

9. Wilner, *The Railway Labor Act: Why, What and for How Much Longer*, 55 TRANSP. PRAC. J. 242, 281 (1988).

to resolve major contractual issues through collective bargaining, and self-help (strikes and lockouts).

Further procedures of the Railway Labor Act are invoked only when the parties fail to reach an agreement. Minor disputes between air carriers and their employees are not strikeable but are settled by "system boards of adjustment." Minor disputes on the railroads are settled by the National Railroad Adjustment Board (NRAB).[10]

B. Procedural Steps in Major Disputes

If a major dispute between management and labor arises, the RLA requires that the parties attempt to resolve their dispute through the collective bargaining process.[11] However, the RLA process as it appears through collective bargaining has been so formalized that it bears little resemblance to dynamic bargaining. Unlike labor contracts in other industries, railroad and airline labor contracts usually have no expiration dates. They continue in effect until one of the parties is dissatisfied and wants to change them.

If the parties cannot negotiate a settlement, the party seeking to change the existing contract may post a "Section 6 notice."[12] The filing of a Section 6 notice invokes the collective bargaining procedures of the RLA. The notice must give the other party at least thirty days written notice of any intended changes in working conditions. "Oftentimes, the party who has been served the notice will file counterproposals for concurrent handling with the other party's notice, or, as an alternative, reserve the right to file counterproposals."[13]

A Section 6 notice filed by a carrier or its unions is the only recognized way for changing work rules and triggering the bargaining process. The process typically involves several steps before an agreement is reached between the carrier and labor. The parties must agree on a time and place to meet and confer within ten days of receipt of the notice. The conference must begin within the thirty days provided for in the notice. Neither party may change the existing rules or pay during this period.[14]

There is no time limit as to how long the parties may negotiate. Either party may notify the National Mediation Board (NMB) that they are unable to settle the dispute.[15] In that case, the NMB will try to either mediate the dispute or recommend arbitration.

When a case goes to mediation, the NMB or a mediator works with

10. 45 U.S.C. § 184 (1982).
11. 45 U.S.C. § 152 (1982).
12. 45 U.S.C. § 156 (1982).
13. J. GOHMAN, AIR AND RAIL LABOR RELATIONS at 323 (1979).
14. Railway Labor Act, § 6, 45 U.S.C. § 156 (1990).
15. 45 U.S.C. § 183 (1982).

the parties, trying to help them resolve their differences. The mediator will be present at negotiating sessions. The mediator may also meet privately with each side. No time limit exists for mediation.[16]

If the efforts of a mediator fail to produce an agreement, the final act of the NMB is to proffer arbitration.[17] The provisions for arbitration are found in Section 7 of the RLA.[18] If arbitration is accepted, the dispute is resolved. However, either side is free to reject the NMB's offer of arbitration. Usually, arbitration is not accepted. If arbitration is rejected, the NMB must notify the parties in writing. Neither party may change the work rules until thirty days after the NMB has concluded its efforts.[19]

Theoretically, the bargaining attempts would end there and the impasse could lead to a strike. However, the RLA provides that the NMB shall notify the President if it determines that a strike or lockout would "threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service."[20] Almost every strike of a major railroad will deny some part of the country some essential services. Theoretically, the emergency provisions can also be triggered by a strike on an air carrier, but these procedures have been less frequent.

The wording of the statute is so broad that the NMB usually does notify the President. This notice sets another moratorium ticking. When the emergency provisions (Section 10) of the RLA are invoked, the President is asked to create an Emergency Board to look into the dispute.[21] The President is not required to establish an Emergency Board. For example, President Bush refused to appoint an Emergency Board in the 1989 Eastern Airlines strike. Generally speaking, emergency boards have been established in railroad disputes but not in airline strikes since air deregulation.[22]

The Emergency Board consists of knowledgeable, neutral individuals. Neither arbitrators nor mediators, the Emergency Board is given the investigative powers of fact finders. Within thirty days, the Emergency Board is to report to the President on the potential effects of the threatened strike and the underlying issues. The parties must maintain the status quo during the thirty days that the Emergency Board has to make its report.

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16. Railway Labor Act, § 5, 45 U.S.C. § 155 (1990).
17. 45 U.S.C. § 155 (1982).
18. 45 U.S.C. § 157 (1982).
19. Railway Labor Act, § 5, 45 U.S.C. § 155 (1990).
20. 45 U.S.C. § 160 (1982).
21. Railway Labor Act, § 10, 45 U.S.C. § 160 (1960).
22. *See* Northrup, *The Railway Labor Act—Time for Repeal?* 13 HARV. J. LAW & PUB. POLICY 441, 466 (1990).

Obviously, the President could also read about the strike and its causes in the daily newspapers. Thus, it is a fair assumption that one of the purposes of this section is to extend the cooling-off period for another thirty days. During this time the parties may be able to resolve the issues themselves. Meanwhile, the Emergency Board is supposed to investigate and possibly come up with recommendations. If the Emergency Board's recommendations are ignored and no agreement is made, the parties are free to exercise "self-help."[23] This could include strikes, lockouts, or imposing new rules on the work force.

Until the 1980's, rail unions and carriers bargained on a nationwide basis. That meant that a strike on one carrier could eventually be a strike against all, since the RLA does not prohibit secondary boycotts.[24] When circumstances such as these arise, an additional ad hoc stage may be introduced to the negotiating process. If faced with the possibility of such a nationwide shutdown, Congress has opted for three types of resolution. First, Congress has appointed a board of arbitration to decide the dispute. Second, it has imposed a settlement that other unions had agreed to upon an uncompromising union. Finally, Congress has enacted a compromise package of its own.[25]

Inherent in these resolutions by Congress is the expression of the very purposes for which government is present in the dispute in the first place. First, Congress aims to thwart interruption to the national transportation system by virtue of its emergency resolution. Second, it seeks to compel the parties to recommence a negotiated settlement of their dispute.

C. *Procedural Steps in Minor Disputes*

Minor disputes between airline employees and management are handled by system boards of adjustment. Each carrier and labor union under contract is required to establish grievance machinery providing for a system board of adjustment. The authority and jurisdiction of the system board of adjustment are equivalent to that of the National Railroad Adjustment Board.[26]

The NRAB has established formal rules and procedures to handle minor disputes in the rail industry.[27] In contrast, there are no written rules or procedures in the airline industry as each carrier and its employees have their own system board of adjustment. Most airline labor contracts

23. *Id.*

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

25. *See* P. DEMPSEY & W. THOMS, LAW & ECONOMIC REGULATION IN TRANSPORTATION, 299-301 (1986). *See also* note 108, *infra*.

26. International Ass'n of Machinists, AFL-CIO v. Central Airlines, 372 U.S. 682, 694 (1963).

27. *See* 29 C.F.R. § 1207 (1990).

include specific provisions that govern grievance procedures. The contracts also usually include a clause that requests the NMB to designate a neutral referee if the parties cannot agree on one.

Minor disputes involving airlines are committed to a grievance-arbitration process before a system board of adjustment.[28] Airline system boards of adjustment are financed by the parties, while the NRAB is financed by the taxpayers.[29]

D. The Role of the National Mediation Board

The agency administering the Railway Labor Act is the National Mediation Board, an independent administrative agency.[30] The members of the NMB are appointed by the President, with the advice and consent of the Senate.[31] The NMB has three members, no more than two of whom may belong to the same political party, who serve staggered terms. None of them may be affiliated with a railroad or airline or unions which represent rail or airline workers.[32] In addition, there are about twenty-five mediators throughout the country employed by the board. Mediators are not members of the NMB and are not subject to such political considerations as all being from the same political party.

The primary jurisdiction of the NMB is supervising the selection of a bargaining representative by a craft of airline or railroad employees and overseeing the bargaining process.[33] Unlike other national labor agencies, the NMB does not have a detailed list of unfair labor practices to control. Rather, it is governed by general considerations of fair dealing and the duty to bargain toward an agreement.

Central to the NMB'S responsibilities is the duty to bargain in good faith.[34] The NMB has the responsibility of seeing that the union is truly the representative of its craft and that the employees it claims to represent are, in fact, employees of that carrier. The parties must maintain the status quo while the bargaining process goes on.[35] The NMB may be asked to participate by one of the parties, or the board may proffer its services at any time during the bargaining process. The NMB has several other responsibilities. First, NMB may proffer its services to help the parties mediate major disputes.[36] Second, it appoints neutral arbitrators (also called

28. International Bhd. of Teamsters v. Texas Int'l Airlines, 717 F.2d 157, 158 (5th Cir. 1983).
29. Sanchez v. Eastern Airlines, Inc. 574 F.2d 29 (1st. Cir. 1978). *See also* Northrup, *supra* note 22 at 477.
30. 45 U.S.C. § 154 (1982).
31. Railway Labor Act, § 4, 45 U.S.C. § 154 (1990).
32. *Id.*
33. 45 U.S.C. § 155 (1982).
34. Railway Labor Act, § 2, 45 U.S.C. § 152 (1990).
35. Railway Labor Act, § 6, 45 U.S.C. § 156 (1990).
36. Railway Labor Act, § 2, 45 U.S.C. § 152 (1990).

referees or umpires) for tripartite arbitration as well as for the system boards of adjustment on airlines.[37] Third, the NMB controls the arbitration process stipulated in Section 7 of the Railway Labor Act.[38] Fourth, it interprets agreements which have been reached through mediation. Finally, the NMB notifies the President of the United States that an emergency exists, so the president might name an Emergency Board to handle the dispute.[39]

E. Mandatory Bargaining Subjects

Unlike the NLRA, the RLA does not distinguish between mandatory and permissive bargaining subjects. There are, however, certain subjects that appear to be within the unique competence of management. These include corporate policy considerations such as the routes and services that the carrier should offer. Management will usually insist on a "management rights clause" that stipulates which subjects are within management's sphere of authority.

Indeed, the use of the mandatory/permissive distinction under the RLA is entirely consistent with its statutory framework. Section 2, First, provides that parties "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions."[40] It is self-evident that, unless parties are to be required to bargain over every issue, the mandatory subjects under the RLA must be limited to those enumerated in the Act. From this it logically follows, that given the parties' duty to exert every reasonable effort to reach agreement on these mandatory subjects, a refusal to bargain over these issues until an agreement is reached on a nonmandatory subject would violate a party's duty to bargain under Section 2, First.[41]

F. The Duty to Bargain in Good Faith

The duty to bargain implies recognition and respect for the opponent's representatives. The union must deal with the management representative selected by the carrier.

Many carrier management personnel have come up from the ranks. A good number of this group hold on to their union membership, possibly to retain retirement benefits, or perhaps because of a feeling of solidarity and sentiment.[42] Retaining union membership also protects the individual

37. Railway Labor Act, § 5, 45 U.S.C. § 155 (1990).
38. Railway Labor Act, § 7, 45 U.S.C. § 157 (1990).
39. 45 U.S.C. § 160 (1982).
40. Railway Labor Act, § 2, 45 U.S.C. § 152 (1990).
41. Airline Pilots' Ass'n. v. United Air Lines, 802 F.2d 886 (7th Cir. 1986).
42. Unlike the NLRA, The Railway Labor Act includes "subordinate officials" as employees. *See* Northrup, *supra* note 22 at 481.

if he or she should be bumped from a management position back to the rank and file. For the union to discipline a member because of its dissatisfaction with his or her activities as a negotiator or an adjuster for management would be coercion of the carrier in its selection of representatives.[43]

Similarly, the carrier must deal with the union as the sole representative of its employees. There should be no going around the union or attempting to interfere with its position as the exclusive bargaining representative. Neither side may use self-help until impasse has been reached. Until that time, the duty to bargain over mandatory bargaining subjects remains.

No matter how weak a union is economically, the employer has a duty to bargain with it. No matter how much an employer is despised, the union has a duty to bargain with it. The RLA states, "it shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements."[44]

II. SETTLEMENT OF DISPUTES

A. MAJOR AND MINOR DISPUTES

The language of the RLA does not use the words "major" and "minor." However, labor lawyers and courts use these terms to differentiate the types of conflict (besides representation cases) that arise under the RLA.

Major disputes are those that arise in contract negotiations.[45] They are the subject matter for contracts, having to do with wages, hours, and work rules. The resolution of a major dispute is either an agreement or an impasse. The latter can lead to economic self-help such as strikes and lockouts.

Minor disputes, on the other hand, concern the interpretation or application of an existing contract.[46] A railroad or airline labor agreement is often hammered out after weeks or months of tough negotiation. The parties often reduce their understanding to writing under last-minute pressures. In many cases, the final contract contains compromise words that may encompass different meanings.

Thus, a contract, reached to settle major disputes, may be so vague that it gives rise to minor disputes. The Railway Labor Act requires that minor disputes be "adjusted," that is, submitted to compulsory arbitra-

43. Railway Labor Act, § 2, 45 U.S.C. § 152 (1990).
44. 45 U.S.C. § 152 (1982).
45. Railway Labor Act, § 6, 45 U.S.C. § 156 (1990).
46. Railway Labor Act, § 3, 45 U.S.C. § 153 (1990).

tion.[47] The RLA provides an automatic and decisive mechanism for its settlement of minor disputes. Strikes can occur only over major disputes; minor disputes are adjusted.[48] However, the distinction between "major" and "minor" disputes is not as clear as it might be. The facts of a case often do not indicate to which category a dispute might belong.

Depending on the facts of a particular case, one party may prefer presenting the case as a major or minor dispute. For example, since a Section 6 notice is required to initiate a major dispute, the parties are likely to serve such a notice in any dispute arising out of any ambiguous situation to make the controversy appear more like a major dispute. However, it has been "pointed out that undue emphasis must not be placed on the maneuvers of the parties."[49] Furthermore, the parties cannot agree to specify the type of dispute. "[E]ven though the parties thought it was a major dispute, their designation is not controlling."[50]

1. *Interest Arbitration of Major Disputes*

The RLA is detailed as to the rules for voluntary arbitration of major disputes. Section 7 of the Act provides for tripartite arbitration of major disputes.[51] This means that each side names an arbitrator and the two arbitrators agree upon a neutral referee. If the two arbitrators cannot agree upon a third person for the neutral, the National Mediation Board will select the referee. Either a three or six person arbitration panel will be chosen by this method.

The agreement to arbitrate must be in writing and must refer to the RLA. The decision of the arbitrators is final, but is limited to the questions placed by the agreement to arbitrate. In addition, the "award," as the decision is called, may not be appealed. However, it can be "impeached."[52] Impeachment occurs if the court is convinced that the arbitrators acted ultra vires (beyond their powers granted by the agreement), or that the award was obtained by bias or fraud, or was not in conformity with the procedures of the RLA.[53]

Despite RLA provisions, voluntary arbitration for major disputes (interest arbitration) is rare in the railroad and airline industries. Carriers and unions want to retain control over the bargaining process. Both parties are reluctant to hand over their powers to an arbitrator who may act in an

47. 45 U.S.C. §§ 153, 184 (1982).

48. *See* Northrup, *The Railway Labor Act — Time for Repeal?* 13 HARV. J. OF LAW & PUB. POLICY 441, 445 (1990).

49. Airline Flight Attendants v. Texas Int'l Airlines, 411 F. Supp. 954, 961 (S.D. Tex. 1976).

50. Piedmont Aviation v. Airline Pilots' Ass'n., 347 F. Supp. 954, 961 (M.D.N.C. 1972).

51. 45 U.S.C. § 157 (1982).

52. Railway Labor Act, § 9, 45 U.S.C. § 159 (1990).

53. Railway Labor Act, § 9, 45 U.S.C. § 159 (1990).

unforseen manner.[54] There are special procedures for emergency boards to investigate labor-management disputes on commuter railroads with a quasi-compulsory settlement procedure.[55]

2. *Boards of Adjustment*

The 1936 amendments to the RLA, which extended coverage to the airline industry, provided for a National Air Transport Adjustment Board.[56] However, no such board has ever been established. Unlike the National Railroad Adjustment Board (NRAB) in the rail industry, there is no formal statutory authority for minor disputes on airlines.

Instead, each airline has a system board of adjustment.[57] The board of adjustment is the final arbitrator of minor disputes arising out of air labor contracts. The term "adjustment" actually stands for compulsory arbitration of minor disputes.[58]

Airline system boards of adjustment have been commended for being much faster than the railway industry's resort to the NRAB. However, airlines are finding that even system boards of adjustment are too slow. Some carriers are negotiating faster systems, such as using a single arbitrator for discharge-and-discipline-based questions.[59] The system board is retained for system-wide precedential cases.

The grievance chairperson has a role similar to that of a shop steward in NLRA governed industries. The chairperson has the duty to process meritorious grievances in an equitable fashion. The chairperson cannot refuse to go forward with a grievance because of personal or political consideration. The chair owes this duty to all within the bargaining unit, union member and nonmember alike.[60] Under Section 3 of the RLA, the parties are required to first handle minor disputes directly between them up to the highest officer of the carrier designated to handle these cases.[61] There are no formal procedures for a system board of adjustment found in the RLA. Thus, the parties must look to the collective bargaining agreement for procedures in filing and processing grievances. System boards of adjustment awards are reviewable by the court to the

54. Northrup, *supra* note 22 at 462.

55. Railway Labor Act, § 9A, 45 U.S.C. 159a (1990). *See also Northrup, The Railway Labor Act — Time for Repeal?*, 13 HARV. J. OF LAW & PUB. POLICY 441, 449-51 (1990).

56. 45 U.S.C. § 185 (1982).

57. *See Northrup, The Railway Labor Act — Time for Repeal?* 13 HARV. J. OF LAW & PUB. POLICY 441, 446 (1990).

58. *See Northrup, The Railway Labor Act — Time for Repeal?* 13 HARV. J. OF LAW & PUB. POLICY 441, 445 (1990).

59. Crable, *System Boards of Adjustment: The State of Expedited Arbitration in* CLEARED FOR TAKEOFF at 255 (J. McKelvey ed. 1988).

60. Steele v. Louisville & Nashville R.R. Co., 329 U.S. 129 (1944).

61. J. Gohmann, AIR AND RAIL LABOR RELATIONS at 321 (1979).

same extent as those of the NRAB.[62]

"Minor" disputes are committed to a grievance-arbitration process before a system board of adjustment, which is the mandatory, exclusive, and comprehensive system for resolving grievance disputes. "Neither federal nor state courts have jurisdiction to interpret labor contracts subject to the Act; that function is assigned exclusively to the system boards of adjustment."[63]

B. Self-Help After Impasse

1. Economic Self-Help

The state of impasse is reached when bargaining can go no farther, the parties are fixed in their positions, and mediation has failed. At this point, the union is free to strike.[64] Conversely, the employer is free to take defensive action.[65]

In NLRA cases, the employer may shut down the operation and lock out the employees.[66] Rather than waiting for the union to strike, this is an attempt to get a settlement more favorable to the employer.

There is a complicating factor in railroad and airline strikes. The carrier is under a duty to serve the public, that is, to operate as is feasible under the circumstances.[67] This duty arises from the traditional definition of a common carrier. The carrier was a corporation which had been given a license and protection from competition by the government. In return for this privilege, the carrier had the duty to maintain operations for shippers and passengers.[68]

A strike does not sever the relationship of carrier and employee.[69] However, the contractual relationship between them is suspended during the strike.[70] The carrier is free to permanently replace the strikers.[71] Re-

62. *See* International Assn. of Machinists, AFL-CIO v. Central Airlines, 372 U.S. 682 (1963).

63. International Bhd. of Teamsters v. Texas Int'l Airlines, 717 F.2d 157, 158 (5th Cir. 1983).

64. *See* Wilner, *The Railway Labor Act: Why, What, and for How Much Longer, Part I*, 55 TRANSP. PRACTITIONERS J. 242, 282-283 (1988).

65. *Id.* at 282.

66. Arouca and Perritt, *Transportation Labor Regulation: Is the Railway Labor Act or the National Labor Relations Act the Better Statutory Vehicle?*, LABOR LAW JOURNAL 145, 154-155 (March 1985).

67. Brotherhood of Ry. & Steamship Clerks v. Florida E. Coast Ry. 384 U.S. 238 (1966).

68. The first purpose of the Railway Labor Act is stated "to avoid any interruption to commerce or to the operation of any carrier engaged therein," 45 U.S.C. § 151a (1990).

69. *See* McCabe, The Railway Labor Act: A Procedure Reappraisal. 33 J. OF TRANSP. RESEARCH FORUM, 210, 211-212 (1989).

70. *See Northrup, The Railway Labor Act — Time for Repeal?*, 13 HARV. J. OF LAW & PUB. POLICY 441, 451-461.

71. *See Campbell & Hiers, Carriers' Right to Self-Help During Strikes, in* CLEARED FOR TAKEOFF, 221 (J. McKelvey, ed., 1988).

turning strikers are, however, placed on a preferential hiring list.[72] Strikers cannot be fired for striking. That is a cold comfort to an employee who finds that his job has been given to a replacement.

Because a strike is so dangerous, unions have tried many devices short of strikes. These include job actions, refusal of overtime, informing prospective passengers about strike conditions, slowdowns, and misrouting of baggage.[73] Recently, unions have opened negotiations with "white knights" about to take over a carrier and free it from an anti-union management.[74] This would appear to be a breach of the duty to bargain with the carrier's management.

2. *Limits of Self-Help*

The union may or may not have the right to engage in sympathy strikes. This is based upon the limitations of any no-strike clause in its agreement with the carriers. Even nonunion employees may engage in a sympathy strike, if it is "concerted activity."[75] Particularly since the deregulation movement began in 1978, there are actually few statutory or judge-made constraints against the right of either party to engage in self-help. Unless the parties limit themselves by contract or mediation, there is a great potential for a "law of the jungle" situation in rail and airline labor relations. The extent of this freedom from injunctions has yet to be determined. The Norris-LaGuardia Act[76] barring the use of labor injunctions in federal courts is broad in its application.

During the 1989 Eastern Airlines strike, striking machinists placed a picket line outside New York's Grand Central Terminal, used by rail carriers Amtrak and Metro-North Commuter Railroad, both subject to the Railway Labor Act. The picketing was enjoined by a U.S. District Court, but few limits have been placed on inter-airline or inter-railroad picketing.[77]

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72. *Id.*

73. The Northwest-Republic merger of 1986 resulted in a number of slowdowns, including tearing off baggage tags from passenger's luggage. Virtually all these activities have been enjoined.

74. In cases involving Frank Lorenzo, carrier employees negotiated with any outsider in an attempt to deliver them from Lorenzo — even the dreaded Carl Icahn! Similarly, railway unions were instrumental in the rescuing of Delaware and Hudson from anti-union Guilford Transportation and its eventual inclusion in Canadian Pacific's system.

75. 29 U.S.C. § 101 ff (1990). *See* Wilner, *The Railway Labor Act: Why, What and for How Much Longer, Part I*, 55 TRANSP. PRACTITIONERS J. 242, 285 (1988).

76. Arthur v. United Airlines, 655 F. Supp. (D.Colo. 1987).

77. Long Island R.R. v. International Ass'n. of Machinists, 874 F.2d 901 (2d Cir. 1989).

C. Strikes, Boycotts, and Injunctions

1. Right to Strike

A strike is an all-or-nothing proposition in the United States.[78] The type of situation one sees in Europe, where railroad workers lay down tools for an hour or more in a day to select certain targets for strike action is unknown. Here, partial strikes or work interruptions are not allowed and may be enjoined.[79]

A strike is pure economic warfare. Historically, a strike was waged by the union in hope of attaining its economic goals. More recently, it appears that unions have become concerned with keeping their status intact rather than losing hard-won gains to management cost cutting.

When a carrier is on strike, its employees are the first to suffer. They receive no wages and must depend on whatever war chest a union has managed to amass for a strike fund.[80] Management also suffers from strikes. Idled planes and locomotives continue to require maintenance costs and interest payments. After deregulation, management also suffers diversion of passengers and freight to other carriers. This gives carriers an incentive to resume operations with management or replacement personnel.[81]

When a legal strike is called, the membership is asked for a "strike vote" to authorize the action. Union members are advised to withdraw their services. A picket line is placed at areas where the carrier does business, including its corporate headquarters, downtown ticket offices, and stations, served by the carrier. They not only communicate the union's message, but they act as a signal to would-be passengers. The messages say, "please don't patronize; join us in our struggle; or at least stay neutral." To union members it is a sign to stay away. There is an implied promise that if you honor our picket line, we may help you if you go on strike against your employer.

2. Right to Picket and Boycott

Because of the implicit tension and possibility of violence, courts

78. Campbell and Hiers, *Carriers' Rights to Self-Help During Strikes in* CLEARED FOR TAKEOFF 221 (J. McKelvey, ed., 1988).

79. "Concerted activity" is protected, but shutting down a railroad for an hour a day (during the commuter rush) has not been considered protected activity. Strikes are only protected if Section 6 procedures are used and bargaining has proceed to impasse. There is no right to strike over grievances. *See generally*, Lynch, *Statutory Rights and Arbitral Values: Some Conclusions*, 44 U. OF MIAMI LAW REVIEW 617, 620-625 (1989).

80. Railroad strikers can be eligible for unemployment benefits after the strike lasts over four weeks.

81. *See* Stone, *Labor Relations on the Airlines: The Railway Labor Act in the Era of Deregulation*, 42 STAN. L. REV. 1485, 1543-44 (1990).

have taken a strict look at picketing.[82] The right to march on public property with picket signs is not protected by the First Amendment.[83] Courts have upheld time, place, and manner restrictions on picketing, reasoning that picketing is free speech plus a signal. The National Labor Relations Act, for example, contains explicit restrictions on what can be placed on signs.[84] The Railway Labor Act, on the other hand, was conceived of as mediatory legislation.[85] As such it is ill equipped to referee disputes that have turned to self-help during strikes.

With no content restrictions on signs, messages have not only been economic, but openly political. In 1989, strikers at Eastern made the personality of Texas Air Chairman Frank Lorenzo the topic of their strike. "Stop Lorenzo" shirts and buttons were passed out or sold to passengers.[86] During the Continental strike, striking pilots intimated that airline safety would suffer with inexperienced nonunion pilots at the controls.[87]On the political front, compromises have often been used to avoid strikes. In 1981, The Air Line Pilot's Association (ALPA) threatened a nationwide work stoppage. The strike threat was related to the FAA's certification of new aircraft capable of being operated by two, rather than three pilots.[88] In 1972, the International Federation of Airline Pilots' Associations tried to ground the world's commercial aircraft in protest against the United Nations' failure to take action against hijacking and air piracy.[89]

Because the railroad system is a unified skein of tracks 4' 8 ½" wide, the framers of the Railway Labor Act realized that interconnectivity is a fact of life. In recognition of that reality, no restrictions on secondary boycotts were placed in the RLA.[90] Unions may and do engage in sympathy strikes in support of job actions on other carriers. Absent any contractual limits on secondary activity air and rail employees generally have

82. *See generally* Wilner, *The Railway Labor Act: Why, What and For How Much Longer, Part I*, 55 TRANSP. PRACTITIONERS J. 242 (1988).

83. *Id.* at 246-55.

84. 29 U.S.C. § 158(b)(4) (1990).

85. *See Northrup, The Railway Labor Act: Time for Repeal?* 13 HARV. J. OF LAW & PUBLIC POLICY 441, 442-446 (1990).

86. This campaign, which involved sale or gift of souvenir items, could not be considered picketing, as no attempt was made to interrupt the movement of passengers or planes. Rather, it was an attempt to enlist passengers in a campaign to oust unpopular management.

87. This example may be the extreme in free speech, as disparaging a product or libelling the carrier's safety record could be rounds for dismissal on the basis of insubordination.

88. This strike never came to pass, as it was settled by certain assurances given to the pilots' organization by the FAA. In any case, such a walkout would not appear to be a labor-management dispute under the Railway Labor Act.

89. Conway, *Standards Governing Permissible Self-Help, in* CLEARED FOR TAKEOFF 201, 214 (J. McKelvey ed. 1988).

90. Northrup, *supra* note 22 at 507-509.

the right to do so.[91] The right to strike and picket, then, is only restrained by contract. There are few safeguards against the dispute spreading to other carriers.

III. THE RLA AND THE FUTURE OF TRANSPORTATION

The Railway Labor Act was conceived in the post-World War I days when railroads were the preeminent carriers of passengers and freight.[92] It was extended to airlines in 1936, largely on the behest of the Airline Pilots' Association, who wondered about the constitutionality of the newly-passed Wagner Act, and wanted a tried and true system for adjudicating disputes.[93] During the first fifty years of the Act, both railroads and airlines were heavily regulated by Federal agencies, along the lines of public utilities.[94]

Since 1978, substantial structural change has occurred in both industries. Regulation has been relaxed and oligopoly has replaced competition in many markets. Several major railroads dominate the industry; airlines have been reduced to five or six viable carriers. There have been mergers within the rail and air unions as well. In view of the striking changes in the framework of the industries, many commentators have questioned whether or not the two separate streams of labor law should remain.[95]

However, few of these criticisms come from within the railroads or aviation labor bar. Practitioners and the parties involved have long preferred working with a statute where the results are predictable, and where labor peace is given a high priority.[96] Commentators have insisted that agreements be made by the parties involved, and that each change be heavily deliberated.[97] Nonetheless, with management pushing for structural changes in the workforce of both airline and railroad industries, the status quo presumption arising from the operation of Section 6 in major disputes tends to favor labor. Management would favor making most changes appear to be "minor disputes" and set them for adjustment,

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91. *Id.*

92. *See* Wilner, *The Railway Labor Act: Why, What and For How Much Longer, Part I*, 55 TRANS. PRACTITIONERS J. 242, 243 (1988).

93. *See* Northrup, *The Railway Labor Act — Time for Repeal?*, 13 HARV. J. OF LAW & PUB. POLICY 441, 446 (1990).

94. Stone, *supra* note 81 at 1486-1493.

95. *See* Comment, *Merging the RLA and the NLRA for Eastern Airlines: Can it Fly?* 44 U. MIAMI L. REV. 5398 (1990). (Authored by Elizabeth L. Cocanoujher).

96. *See* Wilner, *supra* note 92 at 281.

97. *See* Wilner, *The Railway Labor Act: Why, What and For How Much Longer, Part II*, 57 TRANSP. PRACT. J. 129 (1990).

rather than making them strikeable issues.[98] Therefore it is for the courts to finally resolve what is and what is not a major dispute and a subject of bargaining.

Recently, the Interstate Commerce Commission (ICC) has gotten into the act, with its statutory mandate to impose labor protection.[99] ICC has jurisdiction over sale of properties from Class I railroads to shortline railroads.[100] As a rule, the Commission has not imposed labor protection provisions, and the Supreme Court has indicted that such a transaction may be made without the requirement of bargaining over a major dispute by the parties.[101] More recently, in the lease of the Guilford Transportation Company to the Springfield Terminal Railroad (a wholly-owned subsidiary), the ICC provided for a near seventy five days of labor protection payments, then let the transaction go through without any collective bargaining agreement being reached during that time.[102]

In Norfolk & Western Ry. Co. v. American Train Dispatchers Association,[103] the Supreme Court of the United States held that once the ICC has approved a merger, such a consolidation is exempt from antitrust law "and all other law . . . as necessary to carry out the transaction."[104] By a 7-2 decision, the Court indicated that this exemption included the Railway Labor Act, and that law's duty to bargain over labor protection provisions. The Court held that the ICC was authorized to issue orders exempting parties from provisions of collective bargaining agreements.

The N&W case originated with the Norfolk Southern merger. In approving the merger, the ICC had imposed the standard *New York Dock* protective provisions[105] but had noted the possibility that future displacements of employees might arise as additional consolidations occur. In 1986, the merged Norfolk Southern decided to consolidate all locomotive dispatching in Atlanta, thus closing the N&W power distribution center in Roanoke. The unions had claimed that the moving of engine dispatchers would be a change in an existing collective bargaining agreement. The Court held that the ICC's decision allowing consolidation of the two railroads superseded collective bargaining obligations via the RLA.[106]

This may not be the end of the matter. The exemption from "all

98. *See* Lynch, *Statutory Rights and Arbitral Values: Some Conclusions*, 44 U. OF MIAMI L. REV. 617, 620-625 (1989).

99. P. CAPPELLI, STILL WORKING ON THE RAILROAD 51-53 (1990).

100. *See* Thoms, Dooley and Tolliver, *Railroad Spinoffs, Labor Standoffs and the P&LE*, 18 TRANSP. L. J. 57 (1989).

101. Pittsburgh & Lake Erie RR. v. Railway Labor Executives Ass'n., 491 U.S. 490 (1989).

102. Wilner, *Employee Protection Plan*, TRAINS, March 1990, at 21.

103. 111 S.Ct. 1156 (1991).

104. 49 U.S.C. § 11341(a) (1990).

105. 366 ICC 173 (1982).

106. 111 S.Ct. 1165 (1991).

laws" includes only such exemptions as are necessary for the transaction. Section 11347 of the Interstate Commerce Act still requires the ICC to impose labor-protective conditions in mergers.[107] Nonetheless, the N&W case broadens the ICC's authority in mergers at the expense of collective bargaining and the National Mediation Board.

Frank Wilner, a long-time student of rail labor and spokesman for the Association of American Railroads (as well as a proponent of the Railway Labor Act) mentions, in regard to the transfer of lines (and possibly labor agreements) to regional railroads,

> What is needed are simple, clear and certain procedures. So far, Congress has been unwilling to legislate them and collective bargaining has failed to produce them. This is an unfortunate state of affairs.[108]

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107. 49 U.S.C. § 11347 (1990).

108. Wilner, *supra* note 92 at 281. On June 26, 1992, President Bush signed into law a bill passed in the wee hours by Congress ending a nationwide rail lockout. The shutdown began with a strike called two days previously against CSX Transportation by members of the Machinists' Union. Concurrently, a strike vote had been taken against Amtrak by several operating and shopcraft unions, and contract negotiations with Conrail had also reached impasse. The passenger trainmen postponed their strike against Amtrak, but, once the picket lines went up at CSX, all Class I freight railroads locked out their employees, not only paralyzing freight shipments, but locking Amtrak trains off their tracks. (The exception was the Boston-Washington corridor, where Amtrak owns the railroad).

The back-to-work law, based on an artificial emergency (the railroads had locked out their employees, in part, to force congressional action) calls for compulsory arbitration of the dispute. It requires:

> A cooling-off period of 35 days
> A requirement that labor and management resume collective bargaining
> Submission of best final offer from each side in the three labor disputes to the arbitrators within 25 days of the beginning of negotiations
> At the end of 35 days, the arbitrator is directed to pick and choose the best final offer from either labor or management in each dispute
> The arbitrator's recommended settlement goes to the President, who has 3 days to accept or reject it.
> If approved, the President's decision goes into effect as a contract.
> If disapproved, the unions regain the right to strike and management the right to lock out. Denver Post, June 26, 1992, p. 18A, c. 1.

This marks the twelfth time that Congress has legislated an end to a rail strike, and Congress's constant interference makes the right to strike and the duty to bargain collectively somewhat illusory. *See* Thoms, *The Vanishing Fireman*, 14 LOYOLA L. REV. 200 (1967).