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# Labor Law—Railway Labor Act, Section 2 Seventh—Carrier's Self-Help and Duty to Operate During a Strike.—Brotherhood of Ry. & SS. Clerks v. Florida E. C. Ry

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most serious, questions of practical administration should be sufficient to convince New York courts that the assertion of quasi-in-rem jurisdiction under these circumstances is an unwise and difficult method by which to provide a forum to injured residents.

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**Labor Law—Railway Labor Act, Section 2 Seventh—Carrier's Self-Help and Duty to Operate During a Strike.—*Brotherhood of Ry. & S.S. Clerks v. Florida E.C. Ry.*[1]**—On March 1, 1961, the non-operating railway unions, pursuant to Section 6 of the Railway Labor Act (RLA),[2] notified virtually all major carriers that they desired to change the existing collective bargaining agreements as to wages and advance notice of lay-offs. Negotiation and mediation on a national level failed to bring about agreement. A Presidential Emergency Board was then appointed to investigate the dispute. By June 1962, every carrier but Florida East Coast Railway (FEC) had settled with the unions on the basis of the recommendations of the Emergency Board.[3]

Local negotiations and mediation between FEC and the non-operating unions were unsuccessful, and both parties rejected the National Mediation Board's suggestion of arbitration. When the Board terminated its services in October 1962, the parties were free to resort to self-help.[4] The non-operating unions struck in January 1963, and the operating unions refused to cross the picket lines. After a short time, FEC resumed partial operations, using supervisory personnel and replacements. The railroad made separate agreements with the replacements as to rates of pay, rules, and working conditions, on terms different from those in the outstanding collective bargaining agreements.[5] The non-operating unions subsequently changed their position and agreed to arbitrate the wage and notice dispute, but FEC refused this offer.[6] In September 1963, FEC served a section 6 notice on the unions, proposing permanent changes in the collective bargaining agreements which would bring those agreements into conformity with existing operations. Negotiation and

[1] 384 U.S. 238 (1966).

[2] 44 Stat. 582 (1926), as amended, 45 U.S.C. § 156 (1964).

[3] 384 U.S. at 241.

[4] Brotherhood of Locomotive Eng'rs v. Baltimore & O.R.R., 372 U.S. 284 (1963). The term "self-help" refers to the economic weapons that labor and management have traditionally used to induce the other to meet its demands. See Florida E.C. Ry. v. Brotherhood of R.R. Trainmen, 336 F.2d 172, 181 (5th Cir. 1964), cert. denied, 379 U.S. 990 (1965). For instance, after the RLA procedures have been exhausted, the unions are free to strike, Pan Am. World Airways, Inc. v. Flight Eng'rs Ass'n, 306 F.2d 840 (2d Cir. 1962), and the carrier is free to implement the changes discussed and attempt to operate, Flight Eng'rs Ass'n v. Eastern Airlines, Inc., 208 F. Supp. 182 (S.D.N.Y. 1962), aff'd per curiam, 307 F.2d 510 (2d Cir. 1962), cert. denied, 372 U.S. 945 (1963).

[5] These terms were considerably less favorable to the replacements than the outstanding collective bargaining agreements. For example, FEC reclassified many jobs to six-day rather than five-day, thus avoiding overtime pay. Florida E.C. Ry. v. Brotherhood of R.R. Trainmen, supra note 4, at 182.

[6] 384 U.S. at 242.

mediation of the changes proposed by this notice failed when FEC insisted on the presence of a court reporter at the bargaining table.[7] FEC then formally announced that it was instituting the changes described in the notice.

In 1964, the United States sued for a preliminary injunction to restrain FEC from effecting any changes in the outstanding collective bargaining agreements until the procedures of the RLA had been exhausted as to those changes. The non-operating unions intervened as plaintiffs. The district court, pursuant to the Fifth Circuit's decision in a companion case,[8] granted the injunction, but permitted the carrier to petition the court for authorization to make such temporary changes in the collective bargaining agreements as were reasonably necessary to continue operations.[9] The carrier immediately filed such a petition and the court granted permission to: (1) adjust the ratio of apprentices to journeymen; (2) exceed the maximum age requirements of workers; (3) contract out certain work; and, (4) use supervisory personnel to perform specified jobs where trained workers were unavailable.[10] All parties appealed. The Fifth Circuit affirmed on the basis of its earlier opinion,[11] and the Supreme Court granted certiorari.[12]

The non-operating unions and the United States argued that RLA section 2, seventh[13] prohibits any change in the collective bargaining agreements except by the methods provided in the RLA or in the collective bargaining agreements themselves.[14] FEC argued that it could unilaterally make whatever temporary changes it chose during a strike as part of its right to self-help.[15] HELD: Affirmed. Section 2, seventh is inapplicable to changes in the collective bargaining agreements when implemented for the duration of the strike. In order to make these temporary changes, however, the carrier must petition for equitable relief. The courts will allow only those changes as are

[7] United States v. Florida E.C. Ry., 57 L.R.R.M. 2618, 2621 (1964).

[8] Florida E.C. Ry. v. Brotherhood of R.R. Trainmen, supra note 4.

[9] United States v. Florida E.C. Ry., supra note 7.

[10] The district court denied the following changes: (1) abolition of craft lines and seniority districts; (2) cancelling of the union-shop; (3) unrestricted use of supervisors and subcontractors whenever qualified personnel were unavailable; and (4) the use of non-exempt foremen to perform scope work whenever qualified personnel were unavailable. This order is unreported, but is detailed in Florida E.C. Ry. v. United States, 348 F.2d 682, 684 (5th Cir. 1965). It is important to note that the district court decided only that the changes it denied were not necessary in FEC's situation, and not that the changes would not be granted to other struck carriers if necessary.

[11] Florida E.C. Ry. v. United States, supra note 10.

[12] Brotherhood of Ry. & S.S. Clerks v. Florida E.C. Ry., 382 U.S. 1008 (1966).

[13] 48 Stat. 1188 (1934), 45 U.S.C. § 152, Seventh (1964). This section provides:

> No carrier . . . shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

In addition to those of RLA § 6, the principal procedures for settlement of major disputes are found at RLA § 5, First, 44 Stat. 580 (1926), as amended, 45 U.S.C. § 155, First (1964), and RLA § 10, 44 Stat. 586 (1926), as amended, 45 U.S.C. § 160 (1964).

[14] Brief for the United States, pp. 13, 14. Brief for the Non-Operating Unions, p. 27.

[15] See Brief for FEC, p. 26. FEC did not argue that it had the right to implement the permanent changes described in its September 1963 section 6 notice. Id. at 26 n.13. The carrier did argue that the United States had no standing to bring this action. Id. at 42. The Supreme Court dismissed this contention in a footnote, citing RLA § 2, Tenth, 48 Stat. 1189 (1934), 45 U.S.C. § 152, Tenth (1964). 384 U.S. at 242 n.4.

necessary for continued operations "in light of the inexperience and lack of training of the new labor force or the lesser number of employees available. . . ."[16] Justice White, in a dissenting opinion, argued that section 2, seventh should be applicable to all changes, including temporary changes, during a strike.[17]

There is no judicial precedent, other than the Fifth Circuit's decision in the companion case, as to whether this section applies to a struck carrier's *temporary* changes in the collective bargaining agreements. In addition, there is no legislative history on the question: Congress did not consider the application of the RLA to a lawful strike situation. The act was passed to avoid interruptions in commerce caused by labor disputes, and this was to be accomplished by inducing the parties to reach prompt, orderly settlements through RLA procedures.[18] Congress felt that these procedures would be successful enough to end the need for either party to resort to self-help, including strikes.[19]

In holding section 2, seventh inapplicable, the Court pointed out that the collective bargaining agreements actually remained in force during the strike.[20] These agreements contain such stringent personnel qualifications that during a strike a carrier would find it almost impossible to secure a sufficient number of skilled replacements to operate to any great extent within their terms. The struck carrier could secure the changes necessary to operate through RLA procedures, but this would take a great deal of time, and, during the interim, the public would be deprived of essential transportation service. Under the Interstate Commerce Act, the carrier has a duty to make reasonable efforts to maintain service at all times.[21] The Court stated that "the duty runs not to shippers alone but to the public"[22] and exists even when self-help has begun.[23] This duty is placed on the carrier

[16] 384 U.S. at 248.

[17] Justice White contended that the explicit language of section 2, seventh is all-inclusive and that there is no overriding public policy that would justify any exception. 384 U.S. at 248-50.

[18] RLA §§ 2(1), (4), 48 Stat. 1186 (1934), 45 U.S.C. §§ 151a(1), (4) (1964). See Railroad Yardmasters v. St. Louis, S.F. & T. Ry., 218 F. Supp. 193, 201, 206 (N.D. Tex. 1963), rev'd on other grounds, 328 F.2d (5th Cir. 1964), cert. denied, 377 U.S. 980 (1964).

[19] 67 Cong. Rec. 4503 (1926) (remarks of Congressman Cooper); 78 Cong. Rec. 11716 (1934) (remarks of Congressman Kenney).

[20] The Court stated that the unions are the bargaining representatives of all employees whether or not they are union members. 384 U.S. at 246; Steele v. Louisville & N.R.R., 323 U.S. 192 (1944). This includes replacements who are thus entitled to the benefits of the collective bargaining agreements. Moreover, the carrier and its employees cannot supersede the agreements by individual contract. Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944). Neither of the above two cases cited by the Court deals with a strike situation, but the Court's reasoning is logical, and its conclusion is probably valid. See Mission Mfg. Co., 128 N.L.R.B. 275 (1960).

[21] 24 Stat. 379 (1887), as amended, 49 U.S.C. §§ 1(4), (11) (1964).

[22] 384 U.S. at 245.

[23] The Court seems to have misapplied the Interstate Commerce Act in three respects. First, the sections have reference to the commercial transactions between the carrier and its customers. Second, the main purpose of these sections is to prevent the carrier from discriminating between users of its facilities. Howitt v. United States, 328 U.S. 189, 192 (1946); Louisiana & Ark. Ry. v. Export Drum Co., 228 F. Supp. 89, 93 (E.D. La. 1964). Third, the use of the Interstate Commerce Act to construe labor legislation is questionable.

because "in our complex society, metropolitan areas in particular might suffer a calamity if rail service for freight or for passengers was stopped."[24] The carrier could not meet its obligations to the public if it could not operate during the time it takes to exhaust RLA procedures.[25] Furthermore, since the struck carrier's only self-help remedy is resumption of operations, its right to self-help would be meaningless if it could not operate during the above interval. To enable the carrier to operate sooner, it must be permitted to make immediate changes in its collective bargaining agreements. Therefore, the Court concluded, section 2, seventh is inapplicable to temporary changes.

The Court intended to accomplish two objectives: first, to satisfy the public interest in continuous rail service; and second, to insure that the carrier's right to self-help is meaningful. It is submitted, however, that the decision gives the carrier too much self-help and sacrifices the long-range public interest in a full service railroad system in order to achieve the immediate resumption of partial service.

In order to properly analyze the effects of this decision, some reference to special circumstances operating in the railroad industry is necessary. These circumstances are: unprofitable services; featherbedding; and increasing railway unemployment.[26] First, the railroads offer essentially three services, carload freight, less-than-carload freight, and passenger. Of these, only freight is profitable.[27] Second, under the collective bargaining agreements, the railroads operate the above services with more workers, having greater skills, than are actually necessary.[28] Third, lay-offs and mergers in recent years have increased railway unemployment.[29]

See Local 1976, United Bhd. of Carpenters v. NLRB, 357 U.S. 93, 110 (1958); Brotherhood of Locomotive Eng'rs v. Florida E.C. Ry., 346 F.2d 673, 676 (5th Cir. 1965). But see Toledo, P. & W.R.R. v. Brotherhood of R.R. Trainmen, 132 F.2d 265, 269 (7th Cir. 1942), rev'd on other grounds, 321 U.S. 50 (1944). The Court's holding that the duty to maintain service exists even when self-help begins creates an implication that a carrier will be prohibited from "locking out" in anticipation of a strike when such action will cause a cessation of operations. But see American Ship Building Co. v. NLRB, 380 U.S. 300 (1965).

[24] 384 U.S. at 245.

[25] As the Court recognized, the duty to maintain service is not absolute. 384 U.S. at 245. The carrier does not violate this obligation when it is unable to operate because of conditions beyond its control. City of Alexandria v. Chicago, R.I. & P.R.R., 311 F.2d 7, 10 (5th Cir. 1962). A strike could be such a condition. Montgomery Ward & Co. v. Consolidated Freightways, Inc., 42 M.C.C. 225, 231 (1943) (dictum). Therefore, there is no justification for allowing the carrier to change its collective bargaining agreements to enable it to satisfy a duty it has already met.

[26] The airlines industry is also covered by the RLA procedures. RLA § 201, added by 49 Stat. 1189 (1936), 45 U.S.C. § 181 (1964). These conditions, however, do not exist in the airlines industry. See 1964 CAB Ann. Rep. at VII; 1964 ICC Ann. Rep. 134. Moreover, there is a serious shortage of workers in that industry, especially pilots and mechanics. N.Y. Times, July 7, 1966, p. 74, col. 5. If the unions maintain a solid front, it is improbable that the airlines could operate during a strike, even with changes in the collective bargaining agreements. Cf. N.Y. Times, July 19, 1966, p. 24, cols. 1-3.

[27] Compare 1962 ICC Ann. Rep. 37 and 1963 ICC Ann. Rep. 87 with 1964 ICC Ann. Rep. 141-42.

[28] Horowitz, Labor's Role in the Declining Railroad Industry, 9 Lab. L.J. 473 (1958).

[29] Shils, Industrial Unrest in the Nation's Rail Industry, 15 Lab. L.J. 81 (1964). See 1964 ICC Ann. Rep. 134, 143.

During a strike, if the railroad can eliminate featherbedding, it can reduce costs, and if the carrier can hire the minimum number of replacements to operate only its profit-making carload freight service, then it can increase profits. These results usually cannot be achieved, however, unless changes are made in the collective bargaining agreements. The Court removed the procedural obstacles of the RLA[30] by permitting such immediate changes in the agreements as would allow the struck carrier to operate with the minimum number of replacements actually necessary to run the trains efficiently and safely.

The Court stated in a footnote that a carrier making changes in the collective bargaining agreements must be engaged in a good faith effort to restore service to the public,[31] but it did not define what is required by a good faith effort. If the good faith requirement can be satisfied by only a minimum effort to secure replacements, then the number of replacements acquired will probably not be enough to resume all services. Moreover, the ability to secure replacements is limited not only by the terms of the collective bargaining agreements and the general level of unemployment, but also by such factors as the lack of training of the unemployed and the ability of union spokesmen to persuade would-be strikebreakers not to accept employment. Therefore, it is quite unlikely that the carrier will obtain enough replacements to resume more than its profitable carload freight service, even with changes in the collective bargaining agreements.

FEC's own experience in changing its collective bargaining agreements supports these conclusions. FEC's actions at the bargaining table and its attempts to operate aroused great bitterness among the unions. Trains were derailed, and tracks dynamited.[32] From the beginning, FEC was determined to introduce maximum efficiency during the strike,[33] and thus offered replacements less favorable terms than those of existing collective bargaining agree-

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[30] Although the railroads are not covered by the National Labor Relations Act, FEC attempted to draw an analogy from precedents under that act, implying that since management does not have to follow NLRA procedures with regard to strike-induced changes, FEC should not have to follow RLA procedures in similar circumstances. Brief for FEC, pp. 20-21. Under the NLRA there is a duty to negotiate upon request. NLRA § 8(a)(5), 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(5) (1964). Once an impasse has been reached, however, and a strike is in progress, management has the right to deviate from pre-strike practices (e.g., subcontract if there is a shortage of workers), without negotiating these changes with the union. Hawaii Meat Co. v. NLRB, 321 F.2d 397 (9th Cir. 1963); Times Publishing Co., 72 N.L.R.B. 676, 684 (1947). But see Mission Mfg. Co., 128 N.L.R.B. 275 (1960). The NLRA precedents are inapplicable for the following two reasons: (1) A railroad needs to resume only a part of its service to meet a strike effectively, since some of its required service may operate at a loss. Therefore, it needs less self-help than is necessary in other industries; (2) It appears that under the NLRA, these strike-induced changes do not terminate automatically upon conclusion of the strike and may remain permanently in effect. See Hawaii Meat Co., supra at 398-99. Under the RLA, however, the pre-strike collective bargaining agreement would be returned to force simultaneously with the end of the strike. 384 U.S. at 247 n.7 Permanent changes must be achieved via RLA procedures.

[31] 384 U.S. at 247 n.8.

[32] 1964 FEC Ann. Rep. 4. See 1963 FEC Ann. Rep. 8; N.Y. Times, April 11, 1963, p. 34, col. 8.

[33] United States v. Florida E.C. Ry., supra note 7, at 2621.

ments.[34] Because of these factors, FEC was unable to hire enough replacements to resume full carload freight service until the end of the first year of the strike (1963); it did not resume passenger service at all, or less-than-carload freight service to any great extent.[35] Due to the delay in resuming operations, the company showed a decrease in net operating income of $1,234,272 from the previous year (1962).[36] In 1964, however, the carrier's net operating income was more than three times greater than in 1962, in spite of the fact that freight revenues were roughly the same.[37] At the same time operating costs were one-third less than in 1962.

In late 1964, the district court enjoined FEC from making all but limited changes in the collective bargaining agreements.[38] The 1965 statistics demonstrate that these changes were sufficient to enable the carrier to operate at a profit. In that year, the carrier was still handling very little passenger or less-than-carload freight service.[39] Its net operating income was still three times greater than in 1962, and its operating expenses were only slightly increased over 1964. Since FEC was able to do this, and since railroad unemployment is increasing, it seems likely that other struck carriers who obtain the type of relief given in this case will be able to hire enough replacements to operate only their profit-making carload freight service, and operate it more efficiently, thereby increasing their profits during a strike.

Once a struck carrier, with the help of the courts, can operate at a profit during a strike, then serious consequences follow. First, longer strikes are likely, for if a struck carrier can obtain the relief allowed in this case and increase its profits (or at least lose less than it would under normal conditions), it will have every incentive to prolong the strike.[40] If the strike ends, the availability of workers would require resumption of full operations, including the unprofitable services. In addition, since the temporary changes which increased efficiency would no longer be in effect, operating costs will soon return to normal. That lengthy strikes will follow from this decision can be shown in another way. The decision permits the carrier to secure the necessary changes in the collective bargaining agreements without negotiating with the unions.[41] Lack of confrontation decreases the opportunity for settlement. This contention is further supported by the fact that the FEC strike is the longest in railway history.[42]

The second serious consequence is that, in certain situations, more

[34] See note 5 supra.

[35] See 1963 FEC Ann. Rep. 5, 12; Brief for the United States, p. 8.

[36] The statistics are taken from 1965 FEC Ann. Rep. 12.

[37] FEC carried little less-than-carload freight. The freight revenues remained approximately the same in part because FEC's line to Cape Kennedy which began operating in mid-1964 increased full carload freight traffic. See 1964 FEC Ann. Rep. 16.

[38] See note 10 supra and accompanying text.

[39] See Florida E.C. Ry. v. Mason, 177 So. 2d 217 (Fla. 1965). The Florida Supreme Court held that FEC had only enough qualified personnel to resume partial passenger service.

[40] For example, if the underlying dispute is over wages, it may refuse to reach agreement unless the unions accept a decrease in wages.

[41] As Justice White said: "[T]he carrier need not bargain with [the unions] . . . , but with the court. . . ." 384 U.S. at 249.

[42] N.Y. Times, May 24, 1966, p. 19, col. 3.

strikes are likely. Assume that a railroad on the verge of bankruptcy is confronted with a demand for a substantial wage increase. If, during negotiations, the carrier is unable to persuade the unions to greatly reduce their demands, it has two choices: it may accede to the unions' demands and face almost certain bankruptcy, or it may refuse any increase, thereby inducing a strike, and then attempt to increase its profits in the manner FEC has done in the instant case. The carrier, faced with such a decision, will most certainly choose the latter course of action and induce the strike.

Both consequences indicate that this decision is inconsistent with the public interest in continous transportation service. The Court was primarily concerned with providing a quick resumption of some services. During the lengthy strikes that may result in the future, as well as during the instant dispute, the public, however, is still deprived of two essential services—passenger and less-than-carload freight. The Interstate Commerce Commission has felt that these services are of sufficient importance to limit their curtailment even when they are operated at a loss.[43] Moreover, if the decision does encourage more strikes, then interruptions of all services will occur more often.

An additional consequence is that whenever a struck carrier, with the help of the courts, can increase its profits during a strike, the unions' principal self-help weapon becomes ineffective. This weapon is the strike; its traditional success has been a most important factor in securing effective representation for railway workers. The strike's effectiveness, however, depends on the amount of loss it inflicts on the carrier. Whenever the struck carrier increases its profits, the unions, if they desire to end the strike, will have to substantially retreat from their original position. Further, if they have had to capitulate once, the unions will be in a much weaker position in future collective bargaining situations. The workers may therefore be deprived of effective representation.

Once the Court decided to permit the carrier to make temporary changes, it was faced with the problem of how the changes should be implemented. Apart from section 2, seventh, there is no statutory or decisional bar, other than the Fifth Circuit's decision in the companion case,[44] to prevent the Court from allowing the carrier to make the changes unilaterally. Instead, the Court held that equitable relief was necessary. No case has been found where a court has granted equitable relief from the provisions of a collective bargaining agreement. The Court essentially has created a new remedy to meet its conception of the public interest in continuous transportation as weighed against the public interest in prompt, voluntary settlements of labor disputes. The judicial intervention that this entails is reminiscent of the pre-Norris-LaGuardia Act years.[45] This decision may well signify the return of an era of increased judicial activism in setting labor policy. The

[43] New York Cent. R.R. v. United States, 201 F. Supp. 958, 960 (S.D.N.Y. 1962).

[44] Florida E.C. Ry. v. Brotherhood of R.R. Trainmen, supra note 4.

[45] See generally Frankfurter & Greene, The Labor Injunction (1930). The area of labor relations policy is one of "delicate and contemporaneous issues. . . . But economic sympathies and prepossessions [of individual district judges] may unwittingly foreclose the solution of these issues." Id. at 132.

Court felt that in order to minimize the dangers inherent in allowing the carrier to make unilateral changes, the power "to change or revise the basic collective agreement must be closely confined and supervised."[46] The fact that it decided that strict judicial supervision was necessary despite its policy against judicial entanglement,[47] demonstrates the seriousness of permitting a struck carrier to change its collective bargaining agreements.

The Court held that the carrier must petition for equitable relief. It is submitted, however, that the Court should not have granted equitable relief in this case in view of the fact that FEC had rejected arbitration. Section 8 of the Norris-LaGuardia Act provides that unless a party makes every reasonable effort to settle the dispute, it should be denied equitable relief.[48] In *Brotherhood of R.R. Trainmen v. Toledo, P. & W.R.R.*, this section was construed as requiring a carrier to accept arbitration as a condition precedent to being granted equitable relief.[49] The *Toledo* Court stated: "Arbitration under the Railway Labor Act was available, afforded a method for settlement Congress itself has provided, and until [the carrier] . . . accepted this method it had not made 'every reasonable effort to settle' the dispute, as Section 8 requires."[50]

In the *FEC* case, the Court restricts the application of *Toledo* by holding that a carrier which refuses arbitration will be denied equitable relief only if the union accepts arbitration before going out on strike. Consequently, both parties are under pressure to agree to arbitrate before the strike. If the union accepts, the carrier's refusal will result in a denial of equitable relief. This will relegate the carrier to RLA procedures in order to secure any changes necessary for profitable operation during the strike. If the union refuses, the carrier will be able to obtain equitable relief, over union objections, nullifying the impact of any strike.

These inducements to arbitrate are eliminated by the Court after self-help has begun, since neither side need then accept arbitration to comply with Section 8 of the Norris-LaGuardia Act. It is difficult to understand how the initiation of self-help ends the need for exhausting every method to settle the dispute. The public interest in settlement of labor disputes increases proportionately with the length of the strike. This interest would be better served by encouraging both parties to accept arbitration during a strike. Here, if the carrier had accepted arbitation when the union did, the strike would have been over by May 1963,[51] and the losses the public suffered would have been significantly smaller.

Another problem facing the Court was the definition of a standard to be used in future cases for granting or denying changes. The Supreme Court

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[46] 384 U.S. at 246.

[47] See Brotherhood of R.R. Trainmen v. Toledo, P. & W.R.R., 321 U.S. 50, 58-59 (1944).

[48] 47 Stat. 72 (1932), 29 U.S.C. § 108 (1964).

[49] 321 U.S. 50 (1944). But cf. Chicago & W.I.R.R. v. Brotherhood of Ry. & S.S. Clerks, 221 F. Supp. 561, 569 (N.D. Ill. 1963).

[50] 321 U.S. at 65.

[51] The unions agreed to arbitration in late April, May, and October, 1963. Each time FEC refused. Brief for the Non-Operating Unions, p. 14.

felt that the carrier should be permitted to make "only those [temporary] changes as are truly necessary in light of the inexperience and lack of training of the new labor force or the lesser number of employees available for the continued operation."[52] The opinion does not specify what these changes are and only sets vague guidelines to help the lower courts ascertain what changes should be permitted under this decision. Even the Court's vague standard, however, is preferable to that of the Fifth Circuit, which would allow whatever changes are reasonably necessary to continue operations.[53] This leaves too much discretion in the district court and could be interpreted to include almost anything, including such changes in rates of pay as would deprive the new workers of the benefits of the collective bargaining agreements.[54]

After examining the effects of the decision and the problems involved in the implementation of the type of relief given, there still remains the question of what else the Court could have done. It is submitted that in this case, the simplest answer is also the best one, *i.e.*, the Court should have held that section 2, seventh is applicable to temporary changes and required FEC to effect its changes through the RLA procedures designed for that purpose.[55] In this way, the parties would be brought together in a situation where bargaining positions would be more evenly balanced. During these negotiations, both parties will be under considerable pressure to settle the underlying dispute. The carrier's self-help weapon, resumption of operations, is of limited effectiveness because it will be a little over a year before it can operate to any great extent,[56] and until then, it will be losing money. The unions' self-help weapon, the strike, is also of limited effectiveness; first, because once the procedures are exhausted and the changes go into effect, it is likely that the railroad will be able to operate without a loss;[57] and second, because during the strike, the unions and their members are also losing money. The above circumstances should be an inducement to an early settlement and consequent resumption of full services.[58] It is submitted that the public interest is best served by a judicial policy which encourages quick settlements and resumption of all services, rather than one which permits immediate resumption of partial service at the expense of almost permanent curtailment of the other services.

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[52] 384 U.S. at 248.

[53] 348 F.2d at 686.

[54] See note 5 supra, and cf. note 20 supra.

[55] Section 6, 44 Stat. 582 (1926), as amended, 48 Stat. 1197 (1934), 45 U.S.C. § 156 (1964). There is no duty to negotiate the underlying dispute, but because of the mounting pressures on both parties, it is likely that they would attempt to reach agreement on all issues.

[56] As is evidenced by the national dispute, it usually takes a little over a year to follow the RLA procedures. See pp. 155-56 supra. It is uncertain to what extent a struck carrier could resume operations while following the terms of the collective bargaining agreements. FEC witnesses testified at the district court hearing that unless changes were permitted, FEC could only operate between 50% and 70% of its carload freight service. Brief for the Non-Operating Unions, p. 20.

[57] Avoiding loss is not certain, however, because of the many variables involved in securing replacements; therefore, the railroad, losing money during a strike, is not likely to wait out the year rather than attempt to reach an early agreement.

[58] Cf. NLRB v. United States Cold Storage Corp., 203 F.2d 924, 928 (5th Cir. 1953).

Additionally, if the Court had held section 2, seventh applicable, it would have avoided involving the judiciary in the day-to-day supervision of labor disputes. At the same time, the Court would not have had to define a standard that, at best, had to be unsatisfactorily vague because of future variables.

In the past two decades the RLA has failed to avert nation-wide strikes in the railroad and airline industries. On several occasions the President, with congressional authorization, has found it necessary to seize the railroads and operate them through receivers until the parties could settle their differences.[59] In the Firemen's dispute, Congress was forced to enact a special law establishing compulsory arbitration.[60] The result of the instant decision, however, is to make an ineffective act more ineffective by increasing the likelihood of lengthy strikes in the railroad industry.

When the RLA was passed, some of its supporters indicated that if the act failed to avert strikes in this vital industry, Congress could enact additional legislation.[61] The act has so failed, and the instant decision makes it more probable that it will fail in the future. Senator Lausche has introduced a bill that would make arbitration compulsory for labor disputes in the transportation industry if the parties could not agree following negotiation and mediation.[62] Senator Javits has introduced RLA amendments providing a different solution.[63] Under his proposal, if, after the Presidential Emergency Board's recommendations, the parties fail to agree, the President is authorized to direct the Attorney General to petition the district court having jurisdiction of the carrier to appoint a special receiver to take possession of the lines in the name of the United States. The court is first to direct the parties to make every effort to agree to resume such operations as are necessary to protect the public health and safety. If they fail to agree, a receiver is appointed to operate the lines without changing conditions of employment (except that if the Emergency Board has recommended changes, the court may order the receiver to make such temporary changes as it considers appropriate). The receivership remains in effect as long as necessary, or until the parties reach an agreement. They are not under a duty to negotiate the underlying dispute, but the receiver is to encourage them to meet. The carrier is compensated by a rental fee which is relatively low due to the inability of the carrier to operate during a strike.

The Javits amendment considerably increases the pressures on both parties to reach an early settlement before self-help begins, since the unions face forfeiture of their right to strike, and the carrier faces forfeiture of possession and operation of its facilities.[64] The amendment avoids some of the objections to compulsory arbitration in that it preserves free collective bargaining; yet it still safeguards the public from the harmful effects of a strike to the same extent as compulsory arbitration.

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[59] Levinson, Railway Labor Act—The Record of a Decade, 3 Lab. L.J. 13 (1952).

[60] 77 Stat. 132 (1963). The arbitrators' award was to remain in force for two years, 77 Stat. 133, § 4 (1963).

[61] 67 Cong. Rec. 4570 (1926) (remarks of Congressman Rayburn).

[62] 112 Cong. Rec. 14394 (1966) (S. 3587) (daily ed. July 11, 1966).

[63] 112 Cong. Rec. 662 (1966) (S. 2797) (daily ed. Jan. 20, 1966).

[64] Id. at 663.

A detailed examination of the merits of these two proposals is beyond the scope of this note, but it is urged that the Court's decision conclusively demonstrates the need for revitalizing the RLA, and also that legislation is the only source of relief.

JOSEPH KORFF

**Trade Regulation—Section 7 of the Clayton Act—Horizontal Mergers —Share of Relevant Geographic Market.—*United States v. Von's Grocery Co.*;[1] *United States v. Pabst Brewing Co.*[2]**—In 1960, the defendant in the first of these two cases, Von's Grocery Company, the third largest food retailer in the Los Angeles area, acquired Shopping Bag Food Stores, the sixth largest. As a result, Von's became the second largest food retailer in the area with a market share of about 7.5% of the gross sales. The United States brought suit, charging that the acquisition violated Section 7 of the Clayton Act.[3] The district court found: "From the evidence, it cannot be concluded that the merger in question would probably lessen competition in the metropolitan area either at the time of the merger or in the foreseeable future."[4] On appeal,[5] the Supreme Court HELD: Reversed. The merger of two very large and successful firms in an industry marked by a trend toward concentration violates section 7, because such a merger may substantially lessen competition in that industry.

Justice White concurred, stating that, although the majority opinion did not prohibit all mergers in a concentrating industry, nor all mergers where the resulting market share of the acquiring firm was 7.5%, a merger of two leaders, or of a leader and a lesser firm, in an industry marked by concentration and in which the top eight firms had 40% of the market "would be vulnerable under section 7, absent some special proof to the contrary." Justices Stewart and Harlan dissented, concluding that there was no violation of section 7, because the evidence revealed an unconcentrated retail food industry, vigorous competition, ease of entry, and equality of competitive position between chain and independent grocers.

In 1958, the defendant in the second case, Pabst Brewing Company, the tenth largest brewer in the United States, acquired Blatz Brewing Company, the eighteenth largest. As a result, Pabst became the fifth largest brewer in the United States with 4.49% of the sales in the nation, 11.32% of those in a three-state area (Wisconsin, Michigan, and Illinois), and 23.95% of those in Wisconsin. The United States brought suit, charging a violation of section 7. After the presentation of the Government's case, the district

[1] 384 U.S. 270 (1966).

[2] 384 U.S. 546 (1966).

[3] As amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964).

[4] 233 F. Supp. 976, 985 (S.D. Cal. 1964).

[5] Both *Von's* and *Pabst* were appealed directly to the Supreme Court under the Federal Expediting Act § 2, as amended, 62 Stat. 989 (1948), 15 U.S.C. § 29 (1964), which provides that the Supreme Court shall be the only court of appeal from a final judgment of a district court in a case charging a violation of the Clayton Act in which the United States is the complainant.