

1977

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### Recommended Citation

Joseph Krislov, *The NMB's Representation Function: A Declining Activity*, 43 J. Air L. & Com. 47 (1977)  
<https://scholar.smu.edu/jalc/vol43/iss1/3>

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## THE NMB'S REPRESENTATION FUNCTION: A DECLINING ACTIVITY

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THE RAILWAY Labor Act (RLA), which celebrated its 50th anniversary in 1976, is a comprehensive statute dealing with many phases of labor relations. The RLA's jurisdiction, however, is limited to the railroad and airline industries; coverage of the latter industry was added in 1936. The Act mandates that the National Mediation Board (NMB), the administering agency, perform two major functions: (1) mediate major disputes (contract disputes) between parties regarding changes in pay, rules or working candidates and (2) designate collective bargaining agents for employees when disputes arise as to the proper representative. The NMB also appoints referees and neutral arbitrators to hear minor disputes (grievances). Finally, the NMB reports to the President when it believes a dispute is likely to interrupt substantially transportation services in one section of the country. The President can then delay a strike or lockout by appointing an Emergency Board to study the positions of both parties and to recommend a settlement.<sup>1</sup>

During the early 1970's several bills which would have drastically altered the RLA were debated in the Congress.<sup>2</sup> Some of

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<sup>1</sup> For a brief introduction to the Act, see B. TAYLOR & F. WITNEY, *LABOR RELATIONS LAW* 143-45, 453-58, 465-68 (1971). An equally brief introduction to the RLA and its application to the airline industry can be found in U.S. DEP'T OF LABOR, BULL. NO. 1683, *AIRLINE EXPERIENCE UNDER THE RAILWAY LABOR ACT*, 1-16 (1971). The National Mediation Board (NMB) has published a volume summarizing its 36 year history. See NATIONAL MEDIATION BOARD, *ADMINISTRATION OF THE RAILWAY LABOR ACT BY THE NATIONAL MEDIATION BOARD, 1934-1970* (1971).

<sup>2</sup> A starting point for a discussion of legislative proposals is the symposium *Labor Relations in Transportation*, 25 *INDUS. & LAB. REL. REV.* 3 (1971). The application of the RLA to the airline industry is explored at length in *Air Trans-*

these bills would have transferred the NMB's authority to designate collective bargaining agents (the representation function) to the National Labor Relations Board (NLRB). That Board administers the National Labor Relations Act (NLRA) and has jurisdiction over employment in interstate commerce. Other bills would have reconstituted the NMB as the Railroad and Airline Representation Board, and transferred the mediation function to the Federal Mediation and Conciliation Services (FMCS).<sup>3</sup> The existing Emergency Board procedure would have been eliminated by some of the proposals, and the NLRA's eighty day injunction would have been substituted.

Despite considerable support from the Nixon Administration, none of the proposed changes passed the Congress. And the issue of the RLA's revision appears to be dormant at this time. Nevertheless, criticism of the Act continues, and the issue of revision may be revived in the future. A critical examination of the NMB's representation activities is therefore desirable. The examination which follows focuses on the volume and pattern of representation elections. It is confined to the data and does not attempt to evaluate the wisdom of NMB policy regarding bargaining units or election procedures.<sup>4</sup> The study concludes that the NMB's representation function has been declining and is now quite modest. Unless employment in the railroad and airline industries increases dramatically or employees suddenly exhibit a frenzied desire to change union representatives, it does not seem likely that the workload will increase.

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*port Labor Symposium*, 35 J. AIR L. & COM. 313 (1969). For a brief and particularly unfavorable view of the application of the Act, see Northrup, *The Railway Labor Act: A Critical Reappraisal* in COLLECTIVE BARGAINING: SURVIVAL IN THE '70's? 187 (R. Rowan ed. 1972). President Nixon's message to revise the RLA is available as NATIONAL EMERGENCY LABOR DISPUTES, H.R. DOC. NO. 266, 91st Cong., 2d Sess. (1970).

<sup>3</sup> For a discussion in favor of the transfer by a former head of the FMCS, see W. SIMKIN, *MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING* 220 (1971). See also Shils, *Union Fragmentation: A Major Cause of Transportation Labor Crises* in COLLECTIVE BARGAINING: SURVIVAL IN THE '70's? 263 (R. Rowan ed. 1972).

<sup>4</sup> For some critical comments on the NMB's representation procedures, see Goulard, *The Employees' Free and Clear Choice*, 35 J. AIR L. & COM. 420 (1969), and Curtin, *The Representation Rights of Employees and Carriers: A Neglected Area under the Railway Labor Act*, 35 J. AIR L. & COM. 468 (1969). For the NMB's view of its representation activities, see NATIONAL MEDIATION BOARD, *supra* note 1, at 65-79.

The NMB's annual reports contain data on election results.<sup>5</sup> Two measures of representation activity are available; one focuses on the number of elections and the second on the number of employees eligible to vote. An election may be conducted in either an unorganized or organized unit. In unorganized units the petitioning union is attempting to bargain for employees who have no representation; in organized units one union is seeking to displace an incumbent union as the bargaining agent for a group of workers. The labor movement praises the former effort because it seeks to extend union influence. The latter effort is termed a "raid" and has been condemned by the AFL-CIO, which inaugurated a program over twenty years ago to curtail such efforts.<sup>6</sup>

The annual average number of elections, the annual average and percentage of raids, and the outcome of these raids, by five year intervals for the past thirty years (1945-1974), were as follows:

Period	Number of Elections	Raids		Successful Raids	
		Number	Percent of All Elections	Number	Percent of All Raids
1945-1949	180	95	53	55	58
1950-1954	130	79	61	43	54
1955-1959	120	65	64	37	57
1960-1964	61	43	70	30	70
1965-1969	73	38	52	28	74
1970-1974	51	27	51	18	66

These data show a marked decline in the number of NMB representation elections. Almost two hundred elections were conducted annually during the first five year period, but the number of elections has declined to slightly over fifty in the last five year period. Except for the pattern during 1965-1969, the decline has been continuous in each five year period. As a result, there is a sharp difference in the volume of elections between the first and the second fifteen years. About one hundred thirty elections were

<sup>5</sup> See, e.g., NATIONAL MEDIATION BOARD, 40TH ANNUAL REPORT, 1974, at table 6.

<sup>6</sup> See, e.g., Cole, *The AFL-CIO's Internal Dispute Plan*, 92 MONTHLY LAB. REV. 12 (1969). For an early study of raids in the railroad and airline industries, see Krislov, *Representation Disputes in the Railroad and Airline Industries*, 7 LAB. L.J. 98 (1956).

conducted annually during 1945 to 1960, compared with half that number in the last fifteen years.

A similar decline is apparent in the number of raids. In the first five year period there were almost one hundred raids annually, compared with only twenty-seven in the last five years. The average number of raids has declined during each five year period. And the pattern during the first fifteen years is again strikingly different from that of the second fifteen years. An average of seventy-nine elections in organized units were held in the period 1945-1960, but only thirty-six such elections were conducted during 1961-1974.

The data also show that there has been a slight decline in the proportion of raids during the last ten years. An earlier study of NMB elections<sup>7</sup> showed that fifty-nine percent were in organized units during 1938-1945. And the proportion of raids during the 1945-1965 period—approximately sixty percent—was remarkably similar. During the past ten years, however, only about one-half of all elections were conducted in an organized unit. This decline may be due to the AFL-CIO's program of curtailing raiding. Of course, a number of unions active in the railroad and airline industries were not affiliates of the Federation during this period and apparently did not cease raiding.

The NMB's proportion of raids is quite high compared with the NLRB's proportion. Professor Gary N. Chaison, who has studied the pattern of such elections in a recent decade, found that there were only 2,599 raids out of 79,777 NLRB elections during the 1964-1973 decades—slightly over three percent.<sup>8</sup> Of course, unionization in the railroad and airline industries is much more extensive than in most industries falling within the NLRB's jurisdiction. Moreover, new companies are more likely to be formed in other sectors of the economy than in the railroad and airline industries.

Unions in the railroad and airline industries have been more successful in raiding than their counterparts in the NLRB's jurisdiction. During the ten year period 1964-1973, raiding unions were successful in capturing less than one-half of the NLRB contests.<sup>9</sup> In contrast, unions in the railroad and airline industries were successful in sixty percent of the elections in previously

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<sup>7</sup> Krislov, *supra* note 6, at 100.

<sup>8</sup> Chaison, *The Frequency and Outcomes of Raids*, 15 INDUS. REL. 108 (1976).

<sup>9</sup> *Id.* at 109.

organized units during the thirty year period under review. In one five year period, 1965-1969, raiding unions were successful in nearly three-fourths of their contests.

Raiding unions in the railroad and airline industries have been more successful in capturing units in the past fifteen years. From 1960-1974, unions were successful in capturing seventy percent of the units, as compared with fifty-six percent for the earlier fifteen years. As in the case of the decline in the proportion of raids, the AFL-CIO's no-raiding program probably accounts for some of the change. Because the AFL-CIO has formally condemned raiding, unions hesitate to raid unless success seems likely. This reluctance results in a very careful selection of organizing targets and hence may account for the higher success rate.

The annual average number of eligible voters in NMB elections, the annual average and the percentage of voters in raids, and the outcome of these raids, by five year intervals for the past thirty years, were as follows:

<i>Period</i>	<i>Eligible Voters</i>	<i>Eligible Voters in Raids (in thousands)</i>		<i>Eligible Voters in Successful Raids (in thousands)</i>	
		<i>Number</i>	<i>Percent of Voters in All Elections</i>	<i>Number</i>	<i>Percent of Voters in All Raids</i>
1945-1949	54.2	47.6	88	20.2	42
1950-1954	37.2	35.3	95	10.6	30
1955-1959	11.5	10.7	93	3.2	30
1960-1964	8.5	8.0	94	5.8	72
1965-1969	26.7	24.4	91	10.6	43
1970-1974	11.0	9.1	83	1.7	19

As indicated above, the number of eligible voters in NMB elections has also declined during the thirty year period under review. Over one hundred thousand voters were eligible in NMB elections during the first fifteen year period, but the number declined to less than half that number in the latter fifteen year period. There was, in fact, a marked concentration of voters in the first ten years; over sixty percent of all eligible voters were in units contested during that period.

The proportion of eligible voters in raids has been consistently

high and has not varied very much. Only the first and last five periods have been below ninety percent: eighty-eight percent and eighty-three percent, respectively. Overall, therefore, more than ninety percent of all voters participated in an election in a previously organized unit during the period. This concentration of voters in organized units again contrasts sharply with the pattern of NLRB elections. Professor Chaison found that only twelve percent of all voters in NLRB elections during the ten year period 1964-1973 voted in organized units.<sup>10</sup>

The proportion of voters in units successfully raided has fluctuated widely, from a high of seventy-two percent in one five year period to a low of nineteen percent in another. The fluctuation is undoubtedly the result of a victory or loss in a few particularly large units in a given year. As indicated above, unions apparently captured units with thirty percent to forty percent of the eligible voters during the more typical five year period.

NLRB data show that raiding unions have been more successful in smaller units. From 1964-1973, for example, raiding unions captured forty-six percent of the units but the percent of eligible voters in these units was only thirty-six percent.<sup>11</sup> The NMB's election experience shows a similar pattern.<sup>12</sup> Although raiding unions captured sixty percent of their contests in the NMB elections, the eligible voters in these units constituted only thirty-nine percent of all eligible voters. Only in one five year period was this pattern reversed. From 1960-1964, raiding unions were successful in seventy percent of the contests, but they succeeded in units which included seventy-two percent of the eligible voters.

During the thirty years under review, the number of employees in the railroad industry has declined dramatically while the number employed by airlines has increased. It would seem logical, therefore, to assume that representation elections in airlines would increase. Data for the two industries is available for the past twenty years, and it confirms a gradual shift to the airline industry. For the

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<sup>10</sup> *Id.* at 108.

<sup>11</sup> In response to my written request, Professor Chaison calculated the percentage of eligible voters in units in which raiding unions were successful. Letter from Gary N. Chaison to Joseph Krislov (May 25, 1976).

<sup>12</sup> Krislov, *The Developing Law: Everybody's Stake in the No-Raiding Agreement*, 4 LAB. L.J. 83 (1954).

five year period 1955-1959, one-fourth of all elections were held in the airline industry; in the five year period 1970-1974, slightly over one-half (fifty-two percent) of all elections were in airlines. The majority of eligible voters each year are usually in the railroad industry, but eligible voters in the airlines exceed those in the railroads in six of the twenty years for which data is available. From 1960-1964, the number of eligible voters in the airline industry represented sixty percent of all eligible voters.<sup>13</sup>

### CONCLUDING REMARKS

The NMB's representation function has declined significantly during the past thirty years. In 1968, the NMB estimated that less than twenty percent of its professional staff man-years were allocated to "work on representation cases."<sup>14</sup> Based on the data presented in this study, it seems likely that even that proportion may have declined. Unlike the NLRB, the NMB conducts its elections primarily in organized units. Because the AFL-CIO has developed a program to curtail raiding, it appears unlikely that there will be an upsurge of representation contests in the NMB's jurisdiction. Legislation to revise the RLA should therefore take into account the likelihood that the NMB's representation function is, and probably will continue to be, quite modest. If the NMB's mediation function is shifted to the FMCS and the NMB is reconstituted as a representation board only, Congress should consider whether the reconstituted agency's potential workload justifies a separate government agency.

The NMB's representation function has shifted slowly from the railroad industry to the airlines. Perhaps airline cases may dominate the NMB's representation caseload in the future. What impact this new pattern will have is not easy to predict. It may encourage efforts to remove the airlines from the RLA's jurisdiction.<sup>15</sup> It

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<sup>13</sup> For a brief discussion of the NMB's establishment of bargaining units in the airline industries, see Mason, *Collective Bargaining Structure: The Airlines Experience in THE STRUCTURE OF COLLECTIVE BARGAINING* 227 (A. Weber ed. 1961).

<sup>14</sup> SIMKIN, *supra* note 3, at 366.

<sup>15</sup> Writing in 1972, Robert J. Hickey concluded, "It is evident that the subjection of the airlines to the Railway Labor Act and to the Federal Aviation Act has been a disaster." See *Aviation Labor Laws—A Fresh Look*, 38 J. AIR L. & COM. 231, 261 (1972). Two journalists have concluded that the NMB is "largely



may lead to further efforts by the NMB to understand and make allowances for the specific problems and needs of the airlines.<sup>16</sup> It seems certain, however, that the growing importance of the airlines will have some impact on the Act's administration.

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useless and redundant." See Hoerr & Wildstrom, *Ripe for Oblivion: The Railway Labor Act*, BUSINESS WEEK, Dec. 15, 1975, at 27.

<sup>16</sup>In January, 1976, about one-third of the agency's mediators had had prior labor relations experience in the airline industry. Interviews by the National Mediation Board (Jan. 1976).