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GRIEVANCE AND ADJUSTMENT BOARD PROCEDURES IN THE AIRLINE INDUSTRY AS A REASONABLE ALTERNATIVE TO STRIKES

BY ASHER W. SCHWARTZ†

AS I reviewed the subject of my speech, I noted once again that despite an improvement over the railroad industry's grievance structure, the airline industry suffers from an unnecessarily cumbersome, questionably fair and often frustrating grievance machinery. Something can and should be done to improve it. The grievances and the people involved with the grievances in the airline industry are basically not different from those in other industries. Like the railroad industry, the airline industry is unique because its components operate on a nationwide basis, its agreements are national in scope, its employees are based at major points across the continent and overseas and its labor-management relations are under the command or influence of the Railway Labor Act.¹ While in these respects the airline industry is no different from the railroad industry, it does differ from it in the area of grievances because there is no National Adjustment Board in the airline industry.²

I. THE RAILWAY LABOR ACT

The impact of the RLA on airline grievances is of primary importance. Employees ordinarily define a "grievance" as any employee complaint of mistreatment by an employer within the status quo.³ In many working agreements, however, grievances are divided between those relating to a violation of the agreement subject to impartial review and those which stand or fall at the desk of a vice-president.⁴ This dichotomy does not exist under the RLA since sections 3 and 204, which require the airlines and their employees to "handle" disputes, describe them as "disputes growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." Grievances covered by the Act, as we use the term, therefore, embrace all disputes within the status quo, not merely those involving the interpretation and application of agreements.⁵

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¹ Railway Labor Act, 44 Stat. 577 (1926), as amended, 45 U.S.C. § 153, § 184 (1964).

² See Railway Labor Act, 44 Stat. 577 (1926), as amended, 45 U.S.C. § 185 (1964).

³ Labor-Management Relations Act, § 8(a)(5), as amended, 61 Stat. 136 (1964).

⁴ Boeing Co. v. International U., United A.A. & A.I. Workers, 231 F. Supp. 930, *aff'd*, 349 F.2d 412 (1964).

⁵ Elgin, Joliet & Eastern R.R. v. Burley, 325 U.S. 711, 723 (1944). "The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one."

A second distinctive feature of the RLA is the requirement that all grievances be finally resolved by arbitration.⁶ The Taft-Hartley Act requires employers to bargain on grievance machinery and requires employees to process a grievance under the contract grievance procedures.⁷ However, it does not prescribe a final process for mutually resolving grievances, nor does it require the parties to provide one,⁸ although many contracts covered by Taft-Hartley will voluntarily provide for the arbitration of such disputes.

A third aspect of the RLA is that it specifically gives individual employees the legal right not only to file grievances individually, but also the right to pursue them to finality with or without union endorsement.⁹ Taft-Hartley, on the other hand, guarantees the individual employee only that he may present his grievance independently to his employer, but he has no right to insist on impartial review. The union has complete discretion in this request, subject only to an obligation of fair representation.¹⁰

II. THE BROAD SCOPE OF GRIEVANCE HANDLING

The broad scope of the mandatory grievance procedures required by the RLA is of special significance to the parties; the most obvious respect being the enlarged area of potential employee protest and the reduced area of management free wheeling. Employers are so reluctant to concede that any aspect of the employment relationship is not completely within their management prerogative, that even under the RLA, some airline agreements define the scope of their system boards exclusively in terms of the interpretation and application of the agreement, as if section 204 did not really mean what it says. If challenged, such a restriction would fail,¹¹ for the words of the Act are clear.

Because the RLA gives such complete coverage in resolving disputes arising out of both grievances and the interpretation and application of agreements, the federal courts in 1957 almost revolutionized labor relations in the airline industry by judicially legislating the Norris-LaGuardia Act to be inapplicable in connection with "minor disputes."¹² The Act's comprehensive and binding grievance machinery persuaded the courts to decide that no excuse justifies the disturbance of the tranquility on any air-

The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future." *Hornsby v. Dobard*, 291 F.2d 483, 486 (1961).

⁶ *Walker v. Southern R.R.*, 385 U.S. 196, 198 (1966).

⁷ See note 3 *supra*. *Ostrowsky v. United Steelworkers of America*, 171 F. Supp. 782, 790 (1959), *aff'd*, 273 F.2d 614. *Henderson v. Eastern Gas & Fuel Oil Associates*, 290 F.2d 677, 680 (1961).

⁸ *Black-Clawson Co. v. I.A.M.*, 212 F. Supp. 818, 822, *aff'd*, 313 F.2d 179 (1962).

⁹ *Elgin, Joliet & Eastern R.R. v. Burley*, 325 U.S. 711, 746 (1944). *Pacilio v. P.R.R.*, 381 F.2d 570 (1967).

¹⁰ *Vaca v. Sipes*, 386 U.S. 171, 185, 191 (1967). *Ostrowsky v. United Steelworkers of America*, 171 F. Supp. 782, 790-91 (1959), *aff'd*, 273 F.2d 614. *Cox, Rights Under a Labor Agreement*, 69 HARV. L.R. 601 (1956).

¹¹ See cases cited note 5 *supra*.

¹² *BRT v. Chicago River & Indiana R.R.*, 353 U.S. 30 (1951).

line or railroad property resulting from a union dispute or grievance. The *Chicago River*¹³ case informed the industry that the courts would preserve the peace by force if necessary.

The Supreme Court, however, ignored the fact that at that time the carriers could obtain judicial review of a board of adjustment decision, while the unions could not.¹⁴ If the grievant's case was lost before the board, his remedies were exhausted because he had no right of court review. Yet, if he won, the carrier could refuse to comply and the grievant then had to go to court to enforce the award. Thereby, the carrier achieved judicial review, and the case was tried *de novo*, with the board's findings as merely prima facie evidence of the facts. If a money award had been obtained, the findings were not even prima facie evidence in his favor. This situation was changed in 1966 by an amendment of section 3, so as to give both employees and carriers the same right of judicial review, and the court's function now is restricted solely to deciding whether the board had jurisdiction, whether its proceedings were in compliance with the Act and whether there was fraud or corruption in its deliberations.¹⁵ In theory, the Act now grants to employees a fair, effective and peaceful substitute for the violent and disruptive method of self-help which they could otherwise employ to settle disputes.¹⁶ Whether this theory is completely realistic is questionable.

III. AIRLINE GRIEVANCE MACHINERY MOVES SLOWLY

Since the freedom of the parties to resolve their disputes themselves is prohibited because the Act affords a method of handling grievances which is an exclusive alternative to self-help, this method should be fair and fully effective, as well as peaceful. It must also do more than merely guarantee uninterrupted commerce and continued air traffic, because the parties, particularly the employees who have the laboring oar and whose form of self-help is usually more dramatic and provoking than is management's, are entitled to complete confidence in the methods and in the people by whom their claims are resolved. It is questionable whether the formula of the RLA as applied does as much as it can to reach that result.

Congress is primarily concerned with the public interest. It and the public are happy so long as the transportation they want is not disturbed when they want it. The courts also desire a definitive administrative process for resolving claims and grievances. Sections 3 and 204 of the Act re-

¹³ *Id.* at 41, 42. This is made clear by the court's reference to the grievance machinery under the Railway Labor Act as a "reasonable alternative" to the use of labor's "primary weapon" and to its contrast of a minor dispute with a major dispute in which ". . . the Railway Labor Act does not provide a process for a final decision like that of the Adjustment Board in a 'minor dispute' case." *Id.* at 42.

¹⁴ *Union Pac. R.R. v. Price*, 360 U.S. 601 (1959).

¹⁵ Railway Labor Act, 44 Stat. 578 (1926), as amended, 80 Stat. 208, 209, 45 U.S.C. § 153 (1964). This amendment of § 3 is applicable to the airlines. *Gordon v. Eastern Airlines, Inc.*, 268 F. Supp. 210 (1967).

¹⁶ See *Manion v. Kansas City Terminal Ry.*, 353 U.S. 927 (1957) and *Westchester Lodge 2186 v. Railway Express Agency*, 329 F.2d 748, 753 (1964), holding that if there is no dispute pending before the adjustment board, the district court has no power to order injunctive relief. *Accord*, *So. Ry. v. B.L.E.*, 384 F.2d 323 (1967).

lieve them of the obligation to pass on the merits of thousands of disputes which otherwise could literally consume them.¹⁷ The airline industry has informed Congress that it is happy with the Act as it is and as it is being interpreted and administered in the handling of grievances.¹⁸ The employee's reaction, on the other hand, can only be described as between ambivalent and hostile. They and their representatives do not desire to strike whenever they have a complaint they want remedied. Yet, they do not like the procedure fostered by the RLA which encourages a timetable stretching out inordinately, sometimes so much as to make ultimate victory unimpressive, with no relief in the meantime. To the employees, law and order is not enough. An honest and real measure of relief in any kind of dispute requires promptness in its consideration, as well as a fair hearing on its merits.

IV. THE GRIEVANCE MACHINERY PRIOR TO BOARD OF ADJUSTMENT— THE STEPS

When the RLA was enacted, it either deliberately or inadvertently followed a pattern of grievance machinery already devised by railroad carriers and national unions representing railroad workers. These parties had created a formal arrangement of "steps" which varied only in detail from carrier to carrier. This procedure was described in the following manner:

Individual employees ordinarily first present their claims to their foremen or other immediate superiors. If the claims are granted, the case ends; if they are denied, the employee submits his case to his local union. If the local union rejects it, the case ends; otherwise, the representative of the local union takes up the question with the local superintendent of the carrier. If no settlement is reached, the case goes to the general superintendent, then to the general manager, and finally to the chief operating officer. Cases are customarily presented to carriers' national unions. The great preponderance of all disputes that arise are, of course, settled through negotiation at some one of the various levels of this hierarchy.¹⁹

This procedure is still unchanged, as none of the amendments to the Railway Labor Act have had any impact on this pre-board of adjustment structure.

The airlines either copied or were so influenced by this railroad pattern that while the titles are different, there is the same obstacle course which the railroads and railroad unions devised to force proof of the validity of a grievance as much by endurance as by merit. There is no sense of urgency or even of readiness to dispose of a grievance until it has been scheduled

¹⁷ *Order of Railway Conductors v. Pitney*, 326 U.S. 561, 566 (1945); *Taylor v. Hudson Rapid Tube Corp.*, 362 F.2d 748, 750 (1966).

¹⁸ "With reference to the airline industry's experience in the settlement of grievances under existing collective bargaining agreements, the existing system boards of adjustment procedures, or variations thereof, have proved and are proving to be satisfactory in achieving the Railway Labor Act's legislative goal of prompt and orderly disposition of such disputes." J. L. O'Brien, *Hearings on H.R. 701, 704, 706, Before the Subcommittee on Transportation and Aeronautics*, 89th Cong., 1st Sess., at 102 (1965).

¹⁹ PRELIMINARY RESEARCH REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE at 8 (February, 1940).

for some time or has climbed enough "steps" to convince the grievance Establishment that it insists on a responsive and fair determination. This step by step procedure is an unfortunate waste of time despite some minor sifting out of time claims. Once a substantive grievance has been filed plant level treatment has failed. It really takes only one management officer, acting by himself or by canvassing the appropriate ruling circles in management, to determine what is going to be its decision on appeal. The other officers go through the motions. Also, if the grievant is going to appeal a decision to an adjustment board, with or without union approval, he will do it whether he has been turned down once or three or four times by the same management. However, not all grievances will be pursued when rejected on appeal. If trivial or hopeless, they will be withdrawn or abandoned, since cost alone is a substantial factor. In the interest of fair treatment and sound labor policy, all grievances should be dealt with firmly and quickly, with the elimination of as much surplusage in procedure as possible and a reduction of the outrageous interval between the submission of a grievance and management's final answer to it.

V. BI-PARTISAN BOARDS OF ADJUSTMENT

When a grievance is not satisfactorily settled at the Superintendent or Vice-President level and it remains alive, it becomes the problem of a board of adjustment. Following the pattern of the railroad industry, but dispensing with a national board, the airlines utilize bi-partisan boards. It could be argued that because of the framework established by Congress in setting up the National Railroad Adjustment Board, Congress has indicated an intent that all boards of adjustment be bi-partisan as well as multi-membered. This is not necessarily so. In my judgment they are inappropriate and obsolete. Since the bi-partisan board does not lend itself to the expeditious handling of grievances, it should be discarded. We should remember that the board of adjustment structure must be treated with greater caution than any of the earlier steps of the grievance procedure, because the board has the power to make judicially enforceable and non-reviewable, final and binding decisions.²⁰ Bi-partisanship has its place in a legislative process, whether it is to enact statutes or reach agreements; but it does not fit the judicial process, which has become the board's sole function. It no longer "adjusts" disputes, rather it decides them.

When awards of boards of adjustment against grievants were not reviewed by the courts, but those in favor of grievants which the carrier refused to obey were so reviewed with a *de novo* consideration of the merits of the grievance, the union's view of relief through the courts was necessarily dim. The unions were more inclined to rely on a traditionally more useful sanction, such as a strike, slowdown or a threat of either. This encouraged "adjustment." In 1957, this method was changed by the *Chicago*

²⁰ *Id.*

River case and, in 1966, by amendment of the Railway Labor Act.²¹ The union's strike sanction was now frustrated by the threat of injunction, and the awards of adjustment boards became realistically enforceable in the courts. The boards are now truly quasi-judicial agencies with tremendous authority over carriers and their employees.

The Air Transport Association has found that the time required for the processing of a grievance before adjustment boards varied from four to twelve months.²² This is an extraordinary lapse of time after "the steps" in which to dispose of the usual grievance. The arrangement of meetings at which four members of the board, the grievant, union and carrier representatives and sometimes their counsel must be present is not accomplished easily. A multi-member board also requires one or more executive sessions; meetings must be arranged well in advance; and in the event of a deadlock, this procedure must be repeated with the added complication of the time availability of the neutral.

There are other problems also. There is usually one board for the entire system covering a craft and class. This system almost always involves a number of domiciles or stations far removed from the home office at which the board functions, thus adding the burdens of cost of travel and increased consumption of time. The board's cases are generally put on the calendar and taken up in chronological order, without regard to the critical importance of the case. One can almost say that delay is of the essence in a bi-partisan board of adjustment structure.

VI. EXPERTISE OF BOARD MEMBERS

It cannot be said that the presence of representatives of the parties on the board of adjustment adds substantially to the fairness or soundness of its product. In defense of the bi-partisan board, it is argued that the party-appointed members make a contribution in their knowledge of facts and practices relating to the grievance which is not necessarily reflected in the record. That is, they add "expertise."²³ This contribution which board members may make in executive session has always disturbed me. When a case is presented at an open hearing, particularly with the participation of counsel, it would seem appropriate for the decision to rest upon the record as it was made at the hearing. One can never be sure that this will be so if the board's members add a supplement. Therefore, the neutral's understanding of the case and his decision may be based on evidence and points made in executive session which counsel has no opportunity to refute or clarify. Participation of counsel will occur only if the neutral thinks clarification or comment by counsel is appropriate, and since another hearing must be called and all the parties must once again be present, it is likely that the partisan board members will have the last word on the contentions of the parties.

²¹ See note 12 *supra*. Railway Labor Act, 44 Stat. 578 (1926), as amended, 80 Stat. 208, 209, 45 U.S.C. § 153 (1964).

²² "As for the time which is required in the airline industry to process cases before adjustment boards, we do not have precise figures. However, our overall experience indicates that most cases are concluded within 4 to 12 months." *Hearings on H.R. 701, 704, 706, supra*. Note 18, at 101.

²³ *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

Board members other than the neutral are often amateurs as board members, although professionals as operating officials or employees. In some cases, unions keep the same board members for long periods of time, while in other cases they change frequently. The practice of some boards, in permitting counsel rather than a member of the bargaining unit or an officer of the carrier to sit, is a clear clue that the board's executive sessions are likely to be a *de novo* hearing without the presence of the parties. The desired end result can be achieved more expeditiously, economically and fairly by a simple, concisely stated appeal to a single neutral who in most cases determines the issue in the same way that he would if he had a board of which to be considerate but to which to be oblivious, in arriving at his decision.

VII. THE BI-PARTISAN BOARD IS NOT IMPARTIAL²⁴

The employment of an adjustment board dominated by partisans was a deliberate choice of the railroads and railroad unions. They were not keen about independent, outside influence. The Attorney General's Committee described the Board in the following manner:

The National Railroad Adjustment Board presents the opportunity to observe a bi-partisan system in operation. The Board's thirty-six members are not government employees, and they are frankly partisan in favor of their principals. They are more like advocates than judges, for their primary interest seems to be winning cases, not soundly deciding them. They find facts through the use of hearsay, without witnesses and without oaths or cross-examination. Yet only about one decision in every thousand is judicially reviewed. And the parties seem to be fairly well satisfied with the system.²⁵

This description hardly fits an adjudicating agency as we understand it. Today, the board of adjustment adjudicates rather than adjusts. Its scope is broad and its jurisdiction exclusive,²⁶ and the courts are not available either to grievant or carrier to review its decisions. Its judgment is not subject to question.²⁷

In recent years, Congress and the courts have vested unions with broad authority and responsibility in the negotiation and enforcement of agreements and handling of grievances. Attempts by employees to by-pass the union in matters affecting rates of pay, rules and working conditions have been frustrated and rejected, with good reason.²⁸ Instead, the courts have formulated a duty of fair representation to protect employees from union failure to exercise that authority and responsibility in behalf of a grievant.²⁹

A serious question arises at this point as to whether this duty also applies to union appointed members on the board of adjustment. What duty of fair representation do they have and how is any duty of representation in

²⁴ *Arnold v. United Airlines*, 296 F.2d 191 (1961).

²⁵ RESEARCH REPORT, THE 1940 ATTORNEY-GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE at 1.

²⁶ *Dominguez v. National Airlines*, 279 F. Supp. 392, 394 (1968).

²⁷ *Gunther v. San Diego & A. E. Ry.*, 382 U.S. 257 (1967).

²⁸ *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965).

²⁹ *Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *Brady v. TWA*, 401 F.2d 87, 94 (1968).

an adversary proceeding consistent with the common provision in airline agreements that all board members will be entitled to exercise their judgment independently of the interest of the parties? When union appointed board members decide against a grievant, or contribute votes to out-vote a neutral who favors his grievance, will they be held for a violation of the duty of fair representation?

Arnold v. United Airlines,³⁰ presents a typical case of a possible ambiguity of interest between grievant and union board members. Thirty-four pilots who had been flight engineers filed a grievance asserting that they were not given proper seniority positions as pilots because their service as flight engineers had been ignored. They had gone to court in lieu of presenting a grievance to the adjustment board. The court dismissed their petition because only the adjustment board had jurisdiction. However, by the time they filed with the adjustment board, there was a question of time limitation, and adjustment board ruled against them. What is interesting in the context of this discussion is the court's response to the grievant's complaint about the make-up of the board.

The board is bi-partisan rather than impartial and disinterested. . . . The chairman was a representative of United. His participation on United's behalf in the prior litigation made him no more or less partial than any other person identified with United's interest would have been. It was not a disqualification. Nor does the record show that the two ALPA members of the four member board, through their identification with ALPA, were 'hostile' within the meaning of *Edwards v. Capital Airlines* (1949), 176 F.2d 755. In that case the union aggressively opposed the position of the grievants who were non-members. . . .³¹

In the *Edwards* case,³² two pilots who had entered the armed forces were reinstated with seniority dating back to the time of their original employment. Upon objection by a large number of pilots, the matter eventually was referred to a system board with no referee. The board ruled that the seniority of the two pilots related back only to the date they returned to the airline. The company complied with the award, and the two pilots appealed to the court. A United States district court refused to review the award, but a court of appeals did review and said, among other things:

If the union were neutral in the dispute, that would be one thing. But where the union is aggressively presenting the interests of one group of employees and the company has no stake in the outcome, impartiality, protective of the rights of a non-member minority, could hardly be conclusively presumed.³³

In *P.R.R. v. Rychlik*³⁴ Justice Frankfurter said of this subject:

The short of it is that since every railroad employee is represented by union agents who sit on a System Board of Adjustment, such representatives are in what amounts to a fiduciary position: they must not exercise their power in an arbitrary way against some minority interest. The fact of a general

³⁰ 296 F.2d 191 (1961).

³¹ *Id.* at 195.

³² *Edwards v. Capital Airlines*, 176 F.2d 755 (1949).

³³ *Id.* at 760.

³⁴ 352 U.S. 480 (1949).

conflict of interest between a minority of union members and representatives designated by the majority does not of itself vitiate the pre-supposition of self-government and does not of itself subject the System Board action to judicial review. Conflict between a majority and a minority is commonplace in the whole collective bargaining process. But the bargaining representatives owe a judicially enforceable duty of fairness to all the components of the working force when a specific claim is in controversy.³⁵

The Supreme Court has also said what all of us would assume. "A fair trial in a fair tribunal is a basic requirement of due process."³⁶ My own position is that the union view of a minority interest as well as the carrier's view is prone to be unfriendly if not hostile, and an open, adverse union position should not be required to challenge the fairness of a board whose members are solely or predominantly appointed by the carrier and the union.

VIII. INDIVIDUAL'S RIGHT TO GRIEVE

A third feature of the RLA's requirements on grievances is the right of an individual to file a grievance and to pursue it to a board of adjustment.³⁷ Presumably, an individual's efforts are likely to be less effective because the union's representatives normally have greater skill in presenting grievances; the union's presence lends the grievance a certain prestige; the union's absence raises a question or suspicion as to the merit of the grievance; and finally, the grievance will ultimately be resolved by a board composed partially of union representatives whose votes may be decisive. Nevertheless, the individual can, if he chooses, press his point individually to a conclusion. An individual or group of employees may file a grievance and settle it while others in similar situations are unaware of the filing or of its settlement. This procedure is a problem for the airlines because of the geographically widespread character of airline operations. Employees and the union representatives at one domicile may be unaware of what is being done at another, despite the fact that one agreement with one union party, generally the International union, governs them all. The domiciles are large enough to have separate locals and different union officers responsible for applying the grievance machinery locally. The problem does not exist, to my knowledge, as much among the flight crew members as among the larger ground crew units. It has always seemed strange that on the railroads the division superintendents are out of touch with grievance decisions from their divisions, while the organizations are aware of all of them. However, in the airlines, the reverse is true. While the airline carriers' hot lines work well, the unions have none, and for this neglect, they can only blame themselves.

However, few grievances are filed without the union's aid. Despite this factor, as a general practice in the airline industry, all grievances are signed and submitted by an individual employee, even though the

³⁵ *Id.* at 498-99.

³⁶ *In Re Murchison*, 349 U.S. 133, 136 (1954).

³⁷ *Slagley v. Illinois Central R.R.*, 397 F.2d 546, 551 (1968).

matter involves all or many employees and the union presses them. Except on the basis of history and precedent, I have never received an explanation as to why this practice exists. It may rest on a misapplication of *Elgin, J. & E. Ry. Co. v. Burley*³⁸ in which a settlement of some time claims by the union was held not binding because it was not proved that the claimants had authorized the Brotherhood to represent them individually in the board's proceeding. The Court indicated that the union's constitution could give the union the right to settle all members' grievances. I would think that such a right would be implied out of the union's status as the accredited representative because no harm is done to an individual so long as his own right to grieve is left untouched. The requirement that all grievances be submitted by an employee rather than by the union is archaic. My suggestion of negotiations for a change in this respect has almost always been rejected as there is never enough interest in the mechanics of the grievance procedure on the part of employees to make any phase of it a strike issue. For this reason, its form is almost always the product of management preference.

The Court's view in the *Elgin* case as to the responsibility and authority of the union to act for its members has been modified considerably since 1944. In *Republic Steel Corp. v. Maddox*,³⁹ the Supreme Court said that an employee must afford the union the opportunity to act on his behalf. "Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract."⁴⁰

In *Vaca v. Sipes*⁴¹ the Court majority said:

The collective bargaining system as encouraged by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit.⁴²

The trend away from recognizing the right of individuals to act independently of their union, and its corollary which relies primarily on the union's right to handle all grievances, is accompanied by an expression of the obligation of the union to represent its members fairly and without discrimination. This concept is not new to the RLA. The *Steele, Howard*⁴³ and similar cases already had enforced this obligation of the union to deal with the people they represent fairly. The early cases were concerned basically with unfairness arising out of racial discrimination. Today, the duty of fair representation goes beyond this type of discrimination. The case of *Vaca v. Sipes*,⁴⁴ decided in 1967, is the most recent major contribution to this area of the law. In *Glover v. St. Louis-San Francisco Ry.*,⁴⁵ the

³⁸ 325 U.S. 711 (1944).

³⁹ 379 U.S. 650 (1965).

⁴⁰ *Id.* at 653.

⁴¹ 386 U.S. 171 (1967).

⁴² *Id.* at 182-83. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944).

⁴³ *BRT v. Howard*, 343 U.S. 768 (1952).

⁴⁴ 386 U.S. 171 (1967).

⁴⁵ 393 U.S. 324 (1969).

Supreme Court applied the principle of *Vaca v. Sipes* to a grievance under the RLA. The employees had the right to employ the grievance machinery on their behalf, but the Court stated that its employment in this case would be futile since it meant the submission of their claim to a board which was chosen by the union and carrier against whom the grievants were complaining. It also held that in cases involving a breach of duty of fair representation, the employer may be joined to afford full relief to the complaint. Thus, the rights of an individual employee are presumably protected—whether the union pursues the claim or merely judges it.

No union or carrier can guarantee to each employee that his grievance will be settled correctly. They both have an obligation under the Act, however, to afford him an unquestionably fair, impartial and objective review of his grievance, and a decision must be based solely on the claim's merits. This right, the bi-partisan board does not guarantee.

IX. SELF-HELP

In the parlance of labor-management relations, a strike is referred to as self-help by the union. An employer's announcement of a unilateral change in rates of pay, rules or working conditions is also self-help. Under certain conditions, in major disputes, self-help is legally available to either the union or the employer. The only form of self-help which a union or employee can apply against management is to stop work. The carrier, however, has a broader potential for self-help, since it acts unilaterally in the management of its business and in giving orders to its employees, *i.e.*, it initiates decisions affecting working conditions and the payment of wages.

Since the *Chicago River* case, the carrier has a remedy against the union's resort to self-help in grievance matters in the form of a restraining order or temporary injunction. The effect of such an order is felt immediately, as there are no "steps," and no problem about selecting neutrals. Moreover, scheduling of hearings is quick and simple, and since relief is immediate, the decision is enforceable by fine or imprisonment. The union's remedy, however, is restricted to filing a grievance. The adjustment board has no power to enjoin, and the objectionable conduct of the carrier continues until the grievance steps and board proceedings are completed.

The employee wants to know why his employer cannot be restrained pending the grievance proceedings. It seems to him that management's self-help is presumed to be lawful until decided otherwise by a board of adjustment, while his union's resort to self-help is always unlawful. Whatever the rationalization for this difference of treatment, it is clearly discriminatory. The employees fail to understand why the carrier's wrongful conduct should be allowed to continue when theirs will not, no matter how right they may eventually prove to be in their grievance. The usual answer is that whatever wrong is being committed by the carrier can and will be remedied by an award of money damages, inasmuch as it is not irreparable. The damage to the carrier by a work stoppage in the transportation industry, on the other hand, is irreparable. While this

answer, regardless of its validity, appeals to the disinterested, the public and the carrier, it is not especially appealing to the employees. A money award is not always available nor is it necessarily a complete or satisfactory form of relief for the damage done. This fact is particularly true in disputes involving assignments of work and relocation of employees; it may also be true in discharge cases, if prolonged. An assignment of work or relocation dispute, for example, involves no claim of pay by employees who are required to work at a burdensome or objectionable assignment or at a new location which they claim is unlawful as to them but at which their rates of pay are the same as if they were properly assigned.

If a dispute is labeled a "major" dispute because the carrier is changing the agreement rather than violating it, the status quo provisions in the RLA would be applicable and enforceable by injunction.⁴⁶ In most situations, however, it is difficult to distinguish between a major and a minor dispute. If the union seeks a change in a working condition, it must file a section 6 notice at an appropriate time, which may be many months after it believes the change to be necessary or desirable, and it must maintain the status quo—*no change*—until all the procedures of the Act have been completed, which may require a year or even longer.

If the carrier decides to modify an operation which changes a working condition, it has the power to do so immediately. If the union complains of the effect on working conditions because it represents something new or different, the carrier's answer is either that it has the right to make the change under the agreement or that there is nothing in the agreement which prevents it from so doing. If the union disagrees, then there is merely a dispute as to the interpretation of the agreement which is a minor dispute, and the union's sole remedy is the filing of a grievance. Pending resolution of the dispute, the *change* stays in effect. I have insufficient time to explore the problem further, but it is important because it can mean a court's refusal to use its injunctive power to maintain the status quo when it might otherwise do so.

X. TEMPORARY INJUNCTIONS

The courts fill a policing role in the administration of the grievance machinery. As we have seen, if the employees do not accept the concept of exhausting the grievance machinery to rectify the carrier's employment of self-help and they decide to use their own self-help, the courts will enjoin them and order compliance with the grievance machinery without deciding the merits of the dispute. However, the court's attention can be drawn to both the equities involved and the merits by requesting that the court attach conditions to the issuance of the injunction, the usual condition being that the *status quo ante*, with emphasis on the "*ante*," be maintained pending resolution of the dispute through the grievance machinery. If successful, the union will have thwarted the carrier's exercise of its

⁴⁶ Railway Labor Act, 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 155, 156, 160 (1964). *American Airlines, Inc. v. Airline Pilots Ass'n*, 169 F. Supp. 777, 787 (1958).

prerogative of self-help until a decision is reached by a board of adjustment. Carriers always insist that the court has no jurisdiction to order a maintenance of the *status quo ante* in a minor dispute, the argument being that the RLA provides for it only in a major dispute. There is now no question that the court does have such jurisdiction. Moreover, the courts have exercised it.⁴⁷

Thus, if the employees want a *status quo ante* pending the grinding away of the grievance machinery, they must first strike, or at the least threaten strike. Clearly a court can issue an injunction requiring a carrier to maintain the *status quo ante* in a minor dispute without a strike or threatened strike. *Westchester Lodge*⁴⁸ involved transfers and layoffs because of the closing of a railroad terminal and a transfer to different seniority districts. The appellate court did not issue an injunction; rather, it directed the district court to do so if the dispute were properly referred to the adjustment board and equity required issuance, even though there was no strike or strike threat. The Court of Appeals for the Second Circuit said:

Nor do we find anything in the Railway Labor Act which prohibits a federal court from issuing an injunction to restore the *status quo* in a minor dispute if the court's discretion is soundly exercised to preserve the primary jurisdiction of the Adjustment Board. See *Brotherhood of Locomotive Fire & Eng. v. Southern Ry. Co.*, 217 F. Supp. 58 (D.D.C. 1963). The Adjustment Board normally requires several years to render a decision. See Note, 76 Harv. L. Rev. 423, 425 (1962). This lengthy delay may encourage voluntary settlement of disputes, but where, as here, relocation and jobs are involved, a victory before the Adjustment Board might well prove Pyrrhic, even though back wages might be collected from the carrier. Of course, if required to retain the *status quo* for three to five years, a carrier successful before the Board stands little chance of being reimbursed by the union for unnecessary expenditures. A court might resolve this dilemma by conditioning its injunction on the union guaranteeing to indemnify the carrier if the carrier prevails before the Board. See Note, 76 Harv. L. Rev. 423, 426 (1962). In any event, "the balancing of these competing claims of irreparable hardship is . . . the traditional function of the equity court, the exercise of which is reviewable only for an abuse of discretion." *Brotherhood of Locomotive Engineers v. Missouri K.T.R. Co.*, *supra*, 363 U.S. at 535, 80 S. Ct. at 1330, 4 L. Ed. 2d 1435.⁴⁹

In my experience, it has been difficult to persuade a district judge that an injunction is appropriate or even that conditions exist requiring a carrier to maintain the *status quo* in a minor dispute. The courts are reluctant to interfere with management's administration of its affairs or to overlap the jurisdiction of the adjustment board, and are therefore, inclined to look upon the irreparable aspects of a grievance as trivial when compared with these considerations, particularly if a claim for money is also involved.

If, however, the thesis of the *Chicago River* case is true, in that the statutory grievance machinery is so reasonable an alternative to the griev-

⁴⁷ *Bhd. of Locomotive Eng'rs v. Missouri-Kansas-Texas R.R.*, 363 U.S. 528 (1960).

⁴⁸ *Westchester Lodge 2186 v. Railway Express Agency, Inc.*, 329 F.2d 748 (1964).

⁴⁹ *Id.* at 753.

ant's right and power of strike that jurisdiction to issue injunctions in a labor dispute may be asserted, Norris-LaGuardia notwithstanding, it would be equally appropriate for courts to fill the gap if delay in affording relief to the grievant makes the grievance machinery an inadequate alternative. The court should grant conditions to the issuance of an injunction on an equitable basis as readily as they issue orders to enjoin strikes. To afford real equity, the courts should assume the burden of determining what damages are suffered by delay in granting relief to the grievant. Whatever may be the cost to the carrier, because of the ultimate dismissal of the grievance, it is only part of the whole cost of the dispute. The awesome remedy of injunction which the carrier has invoked contributes to the cost. It should not be borne solely by the employees whose grievances must wait for "the steps" and the boards unless frivolous contentions or delaying tactics by the employees exist. If the courts generally accept such a philosophy, I think we would see a genuine and general interest in modernizing, expediting and humanizing the grievance machinery in the airline industry.