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## SESSION TWO

### DEVELOPMENTS: PAST AND FUTURE IN THE NMB'S DETERMINATION OF "CRAFT OR CLASS"

BY GLEN HARLAN†

WHEN I think of the Railway Labor Act<sup>1</sup> in philosophical terms—which is not often—I am reminded of the old definition of a camel: A horse designed by a committee. As you know, the Railway Labor Act was drafted by a committee—a joint management-union committee at that. With labor-management negotiations as its source, and with an indulgent and relatively uncritical Congress which was delighted to act on legislation miraculously supported by the two normally hostile factions, it is not surprising that the Act, like the camel, developed some "humps" which the courts, litigants and negotiators have been attempting to surmount for many years.

Perhaps the most puzzling "hump" produced by this committee is section 2, Ninth. This provision is the heart and soul of the collective bargaining system created by the Act, yet no one can be sure what it means. Section 2 clearly specifies that collective bargaining shall take place between the representative of a carrier and the representative of a "craft or class" of employees. Yet, there is no definition of "craft or class"; no standards are prescribed by which anyone can determine what constitutes a craft or class, and indeed, there is no clear authority for anyone to make that determination.

Other terms are specifically defined—"carrier," "commerce," "employee," "representative" and even "district court"—but there is no clue as to the meaning of that critical bargaining unit, the craft or class. This deficiency clearly is not inadvertent. The draftsmen of the Act must have given the matter careful thought, for they specifically provided in section 1, Fifth that "no occupational classification made by order of the Interstate Commerce Commission (ICC) shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission." Thus, we know that the ICC has no authority to define the term and that any ICC listing of "crafts" is wholly irrelevant. Why did the draftsmen not then proceed to state

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<sup>1</sup> Railway Labor Act, 44 Stat. 577 (1926), as amended, 54 Stat. 785-86, 45 U.S.C. § 151 (1964).

who *should* define the term and what standards *should* be used? That question was asked of Commissioner Eastman, the principal sponsor of the 1934 amendments to the Act, who stated:

We thought of that, as to whether or not it was necessary to define craft or class, but those are words which have been used in labor parlance for a very long time, and I think there would be no difficulty in determining what is a craft or class of employees.<sup>2</sup>

Commissioner Eastman went on to state that any disputes of this nature would be resolved by the National Mediation Board under section 2, Ninth.

With all due respect to a most distinguished and capable ICC Commissioner and Federal Coordinator of Transportation, that is not a very satisfactory answer, even as related to the railroad industry. And when one considers that Congress, less than two years later, applied exactly the same provisions to the airlines<sup>3</sup> without further definition of the term "craft or class," it is apparent that Commissioner Eastman's explanation will not suffice. At that point in history the airlines certainly had no established crafts or classes with the possible exception of pilots and, as applied to the airlines, the absence of a definition or statutory standards could mean only one thing, that the agency charged with settling any representation dispute had complete discretion in determining what constituted a "craft or class." Shades of *Schechter*<sup>4</sup> and *Panama Refining*!<sup>5</sup>

Between the 1934 amendments to the Railway Labor Act and the 1936 addition of the airlines to its purview, Congress, in 1935, passed the National Labor Relations Act<sup>6</sup> which spelled out in some detail the factors to be considered in defining the collective bargaining unit subject to that statute. Congress knew how to define such terms; the committee which created the Railway Labor Act knew how to define other terms, and knew how to specify what would *not* govern or influence the definition of "craft or class." Thus, I am forced to the conclusion that the committee simply did not wish to define this term, probably because no agreement concerning a definition could be reached, and the whole project to create an agreed statute might have fallen apart if the drive for a definition had been pressed. Negotiations between labor and management often result in ambiguities since neither party wishes to press for a complete definition for fear that clarity will prove prejudicial to a settlement or to the position of the party. Thus, we are limited to the cryptic language of section 2, Ninth for any clues concerning determinations of crafts or classes. There are two key provisions:

(1) In case of a dispute "among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act," the Mediation Board

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<sup>2</sup> *Hearings on H.R. 7650 Before the Committee on Interstate and Foreign Commerce*, 73d Cong., 2d Sess., at 45 (1934).

<sup>3</sup> Railway Labor Act, 49 Stat. 1189, 45 U.S.C. § 181 (1936).

<sup>4</sup> *Schechter Corp. v. United States*, 295 U.S. 495 (1935).

<sup>5</sup> *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

<sup>6</sup> National Labor Relations Act, 49 Stat. 449 (1934), as amended, 61 Stat. 151, 29 U.S.C. § 151 (1964).

is required to investigate and certify the name of the representative of "the employees involved in the dispute."

(2) The Board is authorized to use any "appropriate method" which will insure choice by the employees "without interference, influence, or coercion exercised by the carrier," and if an "election" is held, the Board (or a neutral committee selected by the Board) shall "designate who may participate in the election."

The provision requiring designation of "who may participate in the election" is often cited as the statutory basis for the Mediation Board's jurisdiction to determine craft or class. However, literally construed, this provision will apply only if an election is to be held, and plainly the Board is not required to hold an election. Hence, in my opinion, the really significant language establishing the Board's power is the provision requiring the Board to resolve employee disputes "as to who are the representatives of such employees." The exact source of the Board's authority is critical for, if the Board has only the power to decide who may vote in an election, its function may be quite limited. But if it may decide any dispute among employees concerning who is their representative, it has jurisdiction of an extremely broad range of potential disputes among employees and unions.

While the Board has not been completely consistent in all its actions throughout its history, it has been reasonably consistent in taking a restrictive view of its powers under section 2, Ninth. For example, in *Locomotive Engineers v. National Mediation Board*,<sup>8</sup> the Board is quoted as saying that its authority under section 2, Ninth does not extend to a "jurisdictional dispute as such" and therefore, section 2, Ninth would not apply to a dispute as to whether Engineers' or Firemen's unions may negotiate concerning "apprentice engineers." This view of the Board was supported by at least one court in *Railroad Trainmen v. National Mediation Board*,<sup>9</sup> at the time when craft or class determinations were thought to be subject to judicial review. However, in that case Judge Rutledge dissented vigorously, pointing out that a representation dispute "involves not only the question of who shall be representative, but also who shall be represented" and the Board must make the decision. As he said, "This necessarily involves fixing the craft or class lines . . . and when doing this requires settlement of a jurisdictional dispute, whether over work or men, the Board must make the decision."<sup>10</sup>

On the same day that these conflicting views were expressed, the same court wrote two conflicting opinions on the issue of the size of a craft or class in *Switchmen's Union v. National Mediation Board*.<sup>11</sup> The majority opinion, written by Judge (later Chief Justice) Vinson, invoked legislative history and erudite principles of statutory interpretation to uphold the Mediation Board's decision that a craft or class must be carrier-wide and

<sup>7</sup> Railway Labor Act, § 2, 44 Stat. 577 (1926), as amended, 48 Stat. 1168, 45 U.S.C. § 151 (a) (1964).

<sup>8</sup> *Locomotive Eng'rs Union v. NMB*, 284 F. Supp. 344 (D.D.C. 1968).

<sup>9</sup> *Railroad Trainmen Union v. NMB*, 135 F.2d 780 (D.C. Cir. 1943).

<sup>10</sup> *Id.* at 783.

<sup>11</sup> *Switchmen's Union v. NMB*, 135 F.2d 785 (D.C. Cir. 1943).

therefore, the small union involved in that case was lawfully swallowed by the big one with the Board's blessing. Judge (later Associate Justice) Rutledge wrote a dissenting opinion asserting that the National Mediation Board had discretion to designate bargaining units of varying sizes, giving prominent weight to the over-all purpose of the Railway Labor Act—the establishment and maintenance of labor peace and stability. All this learned debate came to naught when the *Switchmen's* case went to the Supreme Court, for there it was decided, to the surprise of all concerned, that the Board's discretion was virtually unlimited,<sup>12</sup> being totally beyond the range of judicial review.

The *Switchmen's Union* case was part of one of those trilogies which the Supreme Court loves to set up from time to time—the other two parts being the *M-K-T* case<sup>13</sup> and the *Southern Pacific* case.<sup>14</sup> In this "section 2, Ninth Trilogy" the Supreme Court clearly rejected the theory that the Mediation Board's power to determine craft or class was limited in character. The Court remarked: "It is apparently the view of the National Mediation Board that § 2, Ninth was designed to cover only those disputes entailing an election by employees of their representatives."<sup>15</sup> However, in the text of the opinion the Court said: "It is clear from the legislative history of § 2, Ninth that it was designed . . . to resolve a wide range of jurisdictional disputes between unions and between groups of employees."<sup>16</sup> Immediately after finding that the Board's power extended to a "wide range of jurisdictional disputes," the Court shut off judicial review, thus limiting the possibility that the courts might clarify the precise extent of such power. The Court did reserve the question as to "[w]hether judicial power may ever be exercised to require the Mediation Board to exercise the 'duty' imposed upon it under § 2, Ninth and, if so, the type or types of situation in which it may be invoked . . . ."<sup>17</sup>

Some of us thought that judicial review might become available again when the Administrative Procedure Act<sup>18</sup> was enacted in 1946, but in the *Kirkland* case<sup>19</sup> the court of appeals held that the Railway Labor Act "precludes review" because the Supreme Court so stated in the *Switchmen's Union* case, and therefore the Administrative Procedure Act changed nothing in this respect. Since the "section 2, Ninth Trilogy," most of the judicial light cast on the subject of craft or class has resulted from reflection and indirection. Much of this reflected light results from the refusal of the courts to grant relief in various disputes on the ground that craft or class issues are involved and are the exclusive province of the Mediation Board.

The first significant craft or class litigation in the airline industry arose

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<sup>12</sup> *Switchmen's Union v. NMB*, 320 U.S. 297 (1943).

<sup>13</sup> *General Comm. of Adjustment v. Missouri-Kansas-Texas R.R.*, 320 U.S. 323 (1943).

<sup>14</sup> *General Comm. of Adjustment v. Southern Pacific Co.*, 320 U.S. 338 (1943).

<sup>15</sup> *Switchmen's Union v. NMB*, 320 U.S. at 336 n.11 (1943).

<sup>16</sup> *Id.* at 336.

<sup>17</sup> *Id.* at 336 n.12.

<sup>18</sup> Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. § 1001 (1946).

<sup>19</sup> *Kirkland v. Atlantic Coastline R.R.*, 167 F.2d 529 (D.C. Cir.), *cert. denied*, 335 U.S. 843 (1948).

out of the Mediation Board's first important determination in the industry—the series of rulings in 1947, summed up in what is generally referred to as “NMB Case No. R-1706”—in which the Board established the major classifications of ground employees of the airlines. One of the immediate effects of that decision was to divide up the janitors, represented by a small union at Pennsylvania Central Airlines, and turn them over to the Railway Clerks and the Machinists. The court of appeals held that no judicial review was available, and thus another small union lost to the bigger unions.<sup>20</sup> The Court held that a “Constitutional” issue might have conferred authority for review, but found no such issue in a mere determination of craft or class.

Ironically, the Railway Clerks, which thus captured a small group of clerks from a smaller union, lost *its own* representative status in another jurisdictional dispute. Pennsylvania Central Airlines changed its name to Capital Airlines, and still later merged with United Air Lines. The Capital clerical personnel were represented by the Railway Clerks; some clerks at United were represented by the International Association of Machinists; but most were unrepresented. Railway Cluerks claimed that its contract with Capital remained effective despite the merger and United contended that the union's representation rights expired when the Capital clerks were outnumbered by the United unorganized clerical employees and that, consequently, the contract also expired. The Court of Appeals for the Sixth Circuit held<sup>21</sup> that this was a representation dispute to be decided by the Mediation Board, and thus there was no court jurisdiction. So far as I know, the Mediation Board was never asked, formally or informally, to rule on this as a representation dispute, and I am reasonably confident that it would not have taken jurisdiction in the absence of an application under section 1203.2 of its Rules, supported by authorization cards signed by at least 35 percent of the employees<sup>22</sup> in the entire craft or class as it existed in the merged company. Even then, the Board would have undertaken only to determine the representative of the *merged* craft or class and not the legal question concerning whether the contract with a minority group survived the merger.<sup>23</sup> This case illustrates the vast gulf between the courts and the Board concerning the extent of the Board's power under section 2, Ninth. The courts have said repeatedly that the Board has jurisdiction over disputes which the Board has considered wholly foreign to section 2, Ninth.<sup>24</sup>

Undoubtedly the case for the Railway Clerks in the Sixth Circuit was

<sup>20</sup> United Transport Service Employees Union v. NMB, 179 F.2d 446 (D.C. Cir. 1949).

<sup>21</sup> Railway Clerks Union v. United Air Lines, 325 F.2d 576 (6th Cir. 1963), *cert. dismissed*, 379 U.S. 26 (1964).

<sup>22</sup> 29 C.F.R. §§ 1203.2, 1206.2 (1964).

<sup>23</sup> The Board was asked by Railway Clerks to interpret the meaning and application of the agreement as a “mediation agreement” pursuant to § 5, Second but it concluded cryptically that “the language means just what it says.” (*Cf.* Teamsters Union v. Allegheny Airlines, 58 CCH Lab. Cas. 12,944 (D.D.C. 1968)).

<sup>24</sup> See Railroad Trainmen Union v. NMB, 135 F.2d 780 (D.C. Cir. 1943); Switchmen's Union v. NMB, 135 F.2d 785 (D.C. Cir. 1943); General Comm. of Adjustment v. Missouri-Kansas-Texas R.R., 320 U.S. 323 (1943); and Locomotive Eng'rs Union v. NMB, 284 F. Supp. 344 (D.D.C. 1968).

damaged considerably because, while the litigation was pending, the Railway Clerks filed an application with the Mediation Board seeking to represent the entire craft or class of clerical employees at United. Thus, the dispute over continued effectiveness of a contract with a minority group was, logically or illogically, fused—or confused—with the larger issue of representation of the entire group. This application by the Railway Clerks led to the famous *ABNE* case<sup>25</sup> in which the Supreme Court ultimately took jurisdiction (as foreshadowed in the *M-K-T* case) to determine whether the Board had performed its statutory duty with respect to craft or class,<sup>26</sup> but upheld the Board's refusal to upset the craft or class established under the Board's decision in Case No. R-1706. This Supreme Court decision is perhaps most notable for its implications rather than its holdings. Among its implications are the following:

(1) The Board might be reversed if it "adhered solely to the craft or class chosen by the unions," and

(2) while "Whether and to what extent carriers will be permitted to present their views on craft or class questions is a matter that the Act leaves solely in the discretion of the Board," the Board's action might have been seriously questioned by the Court but for the fact that United "participated in the proceeding establishing the craft or class in question as a cognizable grouping of employees, and it has had opportunities since that time to present further evidence."<sup>27</sup>

On the latter point, it should be observed that the Court's view is diametrically opposed to the Board's as the Board has consistently claimed that it has no power to permit a carrier to be a party to a section 2, Ninth proceeding since the statutory language apparently draws a distinction between the carrier and the "parties" to the dispute, and prohibits the carrier from having any "influence" on the determination.<sup>28</sup> I have never been able to understand how such a determination could be made intelligently without active participation by the carrier (which, of course, is most familiar with the functions of the various groups of employees and other factors which are essential to any craft or class determination), and the Board evidently recognizes that the carrier is essential since it regularly permits participation by the carrier in its section 2, Ninth craft or class proceedings, although ostensibly for the sole purpose of furnishing necessary information as desired by the Board.<sup>29</sup>

Somewhat reluctantly, but inevitably, I turn now to the long, bitter

<sup>25</sup> *Railway Clerks v. Employees Ass'n*, 380 U.S. 650 (1965).

<sup>26</sup> In *Air Line Dispatchers Union v. NMB*, 189 F.2d 685 (D.C. Cir.), *cert. denied*, 342 U.S. 849 (1951) the court reviewed a determination by the Mediation Board (invoking footnote 12 of the *M-K-T* decision) but upheld the Board's decision that a group of employees wholly outside the continental United States is not subject to the Railway Labor Act. The first court decision directly ordering the Board to make a craft or class determination where it had declined to do so is *Locomotive Eng'rs Union v. NMB*, 284 F. Supp. 344 (D.D.C. 1968).

<sup>27</sup> Outside the scope of this study is the Supreme Court's "implication" that a failure to vote in a representation proceeding constitutes a "no union" vote, contrary to the finding in *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515 (1937). But see *Aeronautical Radio v. Mediation Board*, 380 F.2d 624 (D.C. Cir. 1967).

<sup>28</sup> See FIFTEEN YEARS UNDER THE RAILWAY LABOR ACT, AMENDED, AND THE NATIONAL MEDIATION BOARD, 1934-1949 at 4, U.S. Gov't Printing Office (1950).

<sup>29</sup> *Id.* at 28.

and incredibly costly pilot-flight engineer dispute which, out of a welter of confusion, may have produced some guidelines to the future of craft or class determinations. A brief historical background may be necessary to understand the significance of this dispute in relation to the craft or class issue. In the mid-1950's, the Air Line Pilots Association (ALPA) adopted a "policy" that all active crew members in the cockpit must be pilot-qualified, but it indicated a willingness to consider some form of job security for the then incumbents of non-pilot cockpit positions. Flight Engineers' International Association (FEIA) immediately recognized this policy as a threat to its existence as a union and it persuaded the non-pilot flight engineers that their jobs were also at stake. FEIA's response to the ALPA "policy" was a renewed and strengthened demand that all crewmen acting as flight engineers be licensed as airframe and powerplant (A and P) mechanics—a qualification which few pilots would be likely to obtain. The FEIA theory was that ALPA could never take over its jobs, its representation rights or its union so long as it had a contractual job qualification which pilots could or would not meet. With battle lines thus drawn, a direct conflict was inevitable. It occurred at Eastern Air Lines in 1957-58. After lengthy emergency board proceedings, Eastern agreed—as recommended by the emergency board headed by David Cole—to give flight engineers training as pilots and to require that on the new jet aircraft all flight engineers must have pilot qualifications. ALPA agreed, although this agreement was somewhat less than its announced "policy," and it would keep pilots from taking over the flight engineers' jobs. But FEIA rejected the proposal, contending that any acceptance of pilot training would lead eventually to the loss of flight engineer jobs and bargaining autonomy. When Eastern hesitated in its program to force free pilot training on the flight engineers, ALPA set a strike date. Eastern obtained a temporary restraining order on the theory that ALPA was seeking unlawfully to bargain with Eastern concerning the job qualifications of another craft or class. As can be imagined, this was a theory which was invoked and quoted often by FEIA in the subsequent years of controversy among Eastern, ALPA and FEIA.

The basic argument was commonly referred to as a "jurisdictional dispute" between pilot and flight engineer unions. The unions both rejected that characterization, saying that the question was simply "what qualifications does the job require?"—not "what union represents the incumbents?" or "what classification of employees is entitled to perform the work of flight engineer?" Nevertheless, it was a "jurisdictional dispute" and a representation dispute involving the question of craft or class, as the courts finally and definitively adjudicated.

Eastern's 38-day flight engineer strike in 1958 over this jurisdictional dispute (and the parallel dispute at each of American, Pan American and TWA) was settled by an agreement between the carrier and FEIA that flight engineers need not accept free pilot training, and an agreement between the carrier and ALPA that on jet aircraft there would be a third



qualified pilot, thus creating a four-man crew and a "fifth wheel." I hasten to say that the "fifth wheel" was neither the flight engineer nor the third pilot; rather it was a combination of the two, for job functions were redistributed, and all crew members on Eastern, at least, had something essential to do. The airline simply did not need four men to do that work. The presence of the fourth man in the cockpit created more problems than it was expected to solve. Immediately there was an argument over the carriers' duties to train the third pilot. ALPA thought that the airlines were committed to qualify the third pilot as a flight engineer, and the airlines thought that the training commitment was much less extensive. At Eastern, ALPA sought to enforce its interpretation by refusing to take training on new aircraft until the issue was settled. Eastern obtained injunctive relief on the ground that interpretation of the agreement was the exclusive province of the system board of adjustment,<sup>30</sup> relying on the *Chicago River* case.<sup>31</sup> The issue eventually was settled by arbitration.

At TWA, the same issue was "settled" initially by arbitration between ALPA and the carrier, but FEIA sought an injunction against enforcement of the award which required TWA to train pilots as flight engineers. The resulting court decision<sup>32</sup> is one of the most significant since the Supreme Court's "section 2, Ninth Trilogy" of 1943. The court denied the injunctive relief sought by FEIA holding that the underlying dispute was "jurisdictional" and fundamentally the same as the dispute in the *M-K-T* case. In comparing the *TWA* case with the *M-K-T* case the court said: "In both cases the argument advanced by plaintiff is that the contract is invalid because the carrier dealt with the wrong employee representative . . . ."<sup>33</sup> The court then applied to the *TWA* case the following quotation from the *M-K-T* case:

It involves a jurisdictional dispute—an asserted overlapping of the interests of two crafts. It necessitates a determination of the point where the authority of one craft ends and the other begins or of the zones where they have joint authority.<sup>34</sup>

This sounds like simplicity itself, and *M-K-T* appears to "fit like a glove." But until the *TWA* decision, I doubt that many lawyers had considered the possibility that the pilot-flight engineer dispute was *that* kind of "jurisdictional dispute," that is, one which the Mediation Board could even possibly be expected to settle.

As you may recall, in 1960, Eastern also had what might be termed a "class or craft dispute" between the pilots and the FAA inspectors over whether the third pilot or the inspector was entitled to sit in the third pilot's seat.<sup>35</sup> Possibly that dispute should have been referred to and decided by the Mediation Board under section 2, Ninth. However, the injunction which Eastern obtained, and which was miserably ineffective, was based

<sup>30</sup> *Eastern Air Lines v. Air Line Pilots Ass'n*, No. 9702-M (S.D. Fla. 1960).

<sup>31</sup> *Chicago River & I.R.R. v. Trainmen Union*, 353 U.S. 30 (1957).

<sup>32</sup> *Flight Eng'rs Union v. Trans World Airlines*, 205 F. Supp. 137 (S.D.N.Y. 1962).

<sup>33</sup> 320 U.S. at 334-35.

<sup>34</sup> *Id.* at 334.

<sup>35</sup> *Eastern Air Lines v. Air Line Pilots Ass'n*, No. 10,026-M (S.D. Fla. 1960).

on the theory that the principal "dispute" was between ALPA and the government and, therefore, not a "labor dispute" over which ALPA could lawfully strike,<sup>36</sup> and to the extent any "labor dispute" existed it was subject to adjustment board jurisdiction.<sup>37</sup>

FEIA's fears that ALPA's insistence on pilot training for flight engineers would lead to loss of the union's rights as representatives bore fruit in early 1961 when a committee (the Donaldson Committee) appointed by the Mediation Board decided that because United had trained all crew members in both flight and mechanical functions and crew members at United were "integrated," the flight engineer "functions can no longer be considered separate from those of other members of the flight crew."<sup>38</sup> Thus the pilots and flight engineers were merged into a single class or craft at United.<sup>39</sup>

A massive protest strike by flight engineers, clearly a strike against the government (the Mediation Board and its committee), grounded seven airlines in February, 1961, and the flight engineers returned to work only after President Kennedy appointed the Feinsinger Commission to attempt settlement of the basic pilot-flight engineer dispute. Several of the airlines obtained injunctions against the strike, principally on the theory that it was started prior to exhaustion of the procedures of the Railway Labor Act and was based on a dispute with the government rather than with the individual airlines. So far as I know, no one suggested that this was a jurisdictional dispute which could or should be settled by the Mediation Board by a class or craft determination under section 2, Ninth. The terms recommended by the Feinsinger Commission for a settlement called for even more pilot training for flight engineers on jets than the Cole emergency board recommended in the Eastern case in 1958, but some attempt was made to provide representational and job security for FEIA and its members. The airlines accepted the Feinsinger recommendations, and FEIA likewise purported to do so. ALPA never responded, although it later entered into some agreements which were similar to the Feinsinger recommendations. FEIA signed a Feinsinger-type agreement at TWA, yet refused to sign such agreements at Pan American and Eastern, and called a strike against both carriers for 23 June 1962. Pan American obtained a temporary restraining order which remained in effect far longer than was lawful under Rule 65 (b) of the Federal Rules of Civil Procedure,<sup>40</sup> but

<sup>36</sup> Cf. *Railroad Trainmen Union v. New York Cent. R.R.*, 246 F.2d 114 (6th Cir. 1957).

<sup>37</sup> *Slocum v. Delaware L. & W. R.R.*, 339 U.S. 239 (1950).

<sup>38</sup> 3 DETERMINATION OF CRAFT OR CLASS OF THE NATIONAL MEDIATION BOARD, JULY 1, 1953 - JUNE 30, 1961, at 56, 72, U.S. Gov't Printing Office (1961). This Mediation Board decision was allowed to stand in *UNA Chapter, FEIA v. NMB*, 294 F.2d 905 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 956 (1962), where the court said: "It has become well settled that in making 'craft or class' determinations, the National Mediation Board may regroup, amalgamate, or splinter 'historic' bargaining groups, taking into account technological and functional changes, and that the decision of the Board in setting up a 'class' for representation in a jurisdictional dispute is unreviewable in the courts."

<sup>39</sup> Both the Mediation Board and other high government officials gave public assurances that the class or craft decision at United was based on the peculiar factual situation, and would not constitute a precedent elsewhere. Nevertheless, FEIA and its members regarded the decision as a severe threat to their security.

<sup>40</sup> *Pan American World Airways v. Flight Eng'rs Union*, 306 F.2d 840 (2d Cir. 1962).

barely long enough to permit settlement of the dispute without a strike.

At Eastern, the strike began on 23 June. After a month of complete shutdown, Eastern started to replace striking flight engineers with pilots trained by the company as flight engineers and equipped with flight engineer licenses, but without the A and P mechanics' licenses required by the FEIA contract with Eastern. Naturally, litigation ensued. For present purposes, the New York City federal court litigation is most significant. Two suits were filed by FEIA alleging bad-faith bargaining, unfair labor practices and unlawful bargaining between Eastern and ALPA concerning flight engineer qualifications, duties and pay. In the district court injunctive relief was denied in both cases on the merits,<sup>41</sup> although in both cases Eastern raised as a defense the claim that a "jurisdictional dispute" was involved, and therefore, the court lacked jurisdiction. The first decision was affirmed *per curiam* on the merits.<sup>42</sup> The second decision was affirmed on the ground that the underlying dispute involved the problems of representation and jurisdiction between the labor unions, and, therefore, the court lacked jurisdiction for the reasons stated in the *M-K-T* case.<sup>43</sup>

In 1964 the National Mediation Board certified ALPA as the bargaining representative of Eastern's flight engineers after an election in which both the strikers and their replacements were allowed to vote.<sup>44</sup> FEIA subsequently amended its complaint in the second New York lawsuit to seek damages and mandatory relief reinstating the strikers. On motion for summary judgment, the district court dismissed the action on the ground that the basic dispute was still a representation matter.<sup>45</sup> The court of appeals affirmed,<sup>46</sup> holding that a court order reinstating the strikers would fly "in the teeth of the board's certification" of ALPA as the representative of Eastern's flight engineers, and that the requested award of damages would have a similar effect since employers could not rely on Mediation Board certifications if they were subject to severe damages for so doing.

This long story throws a great deal of light on the "craft or class" power of the Mediation Board and the "wide range of jurisdictional disputes"<sup>47</sup> which the Board is charged with deciding. Not only may the Board decide whether and to what extent a carrier may bargain with one union with respect to training to be given the members of another,<sup>48</sup> but it may also decide the precise line of demarcation between the bargaining jurisdiction of two unions with respect to rates of pay, rules and working conditions,<sup>49</sup> or,

<sup>41</sup> *Flight Eng'rs Union v. Eastern Air Lines*, 208 F. Supp. 182 (S.D.N.Y. 1962); *Flight Eng'rs Union v. Eastern Air Lines*, 45 CCH Lab. Cas. 17,814 (S.D.N.Y. 1962).

<sup>42</sup> *Flight Eng'rs Union v. Eastern Air Lines*, 307 F.2d 510 (2d Cir. 1962), *cert. denied*, 372 U.S. 945 (1963).

<sup>43</sup> *Flight Eng'rs Union v. Eastern Air Lines*, 311 F.2d 745 (2d Cir. 1962), *cert. denied*, 373 U.S. 924 (1963).

<sup>44</sup> *See Flight Eng'rs Union v. NMB*, 338 F.2d 280 (D.C. Cir. 1964).

<sup>45</sup> *Flight Eng'rs Union v. Eastern Air Lines*, 243 F. Supp. 701 (S.D.N.Y. 1965).

<sup>46</sup> *Flight Eng'rs Union v. Eastern Air Lines*, 359 F.2d 303 (2d Cir. 1966).

<sup>47</sup> *See General Comm. of Adjustment v. Missouri-Kansas-Texas R.R.*, 320 U.S. 323 n.11 (1943).

<sup>48</sup> *See Flight Eng'rs Union v. Trans World Airlines*, 205 F. Supp. 137 (S.D.N.Y. 1962).

<sup>49</sup> *See Flight Eng'rs Union v. Eastern Air Lines*, 208 F. Supp. 182 (S.D.N.Y. 1962); *Id.* at 307 F.2d 510 (2d Cir. 1962), *cert. denied*, 372 U.S. 945 (1963); *Flight Eng'rs Union v. Eastern Air Lines*, 45 CCH Lab. Cas. 17,814 (S.D.N.Y. 1962); *Id.* at 311 F.2d 745 (2d Cir. 1962), *cert. de-*

as the Court said in *M-K-T*, "the point where the authority of one craft ends and the other begins or of the zones where they have joint authority."<sup>50</sup> But most significantly, if this type of jurisdictional dispute underlies a broader dispute, there is no orderly method for settling any of the questions presented unless the Board decides the jurisdictional dispute.

It could be argued that the absence of a judicial remedy does not compel the conclusion that there is an administrative remedy. The Supreme Court implied in the *M-K-T* case that some disputes may be beyond the jurisdiction of either judicial or administrative tribunals. However, it seems clear that the present trend of the Supreme Court is to require administrative settlement of jurisdictional disputes under the Railway Labor Act,<sup>51</sup> and I would anticipate that the courts would extend that tendency and would hold that the Mediation Board must decide the type of question presented in the *TWA* and *Eastern* cases.

One may wonder how the Board would proceed to settle such a dispute. Certainly it would have to develop techniques different from those customarily used by the Board in the past, for an election or a card check will not determine what training or qualifications are needed for a particular job or how the jurisdictional lines between two unions are to be drawn. However, it seems that the fundamental difficulties involved in the settlement of such a dispute are not much greater than those entailed in a decision by an adjustment board as to which of two unions has jurisdiction over a particular job function, and the Supreme Court has made it quite clear that the adjustment board must make this type of decision.<sup>52</sup> Quite possibly, the Board would use the committee technique to decide such questions, just as it created the Donaldson Committee to decide the United craft or class issue. In any event, it seems that if, as the courts have said, the *TWA* and *Eastern* disputes are basically questions of representation, it is the Board's duty to resolve those disputes under section 2, Ninth and I think the courts should direct the Board to perform that duty.<sup>53</sup> That is what some courts have tried to do in the similar "apprentice engineer" cases.<sup>54</sup> Recently, the railroads have faced a shortage of engineers because of the declining number of firemen eligible for promotion. To meet this shortage, the railroads have created a classification of "apprentice engineers" and have contracted with the Locomotive Engineers with respect to terms and conditions of employment. The Firemen's union has also claimed jurisdiction of the new classification. The Mediation Board—among other puzzling and seemingly inconsistent actions—denied mediation on the ground that a "question of representation" was presented by

*nied*, 373 U.S. 924 (1963); *Id.* at 243 F. Supp. 701 (S.D.N.Y. 1965), *aff'd*, 359 F.2d 303 (2d Cir. 1966); *Flight Eng'rs Union v. NMB*, 338 F.2d 280 (D.C. Cir. 1964).

<sup>50</sup> 320 U.S. at 334-35.

<sup>51</sup> *Transportation-Communication Employees Union v. Union Pacific R.R.*, 385 U.S. 157 (1966).

<sup>52</sup> *Id.*

<sup>53</sup> See *Air Line Dispatchers Union v. NMB*, 189 F.2d 685 (D.C. Cir.), *cert. denied*, 342 U.S. 849 (1951); *Locomotive Eng'rs Union v. NMB*, 284 F. Supp. 344 (D.D.C. 1968); *supra* note 26, and related text.

<sup>54</sup> *Locomotive Eng'rs Union v. NMB*, 284 F. Supp. 344 (D.D.C. 1968); *cf.* *Locomotive Firemen Union v. Louisville & N. R.R.*, 400 F.2d 572 (6th Cir. 1968), *cert. denied*, 59 CCH Lab. Cas. 13,204 (1969).

the dispute between the Engineers and the Firemen, and then refused to proceed under section 2, Ninth on the ground that it was "not a representation dispute" but involved only "an issue as to the right of employees of one craft or class to do the work that is alleged to be that commonly done by employees of another craft or class." In *Locomotive Firemen v. Louisville & N.R.R.*,<sup>55</sup> the court rejected a request by the Firemen for an injunction against the apprentice program, stating that the dispute was subject to the Mediation Board's jurisdiction under section 2, Ninth. In *Locomotive Engineers v. National Mediation Board*,<sup>56</sup> the district court specifically held that the Board had a duty to settle the dispute under section 2, Ninth and ordered the Board to perform that duty. This seems to me to be clearly correct although the court of appeals reversed.

I always dislike performing postmortems on cases which I have handled. It is much more interesting to dissect another lawyer's cadaver. I am compelled, however, to wonder whether injunctions could have been obtained against the flight engineer and pilot strikes of the past ten years on the theory (1) that the basic dispute was a jurisdictional one between pilots and flight engineers which was subject to the exclusive power of the Mediation Board; (2) that the Board had a duty to resolve that dispute; (3) that until the administrative remedy had been exhausted the parties to the dispute could not use "self-help";<sup>57</sup> and (4) that after the dispute had been settled by the Board the parties could not strike over the outcome.<sup>58</sup> I doubt if the courts at that time were ready for such an extension of the *M-K-T* and *Chicago River* doctrines. While the courts were glad to seize upon the phrase "jurisdictional dispute" or "representation dispute" to avoid judicial intervention in a messy situation, I suspect that the judicial attitude toward section 2, Ninth was not then ripe for such a revolutionary step. It may well be ripe now.

While speculating and philosophizing, we may consider a few collateral issues which will arise if the courts compel the Mediation Board to decide such jurisdictional issues. Perhaps the most difficult question is: Which issues are subject to section 2, Ninth, and which are subject to the jurisdiction of the adjustment board? How does one distinguish between the question of who is entitled to bargain and the question of the legal effect where two unions have contracted for the same work? Just to illustrate the difficulty, the Supreme Court in the *Transportation-Communication Employees Union* case<sup>59</sup> held that adjustment board *must* decide which of two unions claiming they had contracted with the carrier for the same work was actually entitled to the work. Yet, is that not exactly the same issue which was involved in the *M-K-T* case? Possibly a distinction can be drawn between jurisdiction to bargain and jurisdiction of work resulting from two bargains by two unions, but I foresee a long future of litiga-

<sup>55</sup> *Locomotive Firemen Union v. Louisville & N. R.R.*, 400 F.2d 572 (6th Cir. 1968).

<sup>56</sup> *Locomotive Eng'rs Union v. NMB*, 284 F. Supp. 344 (D.D.C. 1968), *rev'd*, 59 CCH Lab. Cas. 13,361 (D.C. Cir. 1969).

<sup>57</sup> See *Chicago River & I. R.R. v. Trainmen Union*, 353 U.S. 30 (1957).

<sup>58</sup> *Locomotive Eng'rs v. Louisville & N. R.R.*, 373 U.S. 33 (1963).

<sup>59</sup> *Transportation-Communication Employees Union v. Union Pacific R.R.*, 385 U.S. 157 (1966).

tion on this issue which may well rival or exceed the controversy over the dichotomy between "major" and "minor" disputes.<sup>60</sup>

Another troublesome question may relate to exhaustion of administrative remedies. Since the Mediation Board takes the position that the carrier is not a party to section 2, Ninth proceedings and has no right to initiate such proceedings, I suppose the carrier always will be free to seek judicial relief whenever a representation dispute threatens its operations. However, I think the recent developments in the law which I have just outlined may well lead to a re-evaluation of this ancient and outmoded position of the Mediation Board. In any event, I assume that before one union could seek judicial relief against a bargaining raid by another, it would be required to submit the dispute to the Mediation Board, just as the carrier must submit a "minor" dispute to the adjustment board before seeking injunctive relief against a strike.<sup>61</sup>

Finally, I should like to speculate briefly on the application of the principles we have just discussed to a situation such as that presented in *Ruby v. American Airlines*,<sup>62</sup> where it was held that American violated the Railway Labor Act by insisting on negotiating with a joint pilot-flight engineer committee to resolve issues affecting both pilots and flight engineers. The committee was created by voluntary agreement of the parties, and negotiations were conducted under the auspices of the National Mediation Board with its chairman attending many of the meetings. When the flight engineers became disenchanted with the committee, the pilot representatives continued to claim that the committee represented both groups, and American insisted on a continuance of the joint negotiations to resolve the joint and overlapping problems. The majority of the court of appeals held that this was an unlawful refusal to bargain with FEIA. Judge Friendly dissented, stating that the real issue was "whether the Railway Labor Act prohibits an employer who faces the demands of two employee groups that call for a joint solution from insisting that the negotiations be held simultaneously in one room and across one table, and requires him instead to negotiate across two tables in two separate rooms, running back and forth from one to the other."<sup>63</sup>

The *Ruby* situation would seem to be an excellent example of a dispute among employees "as to who are the representatives of such employees." As the Supreme Court noted in the *M-K-T* case, it is the Board's duty to resolve such a dispute, to determine not only the dividing line between the authority of each group of employees, but also "the zones where they

<sup>60</sup> See the majority and dissenting opinions in *Seafarers Union v. Board of Trustees of Galveston Wharves*, 351 F.2d 184 (5th Cir. 1965). A similar controversy may arise over whether the issue is appropriate for negotiation and mediation on the one hand, or for determination under section 2, Ninth on the other—that is, whether a section 6 demand reaches into an area where the carrier cannot settle because another union "is the true adversary." *Southern Pac. Co. v. Switchmen's Union*, 356 F.2d 332, 335 (9th Cir. 1965).

<sup>61</sup> *Manion v. Kansas City Terminal*, 353 U.S. 927 (1957). It should be observed that when a representation dispute is pending before the Mediation Board the carrier cannot be required to deal with any disputant until the dispute has been settled. *Pan American World Airways v. Teamsters Union*, 275 F. Supp. 986 (S.D.N.Y. 1967), *aff'd*, 404 F.2d 938 (2d Cir. 1969).

<sup>62</sup> *Ruby v. American Airlines*, 329 F.2d 11 (2d Cir. 1964).

<sup>63</sup> *Id.* at 23-24.

have joint authority." Pilots and flight engineers have both joint and several interests where the bargaining contemplates the possibility of cross-bidding from flight engineer to pilot and from pilot to flight engineer, just as is true with the railroad engineers and firemen who frequently move from one classification to the other. Certainly, in this type of situation, joint bargaining and joint solutions should be encouraged. With the Mediation Board as both mediator and judge as to the extent to which joint rights and joint authority are present, problems of this type can be solved in a realistic manner. In any event, it seems to me that once a joint bargaining committee has been established by agreement of the parties, any dispute among them as to the authority of the committee is necessarily one for the Mediation Board, not for the courts.

In summary, I believe that the recent decisions of the courts in declining to grant judicial relief in the presence of "representation disputes" have, by indirection, created the possibility that the Mediation Board will greatly expand its functions to decide the myriad jurisdictional disputes which arise between bargaining representatives over the right to bargain with respect to work and employees. Far from being the mere election judge, as the Board has considered itself for years, it should step up to the "wide range of jurisdictional disputes" which the Supreme Court long ago said section 2, Ninth was designed to solve. If the Board does not voluntarily undertake the resolution of such disputes, I believe the courts should direct such action, as was done by the district court in the case of the "apprentice engineers." Jurisdictional disputes should no longer be a mere justification for judicial abstention; they should be a reason for administrative *action* to resolve them, thus giving effect to the most significant purpose of the Railway Labor Act: "The prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions."<sup>64</sup>

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<sup>64</sup> Railway Labor Act § 2, 44 Stat. 577 (1926), as amended, 48 Stat. 1168, 45 U.S.C. § 151 (a) (1964).