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THE NATIONAL MEDIATION BOARD: TRADITION OF INEFFICIENCY

BY DAVID UELMEN†

IT HAS become a truism to say that the Railway Labor Act was adopted and amended against a background of an industry which was, for the most important part, already organized. There existed a limited number of unions representing operating employees and a somewhat larger number of unions representing the non-operating employees, particularly those engaged in the various traditional crafts. Many of the smaller unions of non-operating employees disappeared with the full enforcement of the union shop provisions that amended the Railway Labor Act in the early 1950's. More recently, a merger of four of the five operating Brotherhoods has resulted in the formation of one new organization called the United Transportation Union.¹

Although the Railway Labor Act was amended, perhaps prematurely, to include airlines, the more numerous and more serious representation disputes have not occurred in the effort to organize unorganized employees. Rather, the bitterly contested disputes have involved employee desire to change from one bargaining agent to another.

Historically, there was some interchange between certain classes of employees represented by operating Brotherhoods in instances where firemen and engineers, because of their job assignments, were compelled to change from one assignment to another depending upon available work. This exchange also occurred between the yard brakemen and the road brakemen. These interchanges caused conflicts between the Switchmens' Union of North America and the Brotherhood of Railroad Trainmen, and between the Engineers' Brotherhood and Firemens' Brotherhood.

The representational aspects of these conflicts were fought out under a set of rules that were well established, and usually involved a vote conducted by the National Mediation Board, the real purpose of which was to determine which union was to "hold the contract."

However, even the vote did not eliminate all of the problems. In the operating Brotherhoods the practice of permitting employees to hold membership in any one of the five operating Brotherhoods, including a Brotherhood that had no contract at all with the carrier, was still maintained. To some extent these "fat" practices were being eliminated prior to the merger.²

It might be an over-simplification, yet it appears that these practices

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¹ This merger should quiet the waggish reference made by some to the "Cooperating non-operating Brotherhoods" and the "Non-cooperating, operating Brotherhoods."

² *Dirks v. Birkholz*, 391 F.2d 289, *vacated*, 37 U.S.L.W. 3450 (U.S. May 26, 1969).

were developed and tolerated only so long as they were all kept within the "family" and no "outsiders" were present.³

One of the more recent efforts in the railway freight industry was a confrontation between the Brotherhood of Railway and Airline Clerks (BRAC) and the International Brotherhood of Teamsters (IBT) involving units of employees working for Railway Express (REA). Historically, the Teamsters Union negotiated contracts covering units of truck drivers working for REA in eight large metropolitan areas of the United States. The BRAC negotiated contracts with REA on a system-wide basis. There were approximately 35,000 eligible voters of which 3,200 were members of the Teamsters. The BRAC filed a petition for a system-wide election with the National Mediation Board, including those units represented by the Teamsters. The tally showed 17,867 for the BRAC and 10,192 for the Teamsters.

The election petition was filed in March, and after contested proceedings, the Mediation Board issued its decision in September. That decision set no specific date for the election. On 8 October the parties were informed that the election would be held no later than 4 November and perhaps earlier. The eligibility list was to be supplied on 15 October. 34,000 names and addresses, involving 8,000 separate locations, were furnished to the Teamsters by the NMB. On 22 October an additional 900 names and addresses, omitted from the original list, were furnished the IBT. On 28 October an additional 1,100 names and addresses were furnished to the IBT. On 31 October the ballots were mailed. Thousands of the addresses furnished to the IBT were incorrect. In addition, the IBT had reason to believe that of the 35,000 eligible voters, only approximately three-fourths of that number were actively employed by the company on the date of the election. Recitation of these facts requires no additional comment from me at this time.

The purpose of this speech is not to fully discuss the ramifications of the disputed procedures used in that election. Suffice it to say, for our purposes here, the Teamsters came away from that election with substantial grievances against the procedures employed by the NMB. It should also be noted that the dissatisfied employees are now making a new effort to change bargaining agents.

The right of employees to change from one union to another must, of course, be balanced with the right of the employer and the public to expect reasonable stability in the collective bargaining relationship. The National Mediation Board has balanced these interests by permitting an election to be conducted no more often than once every two years.

It should be remembered by all interested persons that the right to change from one union to another is no less important than the right to select or reject a bargaining agent where none exists. Employees have a right to organize and bargain through "representatives of their own choosing." Nothing in the statute, nothing in the legislative history and nothing in the decisions of the Court—or indeed of the NMB—state that employees

³ *Pennsylvania Railroad v. Rychlik*, 352 U.S. 480 (1956).

once having selected a bargaining agent, cannot change that agent or abandon collective bargaining entirely if they so desire. But can it be forthrightly stated by those who are experienced in this field that the practices and procedures that have been adopted, and are being used, permit employees to make these moves if that be their desire? The history of proceedings before the NMB on this problem has not been comforting.

First, there is no decertification procedure in the Statute, and the NMB probably is powerless to establish such a procedure. I do not share the fear of some concerning the addition of such a procedure. Decertification, while occasionally occurring under the National Labor Relations Act, has not been a serious problem to the militant unions. Employees want and need representation; and they desire to deal with their employers on a collective rather than an individual basis. The size of the bargaining units themselves are a substantial deterrent to a change in representation. Although I advocate no change in those policies at this time, I mention it to illustrate that this fact alone provides a built-in protection for the existing certified union. Changing unions in a system-wide unit of 8,000 employees, covering a wide geographical area of the United States and elsewhere, is a formidable task which ought not be further frustrated by unreasonable showing of interest rules, hocus pocus as to whether names of claiming unions should be on the ballot, erroneous names and addresses and rushed procedures which fail to afford all employees the opportunity to intelligently act on the ballot.

Second, a petitioner seeking to change the bargaining agent must secure authorization cards from a majority of the employees in the unit, and the practices here leave much to be desired. In the REA case there were *at least* 4,000 "furloughed" employees, and probably many more who were not actively employed by the company at the time of the election. The erroneous facts reported to the Teamsters made communication with the voters impossible. The timing of the election and the timing of the presentation of the list of eligible voters made any investigation of the list impossible.

Third, the challenging union, if certified, must accept the contract negotiated by the prior union for the term of that contract. This procedure has led, in at least one case, to the absurd result of having an established union, knowing that it will be defeated in the pending election, sign a new long-term contract with the Carrier thus tying the challenging—and about to be certified—union to its terms.

Fourth, the ad hoc procedures used by the Board tend to frustrate employee choice in many important cases.

In the Pan American election the BRAC had represented the employees for many years prior to 1965. When the Teamsters filed its petition for an election and the election was ordered, the incumbent, authorized bargaining agent (BRAC) insisted that its name be omitted from the ballot. (Apparently, the BRAC was treating the certification of election procedures like a modified Missouri plan of judicial selection: If a majority

did not vote for the Teamsters, the BRAC would expect to continue as the bargaining agent.)

The 1965 election was sidetracked by some strange campaign tactics, and a second election was conducted in 1966. Again the BRAC remained off the ballot; but out of 6,936 eligible votes, the Teamsters received 3,091 votes. Write-ins for other unions moved the total number desiring representation to a majority. In this election the BRAC campaign asked employees to "tear up the ballot"; 3,000 employees did not cast votes. Perhaps an uncertain percentage of these would not have voted anyway.

In both of those election proceedings, the Teamsters strongly urged the NMB to compel the BRAC to be on the ballot, but the NMB refused. However, instead of certifying the Teamsters after the second election, the NMB decided that there was still confusion attributed to the BRAC absence from the ballot, and it ordered a third election, as well as finally ordering the BRAC to either go on the ballot or forfeit its right to represent the employees.

In the third election the Teamsters received 4,821 votes, the BRAC received 1,092 (out of 8,071 eligible). Again, approximately 25 per cent of the employees failed to vote. Although certification was issued to the Teamsters on 14 February 1969, it is interesting to note that a very thick set of objections to certification were filed by the BRAC in this last election, and their objections included the following:

Carrier interference by refusing to negotiate with the BRAC since the petition was filed in 1965; NMB error in ordering the BRAC's name on the ballot; general allegations concerning mediator errors in the handling of the eligibility lists; and bias in favor of the Teamsters.

The experiences in the Pan American election provide a fruitful base for discussion and suggestions for improvements in the procedures of the Board and, more importantly, in the statute itself. A change in the ballot to provide a space for "no-union" is long overdue. However, while it would be a worthwhile change, it is only one of the fundamental problems which employees face in attempting to secure or reject union representation.

While the National Labor Relations Board found mail ballots to be an undesirable method for representation elections, they nevertheless form the keystone of NMB procedures.

The experiences of the Teamsters in the Zantop election deserve reporting here. Zantop is an air carrier of freight based in Detroit, Michigan. The Teamsters secured an NMB election among the pilots, and a mediator was assigned to set up the details of the election. The mediator traveled to Detroit and held private conferences with the Teamsters and with the carrier. Never did the Teamsters and the carrier meet face to face to resolve any of the eligibility problems which were presented. After taking a statement of the position of each party the mediator decided the issue; then went to a printer in Detroit and had ballots printed. He obtained these ballots, went to a hotel room, wrote out the names and addresses of

the eligible employees on the envelopes, and mailed the ballots to the employees.

Company supervisors went around to different employees and asked them directly if they expected to vote for the Teamsters. If the employee said "no," the supervisor picked up his ballot. Those ballots came into the possession of the carrier who was ineligible to participate in the election. The employee, having surrendered his ballot to his employer for obvious reasons, now complained to the union, and, upon application, a new ballot was sent from Washington. Now there were two ballots for this particular employee.

Such a balloting procedure is far too disquieting for serious men to continue to use. There may be a proper use for mail ballots for part of a large unit of traveling employees. However, it is preferable to use the experiences, procedures and controls formed by the NLRB on such matters.

The procedure that induces employees to refrain from voting at all, in order to vote their choice, is certainly intolerable. In an election now being conducted by the NMB on Braniff Airways, an employee sent a letter out to his fellow employees urging them to vote "no." The last paragraph of this letter states as follows:

One thing more—the Railway Labor Act is tricky, let's all be sure we know how to vote no. I understand one sure way is to tear up your ballot.

In my opinion it is not only a poor practice, but it is unwise for a legal procedure to incorporate and use such a confusing and burdensome rule.

Another serious problem involved with the NMB elections is that the conduct of the parties, both the employer and the unions, is not controlled or controllable by specific unfair labor practice procedures within the jurisdiction of the NMB. The statute is specific: "[I]t shall be unlawful for any carrier to interfere in any way with the organization of its employees. . . ."

Without being held to specific statistics it is my opinion that the vast percentage of unfair labor practices committed by employers under the National Labor Relations Act—and there are thousands of those cases yearly—are committed in connection with an organizing campaign where either a union is attempting to come into the plant for the first time or the employees are seeking to change unions, for these are the times of greatest employer interest. These are the times when the employer expects to, and does, express himself as to whether the employees should be organized, whether it is in their interest to be organized, and whether the business enterprise will be aided or harmed by collective bargaining. It just does not make sense to delegate authority to conduct representation elections to an agency and at the same time withhold from that agency the power to remedy any illegal acts which may occur during the election.

In Zantop, the pilots voted for the Teamsters Union but the union never received certification. The employer and others made protests to the NMB, some of which were referred to the Federal Bureau of Investigation for investigation. I do not have to tell you that an FBI agent calling at a mem-

ber's home to investigate conduct affecting an election has something less than an encouraging effect upon the employee's desires to be represented for purposes of collective bargaining. I do not say that with any intention of disparaging the FBI or any of its agents. But I think every person in this room would agree that the NLRB investigations of such matters are far less discouraging and far less coercive than an investigation conducted by the criminal division of the federal government.

It may be that this type of activity also has a similarly coercive effect upon the employer and its agents. Certainly, if conduct which is an unfair labor practice under the NLRA is criminal under the Railway Labor Act, the officers and agents of the Carrier will be more circumspect in their conduct. But this fact does not meet the issues of whether such coercion is necessary, whether such coercion is desirable and whether such coercion adds to or subtracts from the atmosphere of free collective bargaining that we would like to see encouraged in the airline industry.

I do not advocate at this time that the Railway Labor Act be repealed. I lean in that direction and I think that issue needs a serious dialogue and discussion by all interested parties. Yet, I am definitely of the view that the Railway Labor Act needs substantial revision. Perhaps its election procedures should be turned over to the National Labor Relations Board *en masse*. Failing that, the Railway Labor Act should definitely be amended to remove the airlines from coverage under that Act and they should be placed under the National Labor Relations Act.

We all know the National Labor Relations Act is not perfect, and the National Labor Board has had its ups and downs. There are substantial proposals pending in Congress, and have been for some time, to make revisions in that law. Also, there have been proposals to establish labor courts; however, I think that the rail and airline industries could play an important part in preventing any precipitous changes in our labor codes by Congress. In order to do so both the responsible unions and the carriers have to have some meaningful and forthright discussion on how to proceed from this point.