

1969

Comments on Papers Presented at the Symposium on Air Transport Labor Relations

Benjamin Aaron

Follow this and additional works at: <https://scholar.smu.edu/jalc>

Recommended Citation

Benjamin Aaron, *Comments on Papers Presented at the Symposium on Air Transport Labor Relations*, 35 J. AIR L. & COM. 513 (1969)
<https://scholar.smu.edu/jalc/vol35/iss3/21>

This Symposium is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

SESSION FOUR

COMMENTS ON PAPERS PRESENTED AT THE SYMPOSIUM ON AIR TRANSPORT LABOR RELATIONS

BY BENJAMIN AARON†

THE PAPERS presented at this symposium were generally of high quality; moreover, they collectively provide more up-to-date and comprehensive information about the impact of the Railway Labor Act on the air transport industry than has yet been conveniently available. I regret that time does not permit me to give to each of the contributions the attention it deserves; but my function, as I understand it, is simply to recapitulate the major themes of the symposium and to add a few comments on the principal issues.

With varying degrees of intensity, the speakers have expressed dissatisfaction with the application of the Railway Labor Act to airlines in respect of a broad spectrum of situations: The determination of "craft or class," the investigation of representation disputes, the conduct of elections, the mediation of both "major" and "minor" disputes, the "major"- "minor" dichotomy itself, the handling of so-called emergency disputes under section 10 of the Act and the functioning of system boards of adjustment.

Suggested remedial measures have ranged from modest proposals for more research into existing practices to bold recommendations for a complete reorganization of labor law administration, including the creation of a labor court. In addition, labor and management have been exhorted to collaborate in the development of mutually acceptable alternatives to strikes in the air transport industry, thus averting the dire consequences to themselves of hasty and intemperate action by an aroused Congress.

Despite these various criticisms, some of them quite forceful, none of the participants in the symposium has called for the outright repeal of the Railway Labor Act. Several of them—notably Professor Morris and Mr. Uelmen—marched up the hill; but ultimately they both marched down again, although by different routes. My own view, repeatedly stated for some time past,¹ is that the Railway Labor Act has outlived its usefulness and should be repealed. I have never proposed, however, and do not now advocate such repeal except in connection with a comprehensive review and revision of the entire body of our federal laws affecting labor-manage-

† Professor of Law and Director, Institute of Industrial Relations, University of California, Los Angeles.

¹ See e.g., my paper, *The Airlines and the Railway Labor Act*, presented at the 1966 Connecticut General Flight Forum.

ment relations. Obviously, an enterprise of that magnitude requires both a favorable political and economic climate and a great deal of careful planning. That it is not likely to be launched in the near future is no reason, however, why the idea should not be seriously considered and continuously refined.

At the same time, the more easily achievable objective of removing the air transport industry from coverage of the Railway Labor Act should, I think, be actively pursued. The papers presented at this Symposium indicate, as I have said, a general dissatisfaction with the present situation. At best, the industry's experience under the Act to date invites comparison with Dr. Samuel Johnson's observation about a dog walking on his hind legs: "It is not done well; but you are surprised to find it done at all." Some, like Mr. Heisler, apparently believe that the Act can be made to work if the National Mediation Board will revise its policies in respect of such vital matters as the determination of appropriate bargaining units, but, with all respect, I do not find such arguments very persuasive. Mere patchwork is not enough; more fundamental corrections are required.

In the light of political realities, however, the prospects for removal of the air transport industry from under the Railway Labor Act do not appear very promising. Therefore, even though patchwork of the present system of policies and practices is an essentially inadequate alternative, we should make every effort to use it with maximum effectiveness.

Let us consider, first, the determination of "craft and class" and representation elections. I link these two topics together not only because of their close functional relationship, but also because the papers by Messrs. Harlan, Heisler, Uelmen, and Goulard suggest the existence of substantial agreement on a number of important points. To put the matter the other way, I detected no real opposition against two propositions: First, that employers should be made parties, as a matter of right, in unit determination proceedings; and second, that election ballots should provide a place for a "No" vote. In respect of the latter point it is true, of course, that under the Mediation Board's present practice, an employee who carefully reads the ballot instructions will know that if he writes in the blank space provided for that purpose the name of a union other than the one or more whose names appear on the ballot, or if he deliberately voids his ballot or simply fails to vote, he will, in effect, have cast a "No" vote. This procedure, as we know, is perfectly legal; indeed, under section 2, Ninth of the Act the Mediation Board is not required to determine the wishes of the employees regarding a bargaining representative by secret ballot, but may use "any other appropriate method." No participant in this symposium, however, has defended the present complicated and difficult procedure for exercising a negative choice.

The informal discussion of several of the papers reflected some very sharp criticisms over the manner in which the Mediation Board has determined bargaining units and conducted elections. I can think of no statutory changes, however drastic, that will eliminate that kind of pro-

test. It does seem to me, though, that unit determination questions are likely to be decided more wisely and fairly by the Board if employers are made parties to the proceedings, and that charges of unfair tactics in representation elections, especially those made by rival labor organizations, would be less likely to arise if the NMB were to adapt its election rules more closely to those developed by the National Labor Relations Board.

Let us turn, next, to the grievance and adjustment board procedures in the air transport industry. If I correctly understand Messrs. Kahn, Schwartz, and Hill, they have, after some preliminary exploration, abandoned the attempt to develop a "model" system board procedure. That is good news indeed; for in my opinion they were pursuing a mirage. The idea of a model grievance and arbitration procedure is not new; it was more or less seriously discussed at least as early as World War II, but has been gradually discarded as our experience and sophistication in collective bargaining have increased. Grievance and arbitration procedures must be custom-made and tailored precisely to fit the peculiar needs of the parties.

The papers on this subject all indicate an understandable and entirely justifiable concern about needless steps in grievance procedures and other avoidable causes of delay. Although I fully share their concern about delay, which I consider to be one of the most important defects in the settlement of grievances under both the Railway Labor and Taft-Hartley Acts, I do not attach as much importance as some others do to such things as the elimination of transcripts, briefs, or written opinions. The great breakthrough, it seems to me, must take the form of speedier and much more frequent settlements in the steps of the grievance procedure preceding the stage of third-party intervention.

I have perhaps a somewhat greater concern than has generally been expressed at this symposium about the rights of individual employees who either are not members of labor organizations representing them in collective bargaining or are members at odds with the leadership of those organizations. My views on this subject are set forth in some detail in a recent article,² and I shall therefore merely summarize them here. In brief, I think that the rights of individual employees, both dissident union members and nonunion members of the bargaining unit, are insufficiently protected by either the Railway Labor Act or the Taft-Hartley Act. The complete imperium which employers and unions jointly exert over grievance and arbitration procedures, the strong presumption of a union's reasonableness and good faith usually assumed by the courts, and the judicially imposed requirement of exhaustion of contract and administrative remedies as a condition precedent to bringing an action in court for breach of a collective agreement all combine to place the individual employee almost completely under the control of his bargaining representative. This seems to me particularly unfortunate in the case of a discharged employee who has no wish to be reinstated and merely seeks damages for an alleged violation of his rights under a collective agreement. Although I

² Aaron, *The Union's Duty of Fair Representation Under the Railway Labor and National Labor Relations Acts*, 34 J. AIR L. & COM. 167 (1968).

did not at first, I now agree with Mr. Justice Black that the Supreme Court's decision in *Republic Steel Corp. v. Maddox*³ was wrong.

On the general subject of judicial review of airline system board awards we have Professor Kroner's interesting paper, which deals primarily with two issues: First the standards of judicial review applicable to system board awards when the jurisdiction of such boards is limited by contract language to a narrower scope than that specified in the Railway Labor Act; and second, the procedural and substantive problems inherent in the resolution of work-assignment disputes under the Act.

In respect of the first of these issues Professor Kroner has raised some questions which, as he says, go to the heart of the matter of judicial review. He rightly points out that, depending upon how strictly the courts apply the principle that arbitrators must draw "the essence" of their awards from the collective agreements involved, the way may be open for judicial review of substance in the guise of determining whether system boards have exceeded their jurisdiction. He also mentions the chilling possibility that disputes which would normally be considered "minor," but which have been placed outside the system board's jurisdiction by the language of the collective agreement, as construed by the courts, might then be considered to be "major" disputes or, perhaps, be consigned to a limbo outside of both categories.

In respect of the issue of work-assignment disputes Professor Kroner has convincingly demonstrated, at least to me, that the basic difficulties involved in both intra- and interdivisional jurisdictional conflicts between unions are not resolved by Justice Black's abstract formula enunciated in the *Transportation-Communication* case. I shall not attempt further to summarize Professor Kroner's discussion of this point; what he shows is that although resolution of these types of disputes in a single proceeding binding upon all interested parties is a consummation devoutly to be wished, the Supreme Court's formula in the *Transportation-Communication* case will almost certainly not bring about that happy result.

The procedural and substantive problems involved in the resolution of multiparty work-assignment disputes serve to remind us once again that our cherished distinction between disputes over rights and disputes over interests may not be as perfect or as indispensable as we have always assumed. The British observe no such distinction in arbitration; for a number of reasons which I cannot go into here, they treat each labor dispute as a problem to be solved, without worrying whether the claim is founded on rights or interests. The industrial relations system in Britain has serious defects; but the swelling chorus of criticism of that system is often ill-informed, exaggerated, and misdirected. The British long ago perceived a fundamental truth which we simply refuse to recognize, namely, that the tidy distinction between and separate treatment of disputes over rights and those over interests does not automatically or invariably insure the viable solution to all labor-management disputes.

³ 379 U.S. 650 (1965).

As time goes on, I think we shall have increasingly to ignore that distinction in our grievance and arbitration procedures when dealing with particularly intractable types of controversies, of which the interdivisional work-assignment dispute is the paradigm. Meanwhile, the air transport industry should, in its own enlightened self interest, speedily adopt the eminently sensible suggestion of Professors Kroner and Kahn and others, and undertake a comprehensive review of the relative effectiveness of its various system board procedures.

The distinction under the Railway Labor Act between "major" and "minor" disputes (which, incidentally, should in my judgment be commemorated in the railroad and air transport industries by an annual day of mourning) is adverted to also in the papers by Messrs. Schwartz and Hill and deserves some further notice. Some years ago I advanced the thesis that the changing character of disputes arising under the Act was tending to destroy whatever useful purpose had once been served by distinguishing between "major" and "minor" disputes.⁴ In *Elgin, J. & E. Ry. v. Burley* Mr. Justice Rutledge described "minor" disputes as those involving "the smaller differences which inevitably appear in the carrying out of major agreements" and which "seldom produce strikes."⁵ The most serious disputes arising under the Act today, however, involve issues such as work rules and the size and composition of crews, which are more likely to be denominated "major" or "minor" on the basis of the bargaining tactics of the parties than on the substance of the controversy.

Moreover, the consequences of classifying a dispute in one or the other of these categories can, as Messrs. Schwartz and Hill point out, be of crucial importance to the parties. If the dispute is held to be "minor," the union may not strike and will be compelled by injunction, if necessary, to maintain the status quo. Mr. Schwartz argues that unless the employer is similarly enjoined, which is usually not the case, the employees must continue to work for indefinite and often lengthy periods under changed conditions which they regard as oppressive and unfair. Mr. Hill replies that the foregoing argument is based on several "fallacies," including the belief that the steps an employer must take to manage his business should be equated with a union's resort to self-help. Contrary to Mr. Schwartz, he opposes court orders requiring employers to maintain the status quo in "minor" disputes.

My own views on this particular issue are already on record. Requiring an employer to maintain the status quo as a condition to the granting of an antistrike injunction in a "minor" dispute will not, in my opinion, necessarily balance what the Supreme Court has termed "competing claims of irreparable hardship";⁶ it may in fact simply shift the hardship from the union to the employer. The former can count on some retroactive relief, however inadequate, if it wins a favorable award from a system board of adjustment; the latter, even though it should win, will not be compen-

⁴ *The Labor Injunctions Reappraised*, 10 U.C.L.A. L. REV. 292, 320-21 (1963).

⁵ 325 U.S. 711, 724 (1945).

⁶ *Brotherhood of Locomotive Eng'rs v. Missouri-Kansas-Texas R.R.*, 363 U.S. 528, 535 (1960).

sated for the delay in introducing the charges that prompted the dispute. If those charges happened to be operating economies, a lengthy postponement might prove fatal to the enterprise. Moreover, the balancing of "competing claims of irreparable hardship" is the kind of policy determination which Congress made clear it wanted to reserve to itself by enacting the Norris-LaGuardia Act.

Of course, as Mr. Hill points out, speedy adjudication of "minor" disputes is much more feasible in the air transport industry than in the railroad industry, because the former relies entirely on system boards of adjustment and is not afflicted with a grievance-embalming institution comparable to the National Railroad Adjustment Board. Prompt disposition of "minor" disputes would prevent either party from being unduly prejudiced by judicial orders to maintain the status quo.

Finally, we have the papers on proposed changes in legislation affecting airlines.⁷ Mr. Weiss' paper surveys the current crop of bills; collectively, they show that labor court proposals are very much in style. Mr. Weiss effectively exposes the inanity and potential danger of the better known of these bills, and any further comment would endow them with an importance they do not deserve.

Having spent the better part of the last three years studying the operation of labor courts in several European countries, however, I cannot refrain from making a few observations on the general subject. It seems to me most regrettable that we in this country are so consistently indifferent to foreign experience in dealing with problems of common concern. Although it is apparent, for a number of reasons, that none of the several models of European labor courts could be introduced intact into the United States, we could learn much from studying them. Time does not permit a discussion of this point in detail, but I should like to draw attention to the tripartite structure of the German and Swedish labor courts and the essentially bipartite structure of the French labor courts. This feature, when combined with the conciliation functions built into the procedures of the French and German labor courts, and to a lesser extent into the Swedish labor court, suggests a whole range of possible experiments we might introduce into our present system of administrative and judicial handling of labor-management disputes.

The paper giving rise to the greatest amount of controversy in this symposium is undoubtedly that of Mr. Wisheart, which elaborates on his recent article, "Transportation Strike Control Legislation: A Congressional Challenge."⁸ In brief, Mr. Wisheart proposes that emergency boards established under section 10 of the Railway Labor Act should be given "the responsibility for determining whether a dispute—or any part of it—should be submitted to arbitration. . . ."⁹ He thinks the two controlling criteria in arriving at this decision should be the emergency board's esti-

⁷ I regret that I did not receive a copy of Mr. Curtin's paper and that he did not have time to summarize it orally during the symposium.

⁸ 66 MICH. L. REV. 1697 (1968).

⁹ *Id.* at 1719.

mate of the effect of the threatened strike on the public and its judgment of the likelihood that the parties will settle the dispute by collective bargaining.

Although I have some questions concerning some of the reasons that have led Mr. Wisheart to his ultimate proposal, I shall, because of limitations of time, confine my comments to the latter. Most of the discussion of his paper by other participants in the symposium reflected hostility to compulsory arbitration itself; consequently, his proposal as to how and when it should be invoked received relatively less attention. My own reaction is somewhat different: I do not regard compulsory arbitration as the ultimate abomination; I am even willing seriously to consider the hypothesis that it is the best way to deal with certain types of disputes. Nevertheless, I am troubled by Mr. Wisheart's proposal to vest in the emergency boards the final decision whether to invoke the procedure.

Mr. Wisheart was most generous in his tribute to the competence and dedication of those who serve on emergency boards; but as one who has had his share of that experience, I react to his praise with the same embarrassment and uneasiness that I felt when reading Mr. Justice Douglas' effusive and somewhat inaccurate comments in the *Steelworkers Trilogy* about the wisdom and expertise of arbitrators. I would not rule out the possibility of using compulsory arbitration in some cases, but if it is to be used, the final decision, in my opinion, should rest with Congress. Only in that way can we prevent too ready resort to a highly specialized tool of such limited utility.

I go along with Mr. Wisheart to the extent of believing that emergency boards should have the right, and perhaps the duty, to recommend procedures, as distinguished from substantive proposals, to resolve disputes that apparently cannot be settled by mediation. In my opinion, however, such recommendations should go first to the President, and should be referred by him to Congress, together with his own recommendations, if any. Presumably, Congress would not be insensitive to emergency board recommendations, particularly those endorsed by the President. But only in Congress can there be a full and public airing of arguments for and against the use of compulsory arbitration in a given case. To be sure, the circumstances may be urgent, and Congress may be forced to legislate in haste and, possibly, in anger. If so, that is one of the incalculable risks the parties must assume as a consequence of their unwillingness or inability to settle their dispute.

It is impossible here to do justice to Professor Morris' proposal for the creation of a constitutional "United States Labor Court." For one thing, as I understand it, the court would have jurisdiction over the substantive provisions of the Taft-Hartley Act, the Railway Labor Act, and the Labor-Management Reporting and Disclosure Act of 1959; thus the proposal encompasses many more topics than were covered by this symposium. A more immediate and practical difficulty is that I have not seen the full text of his paper, and the portion that I have read does not deal in any

detail with the application of his proposal to the Railway Labor Act, or, more specifically, to the air transport industry. Without endorsing the details of his proposal, which I would want to review when the entire paper is published, I should like, nevertheless, to applaud his general approach, which seems to be the closest among all those presented at this symposium to my idea of a comprehensive revision of all of our labor laws.

In conclusion, I should like to compliment Mr. Highsaw for his scholarly and lucid discussion of the experience of the air transport industry under the Railway Labor Act. Reasonable men can and do differ as to the extent of required administrative or legislative changes in the existing system, but all will benefit from informed and relatively dispassionate analysis of things as they are.