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Airline Labor Laws - A Fresh Look

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AIRLINE LABOR LAWS—A FRESH LOOK

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THOSE who handle labor problems on a day-to-day basis often feel a desire to rewrite the nation's labor laws to undo the harm done by a court or an agency in perverting the purpose of these statutes. But then others, both legislators and businessmen, do not share this interest. Businessmen particularly are unaware of the degree to which labor laws restrict their rights and the rights of their employees. That is, until the law is applied to them. For example, it is not unusual to hear company presidents express shock at being told that their employees, under the Railway Labor Act, cannot vote directly against a union.

This does not mean that every unfair or unjust decision should lead to a change in the law, but rather, labor, management and the government should periodically review these laws to see whether the forums that are administering them are protecting the public interest. This is particularly true of the laws regulating labor relations in the airlines and railroads, most of which were enacted over forty years ago and were based on industrial conditions and philosophies then prevalent. In the last forty years, American society has changed and so has the political and economic power of unions. Accordingly, there has been an increasing awareness in the last few years of the need not only to update these laws, but more importantly, to update the philosophy behind them.

I. NATIONAL MEDIATION BOARD

A. *Representation Procedures*

One of the major functions of the National Mediation Board is to establish and administer procedures for the selection, or rejec-

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tion, of a union seeking to represent employees in bargaining with their carrier. This function is accomplished in the provisions of section 2, Ninth,[1] of the Railway Labor Act, and part 1206 of the National Mediation Board's Rules.[2] In this area the NMB has been severely, and justly, criticized. Because of this criticism, there have been many bills introduced in Congress that would curb the NMB's pro-union bias. Recently, Senator Robert Packwood of Oregon introduced a bill,[3] which appears to have the support of the Nixon Administration, abolishing the NMB and transferring its functions to the NLRB.[4] Unfortunately, it is unclear from the bill whether it applies the representation procedures of section 9 of the Labor Management Relations Act to rail and air carriers or merely substitutes the NLRB for the NMB as the enforcer of section 2, Ninth. By examining selected major facets of NMB representation procedures, it will become demonstrable that the LMRA and the NLRB procedures are clearly superior.

1. *Carrier Participation in NMB Procedure*

Railroad and airline unions have long argued that carriers cannot participate in National Mediation Board representation procedures because section 2, Ninth, refers to "any dispute . . . among a carrier's employees" and does not mention disputes between the carriers and their employees.[5] The unions have also argued that the Railway Labor Act is designed to foster unionization of employees and accordingly, carriers should not be allowed to interfere with this objective. These arguments fail to recognize, however, that the carrier has a legitimate interest in the election process. First, both the union's organization campaign and its ultimate representation of the employees, if selected by them, will have a profound effect on the company's operations. Second, because only the car-

[1] 45 U.S.C. § 152, Ninth (1970).

[2] 29 C.F.R. § 1206 (1972).

[3] On February 24, 1972, Senator Packwood introduced his bill, S. 3232, 92nd Cong., 2d Sess. (1972) [hereinafter cited as S. 3232)] entitled "Transportation Crisis Prevention Act of 1972." Senator Packwood has stated that the Administration is now supporting his bill; however, the Administration has not yet abandoned its own bills, S. 560, 92nd Cong., 2d Sess. (1972) and H. 4116, 92nd Cong., 2d Sess. (1972).

[4] S. 3232, Part C, § 222(f) and (j).

[5] By the same reasoning, the union is not mentioned, yet the union does not argue and the NMB has not held it not to be a party.

rier has resources comparable to the resources of the union, it is the only party that is in a position to see that (i) the craft and class is properly defined and not merely designed to be coextensive with the extent to which the union has organized the employees; (ii) that all eligible employees are permitted to vote and, conversely, that ineligible persons are excluded from voting; and (iii) that the rights of employees who want to remain unrepresented are protected. It is consistent to both protect these interests and allow the employees to select, or reject, a bargaining representative free from unlawful interference by the carrier and union.

Unfortunately, the NMB has accepted the union's position and has excluded the carrier as a formal party from its proceeding. The Board does permit the carrier to present its views on the appropriateness of the craft and has, occasionally, held a public hearing in which the carrier has been allowed to introduce factual data, to cross-examine witnesses and to file briefs. The Board's accommodation to the carrier, however, is not the same as granting these privileges to the carrier as a matter of right in every instance. Moreover, the carrier has not been permitted to initiate a Board election or to challenge the results of an election. While the Supreme Court has upheld the Board's position,[6] it was done on the narrow grounds that the choice of election procedures was within the discretion of the Board; due process requirements were satisfied by the carrier's limited participation. Under the procedures of the National Labor Relations Board the carrier will be a full participant in all representation proceedings. As early as 1947, Congress, in revising the Wagner Act,[7] included a provision granting employers both the right to petition for an election[8] and to participate in NLRB procedures.[9] In addition, the NLRB has procedures for an employer challenging the results of an election.[10]

2. *Union Organization of Supervisors*

Section 1, Fifth,[11] defines "employee" to include not only those

[6] Brotherhood of Ry. Clerks v. Association for Benefit of Non-Contract Employees, 380 U.S. 650, 659-69 (1965).

[7] Labor-Management Relations Act of 1947, § 9, 29 U.S.C. § 159 (1970).

[8] *Id.* § 9(c)(1)(B).

[9] *Id.* § 9(c)(2). *See also* 29 C.F.R. §§ 102.60 *et seq.* (1970).

[10] 29 C.F.R. §§ 102.67 and 102.69 (1972).

[11] 45 U.S.C. § 151, Fifth (1970).

who normally would come within that definition, but also "subordinate officials." This term is not further defined in the Act, NMB regulations or NMB case law. Subordinate officials, however, have been held to include both first-line supervisors and middle-management personnel,[12] and it would appear that the only person employed by a carrier who might not be a subordinate official is the president of the carrier.

The inclusion of supervisory personnel in a union works to the disadvantage of both the carrier and other employees. If a subordinate official is part of an employee craft and also part of management, he has dual loyalties. As part of management he cannot participate in employee meetings without being considered a company spy. Moreover, his participation would probably be a violation of section 2, Fourth,[13] which prohibits carrier interference with the right of its employees to organize and bargain freely. Conversely, as an employee, he will not fully perform his supervisory duties (particularly in the areas of discipline and grievance handling) for the benefit of management. Section 2(3) of the LMRA[14] clearly recognizes this conflict and excludes from the definition of employee "any individual employed as a supervisor."[15] While the LMRA does not solve all the problems involved in determining who is a supervisor, it does eliminate the dual loyalties problem now existing under the RLA.

3. *Craft and Class Determination*

Although section 2, Ninth, provides for a method of determining which union, if any, shall be the representative of the carrier's employees in a "craft or class," it does not define these terms or specify the appropriate crafts or classes. But the NMB early took the position that all crafts or classes must be systemwide.[16] Also,

[12] Northwest Airlines, NMB Case No. R-2257 (1953).

[13] 45 U.S.C. § 152, Fourth (1970).

[14] 29 U.S.C. § 152(3) (1970).

[15] "Supervisor" is defined in section 2(11), 29 U.S.C. § 152(11) (1970), to include any individual "having authority . . . to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust grievances, or effectively to recommend such action. . . ." It is important to note that an individual need not perform any of the specific functions so long as he can effectively recommend such actions. *E.g., Cone Bros. Contracting Co.*, 135 N.L.R.B. 108 (1962).

[16] New York, Chicago & St. Louis R.R., 1 N.M.B. 1 (1935).

by 1950, the NMB had established the appropriate crafts in the airline industry. It is not the purpose of this article to analyze whether the NMB made the proper determination in establishing craft lines. Because the present craft lines have been in existence for over twenty years, the craft lines should not be revised without the consent of the parties[17] or without technological or functional changes in the industry thereby creating new positions or rendering certain positions obsolete.[18] Primarily,[19] this has been the NMB's position.

Under section 9(b) of the NLRB any of the following may be determined to be an appropriate bargaining unit: an employer, a craft, a plant or any subdivision of these. In addition, the parties may voluntarily agree to a multi-employer unit.[20] The craft concept under section 9(b)[21] is more limited than that of section 2, Ninth. While the NLRB could, under case law,[22] establish systemwide units similar to those now existing under the RLA, the safest course to follow would be to add a new subsection (4) to section 9(b), which would state that the only appropriate bargaining units in the rail and air industries are those that were in existence on January 1, 1972, and that the crafts and classes could only be altered by a showing that technological or functional changes have occurred that warrant a reevaluation of the craft and class.

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[17] Northwest Airlines, 2 N.M.B. 54 (1953) (certification for a unit less than a craft or class does not constitute precedent).

[18] *See* U.N.A. Chapter, Flight Eng. Int'l Ass'n v. NMB, 294 F.2d 904 (D.C. Cir. 1961).

[19] The NMB is presently conducting an investigation to reevaluate its decision in N.M.B. Case No. R-1706 (1947), establishing a craft for clerical, office, station and fleet and passenger service employees. The only apparent reason for "re-evaluating" the craft was arguments made by certain unions that they could organize more of these employees if the class were fragmented. After the hearing started, the various unions were in disagreement over how the fragmentation should take place and whether it should apply to employees already in a bargaining unit. Because of these divergent views, it has become clear that fragmentation of this class on the basis of extent of unionization would be impractical and contrary to the NMB's stated position. Northwest Airlines, 2 N.M.B. 60, 76 (1951). It probably would also be unlawful. *Cf.* NLRB v. Metropolitan Life Insurance Co., 380 U.S. 438 (1965).

[20] NLRB v. Teamster Local 449, 353 U.S. 87 (1957).

[21] Mallinckroft Chemical Works, 162 N.L.R.B. 387 (1967).

[22] Neo-Gravure Printing Co., 136 N.L.R.B. 1407 (1962) (holding a departmental unit to be appropriate when there has been a history of bargaining on that basis).

4. *Determination of Representative Status*

Although the Railway Labor Act contains nothing governing the form of the ballot to be used in an NMB election, from the legislative history of the Act it is clear that Congress intended the NMB to adopt procedures allowing the employees the opportunity to reject union representation and to remain unorganized.[23] The NMB has taken the contrary position, however, that the purpose of the Act is to encourage union representation of a carrier's employees.[24] Furthermore, the NMB has decided that the next best alternative to allowing the union to win every election[25] is to adopt election procedures maximizing the union's chances of being successful.

Instead of being allowed to vote directly against a union by marking a "no union" box on a ballot, the employee who wants to remain unrepresented must abstain from voting, since the Board will not certify the results of an election if less than a majority of the employees vote.[26] As a result of this complex and sophisticated process, there is danger that an employee might vote for the union because that is the only choice on the ballot available to him. In addition, this procedure permits identification of those employees who "vote" against the union thereby subjecting them to possible unfair representation if the union becomes their bargaining agent.

[23] H.R. REP. No. 1944, 73rd Cong., 2nd Sess. 2 (1934), on H.R. 9861, containing the amendment to the 1926 Act, states: "2. [H.R. 9861] *provides* that employees shall be free to join any labor union of their choice *and likewise be free to refrain from joining any union if that be their desire and* forbids intterference by the carrier's officers with the exercise of said rights." (Emphasis added) Similarly, Joseph P. Eastman, Federal Coordinator of Transportation and principal draftsman of the legislation, expressed his view of the bill: "No, it does not require collective bargaining on the part of the employees. If the employees do not wish to organize, prefer to deal individually with the management with regard to these matters, why that, of course, is left open to them, or it should be." *Id.* Senate Hearing on S. 3266, 73d Cong., 2d Sess. (1934). When it reached the Senate, Senator Robert F. Wagner, the future author of the National Labor Relations Act, declared: "I didn't understand these provisions compelled an employee to join any particular union. I thought the purpose of it was just the opposite, to see that the men have absolute liberty to join any union or to remain unorganized."

[24] NATIONAL MEDIATION BOARD, TWENTY YEARS UNDER THE RAILWAY LABOR ACT 14. "The thing of importance . . . is that the interests of the employees . . . shall be looked after by representatives of their own choosing. In other words, the Act does not contemplate that its purpose can be achieved without employee representation. . . ."

[25] The only true election would be when there were two unions involved.

[26] There is no mention of this in the N.M.B. *Rules and Regulations.*

The unfairness of this process becomes apparent when considering that a minority union will be certified as the bargaining representative for all the employees if it receives only twenty-six per cent of the vote in a situation when a twenty-five per cent vote is cast for another union and forty-nine per cent of the employees abstain.[27]

In *Brotherhood of Railway Clerks v. Association for the Benefit of Non-Contract Employees* (ABNE),[28] the Supreme Court held that in view of the Board's practice of treating nonvoters as voting against the union, the NMB did not exceed its authority by excluding "no union" from the ballot. While it is true that NMB procedures give the employees who do not want to be unionized an opportunity to be heard, it is equally true that they do not give the employees an effective voice against representation. Under NLRB procedures[29] the above pro-union imbalance is removed since that agency provides for a "no union" box on the ballots; if there is a runoff, the balloting is between the two choices receiving the highest number of votes and this includes "no union." By following the NLRB approach a truly effective voice is given to those employees who do not want to be represented by a union.

5. *Election Bar Rule*

Under section 1206.4 of the NMB Rules, the Board will not permit two immediately successive elections. If the union becomes certified as a result of the election, then the bar is for a two-year period; but if the union fails to obtain certification, the bar is only for one year. There is no reason for this disparate treatment. Realizing that an election will cause inefficiency and dissension, the two-year rule provides a period of stability following an election to allow operations and employee relationships to return to normal. This same stability is needed regardless of the outcome of the election. While the NLRB election bar rule applies irrespective of whether the union wins or loses, it is, however, only for one year.[30] Accordingly, the Packwood bill should be amended to provide for

[27] Aeronautical Radio, N.M.B. Case No. R-3739 (1965), *aff'd*, 380 F.2d 624, 626-27 (D.C. Cir. 1967).

[28] Brotherhood of Ry. Clerks v. Association for Benefits of Non-Contract Employees, 380 U.S. 650 (1965).

[29] 29 C.F.R. §§ 102.69 and 102.70 (1972). *See also* Labor Management Relations Act of 1947, § 9(c)(3), 29 U.S.C. § 159(c)(3) (1970).

[30] 29 U.S.C. § 159(c)(3) (1970).

a two-year insulated period in the LMRA, that would not only prohibit elections, but also the voluntary grants of recognition.

6. *Decertification*

In *International Bhd. of Team. v. Brotherhood of Ry. A & S. Cl.*,[31] the United States Court of Appeals for the District of Columbia commented:

> [I]t is inconceivable that the right to reject collective representation vanishes entirely if the employees of a unit once choose collective representation. On its face, that is a most unlikely rule, specifically taking into account the inevitability of substantial turnover of personnel with the unit.[32]

Unfortunately, what was inconceivable to the court is conceivable to the NMB, for that agency has not provided for decertification procedures. This situation is easily rectified, however, by applying the decertification procedures found in section 9(c)(1)(A)(ii) of the LMRA. Under that Act, employees wanting to decertify a union may file a petition with the NLRB, supported by thirty per cent of the employees in the unit, asserting that the present incumbent no longer "represents" the employees in the unit. In the subsequent election, if the union receives less than a majority vote, it is decertified. In the rail and air industries, less than thirty per cent should be permitted because logistically it would be extremely difficult for unorganized employees in a systemwide unit to obtain the necessary thirty per cent support to file a petition.

In summary, the representation problems of the air and rail industries will not be solved simply by substitution of the NLRB for the NMB. In addition, it will be necessary to substitute the representation procedures of the LMRA for those of RLA, with certain modifications. Only through this action will the above-discussed deficiencies be corrected[33] and will the rights of all parties—employees, unions and carriers—be safeguarded.

B. *Mediation*

The second major function of the National Mediation Board is

[31] Teamsters v. Brotherhood of Ry. Clerks, 402 F.2d 196 (D.C. Cir.), *cert. denied*, 393 U.S. 848 (1968).

[32] *Id.*

[33] There are additional benefits to be gained from NLRB procedures, which are not discussed herein.

mediation. In view of its importance, mediation is probably the Board's primary function. While mediation is used as a catalyst for collective bargaining in all industries, its role is radically different in the rail and air industries. Under section 6 of the Railway Labor Act,[34] there must be a finding by the NMB that its efforts to bring about an amicable settlement through mediation have failed before the parties can engage in self-help.[35] Because the Railway Labor Act permits the NMB to decide when mediation should cease, the Board, by the exercise of this discretion,[36] has the power to bring pressure on the parties to settle their differences and to enter into an agreement. Thus, if a union is not engaging in meaningful bargaining, the Board, by holding onto a case, can force the union back to the bargaining table. Conversely, if the offending party is the carrier, the Board, by threatening to terminate mediation (and bring on a strike), will find the carrier more than willing to return to the bargaining table.

Under Senator Packwood's bill, the mediation function of the Board will be transferred to the Federal Mediation and Conciliation Service.[37] In addition, section 6 of the Railway Labor Act is revised by eliminating the compulsory mediation features of the present Act. It seems strange that this unique feature of the Railway Labor Act is being discarded in a bill entitled "Transportation Crises Prevention Act of 1972," for it will represent a significant loss to labor peace in both the airline and railroad industries. Accordingly, the mediation function should be continued in whatever bill is adopted.

II. COURTS

The Railway Labor Act sets forth a number of unfair labor practices similar to those governing industries subject to the Labor

[34] 45 U.S.C. § 156 (1970).

[35] Although there is an intermediate step of proferred arbitration, this has proved meaningless in recent years, since only one party, normally the union, can escape arbitration merely by rejecting it.

[36] Although in International Ass'n of Machinist v. NMB, 425 F.2d 527 (D.C. Cir. 1970), the court of appeals stated that there were limits to the exercise to that discretion, the test the court stated to be applied would rarely result in judicial intrusion into the mediation process.

[37] S. 3232, Part C, § 222(g).

Management Relations Act.[38] Both Acts prohibit:

(1) interference with employees' right to engage in concerted action;[39]

(2) domination of or assistance to a labor organization by an employer;[40]

(3) discrimination to encourage or discourage union membership;[41] or,

(4) refusal to bargain in good faith.[42]

In addition, while there is no provision prohibiting jurisdictional strikes,[43] the same result has been reached by treating these disputes as representation questions, subject to the National Mediation Board.[44] Unlike the Labor Management Relations Act, however, the RLA does not prohibit secondary boycotts[45] and "hot cargo" agreements.[46] It is also unclear whether recognitional picketing[47] could

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[38] Labor Management Relations Act (Taft-Hartley Act) §§ 1 *et seq.*, 29 U.S.C. §§ 151 *et seq.* (1970).

[39] Labor Management Relations Act (Taft-Hartley Act) §§ 7, 8(a)(1), 8(b)(1)(A), 29 U.S.C. §§ 157, 158(a)(1), 158(b)(1)(A) (1971); Railway Labor Act § 2, Fourth, 45 U.S.C. § 152, Fourth (1970).

[40] Labor Management Relations Act (Taft-Hartley Act) § 8(a)(2), 29 U.S.C. § 158(a)(2) (1971). Railway Labor Act § 2, Fourth, 45 U.S.C. § 152, Fourth (1970).

[41] Labor Management Relations Act (Taft-Hartley Act) §§ 8(a)(3), 8(b)(2), 29 U.S.C. §§ 158(a)(3), 158(b)(2) (1971). Railway Labor Act § 2, Fourth, Fifth, and Eleventh, 45 U.S.C. § 152, Fourth, Fifth, and Eleventh (1970).

[42] Labor Management Relations Act (Taft-Hartley Act) §§ 8(a)(5), 8(d), 29 U.S.C. §§ 158(a)(5), 158(d) (1971). Railway Labor Act § 2, First, Second, Sixth, Seventh, and Ninth, 45 U.S.C. § 152, First, Second, Sixth, Seventh, and Ninth (1970).

[43] Labor Management Relations Act (Taft-Hartley Act) §§ 8(b)(4)(D), 10(k), 29 U.S.C. §§ 158(b)(4)(D), 160(k) (1970).

[44] *Compare* Switchmen's Union v. NMB, 320 U.S. 336 (1943) *with* Transportation & Communication Employees v. Union Pacific R.R., 385 U.S. 157 (1966).

[45] Labor Management Relations Act (Taft-Hartley Act) § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1970); *see* International Bro. of Elec. Wkrs. v. NLRB, 394 U.S. 492 (1969). Carriers may obtain limited protection, however, under the Labor Management Relations Act. *See also* B.B. McCormick & Co., 150 N.L.R.B. 363 (1964), *aff'd*, 350 F.2d 791 (D.C. Cir. 1966).

[46] Labor Management Relations Act (Taft-Hartley Act) § 8(e), 29 U.S.C. § 158(e) (1970). In Lufthansa German Airline, 197 N.L.R.B. No. 18 (1972), the NLRB held that for purposes of section 8(e) an air carrier was prohibited from entering into a "hot cargo" agreement with a union that was not predominantly composed of rail and air employees.

[47] Labor Manageemnt Relations Act (Taft-Hartley Act) § 8(b)(7), 29 U.S.C. § 158(b)(7) (1970).

be prohibited as interference with the employees' right to choose their representative.[48]

Section 10 of the LMRA establishes an administrative procedure for enjoining, hearing and deciding unfair labor practices. Review and enforcement is provided through the United States Court of Appeals. On the other hand, the Railway Labor Act does not specify the administrator of its provisions. Although the Act does provide for criminal penalties for "willful failure or refusal of any carrier, its officers, or agents to comply with"[49] the law, this provision has proved completely ineffective and impractical because the punishment bears no relation to the activity being regulated and does not directly benefit the employees affected by the unlawful conduct.

Over the years the question has been raised whether the Act's provisions are enforceable either by the courts in a civil action or by the National Mediation Board. Although the Railway Labor Act is one of the nation's oldest labor laws, this question was not decided until last year in *Chicago & North Western Railway Company v. United Transportation Union*,[50] when the Supreme Court held that the mandates of the Railway Labor Act are enforceable by injunctive relief in a federal court. At the same time, the Supreme Court held that the National Mediation Board held no adjudicative role in regard to "unfair labor practices."[51]

The decision of the Supreme Court is clearly supported by the legislative history of the Railway Labor Act. The Transportation Act of 1920,[52] the predecessor of the present act, contained bargaining obligations similar to those now found in section 2, First and Second. But these provisions were found by the Supreme Court in *Pennsylvania Railroad System Federation v. Pennsylvania R.R.*[53] to be unenforceable in a court of law. In 1926 Congress repealed this Act and enacted the Railway Labor Act of 1926.[54] During the hearings, Donald R. Richberg, the architect of the proposed

[48] Railway Labor Act § 2, Fourth 45 U.S.C. § 152, Fourth (1970).

[49] Railway Labor Act § 2, Tenth, 45 U.S.C. § 152, Tenth (1970).

[50] 402 U.S. 570 (1971).

[51] *Id.* at 581.

[52] The Transportation Act of 1920, 41 Stat. 456 (1920).

[53] 267 U.S. 203 (1925).

[54] Railway Labor Act, §§ 1-208, 45 U.S.C. §§ 151-88 (1970).

legislation, testified that the Act would be legally enforceable.[55] The reason for not stating this expressly in the bill was because of the belief of the carriers' unions that it would be preferable "for the law of such enforcement or compulsion to be developed in the courts, according to the old common law of letting the courts develop the law after the obligations are clearly understood."[56] Moreover, the legislative history also provides that the Board of Mediation, the predecessor of the National Mediation Board, was to have no adjudicatory function,[57] to prevent its mediation functions from being compromised.

The Supreme Court in *Texas & N.O. R.R. v. BRC*,[58] held that Congress in the 1926 Act "did impose certain, definite legal obligations enforceable by judicial proceedings." After the passage of the 1934 Act, which adopted, verbatim, most of the provisions of the 1926 Act, the Supreme Court in *Virginia Ry. Co. v. System Federation*,[59] again held that the provisions of the Act were not merely precatory but were legally enforceable. Despite these clear rulings of the Supreme Court, many parties continued to argue either that courts held only a limited adjudicatory power or that this power was really vested in the National Mediation Board. All doubts about judicial enforceability of the Act, however, were resolved by the Supreme Court's decision in *Chicago & North Western*.[60]

The dispute in *Chicago & North Western* revolved around the number of brakemen to be employed on each train following an elimination of most of the brakemen's jobs by a Congressionally appointed Arbitration Board.[61] Prior to the expiration date of the award, the United Transportation Union served section 6 notices on the Chicago & North Western Railroad and several other carriers requesting that they negotiate the reestablishment of the brakemen's position. The carriers countered both with their own section

[55] *Hearings on H.R. 7180 Before House Comm. on Interstate and Foreign Commerce*, 69th Cong., 1st Sess. at 21-22, 40, 41, 66, and 84-85 (1925) [hereinafter cited as *Hearings*].

[56] *Hearings* at 41.

[57] *Id.* at 18.

[58] 281 U.S. 548, 567 (1930).

[59] 300 U.S. 515, 545, 547-48, 550 (1937).

[60] 402 U.S. 570 (1971).

[61] 77 Stat. 132 (1963).

6[62] notices that would leave this decision to management and with a request that the issue be negotiated in a conference between the union and all the carriers affected. During the subsequent negotiations Chicago & North Western offered alternative proposals that would have reduced the number of brakemen on a crew and, at the same time, increased the compensation of the remaining employees in the crew. The union rejected multi-carrier bargaining, however, and refused to discuss any compromise, which would be more favorable than those negotiated with other carriers.

In these circumstances, negotiations and mediation proved fruitless. After the National Mediation Board had terminated its services, it was anticipated that the union would strike the carriers.[63] Before the union could act, however, Chicago & North Western sought an injunction against the strike on the grounds that the union had not exhausted the Railway Labor Act remedies because it had failed to engage in good faith bargaining. The Supreme Court, in a five to four decision, agreed with the carrier that section 2, First, imposed a legal obligation on carriers and unions; that this obligation was enforceable by the judiciary and not by the National Mediation Board; and, finally, that the Norris-LaGuardia Act[64] did not strip federal courts of jurisdiction to enjoin union strikes in this situation. Because of the possibility of abuse, however, the Court counselled restraint by federal courts in the issuance of the injunctions.[65]

With respect to the bargaining obligation imposed under the

[62] Railway Labor Act § 6, 45 U.S.C. § 156 (1970) provides: "Carriers and representatives of the employees shall give at least thirty days' written notice of intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

[63] Arbitration was proffered by the NMB but was rejected by the UTU. An emergency board was not appointed under section 16 of the RLA. *See* 45 U.S.C. § 160 (1970).

[64] 29 U.S.C. §§ 101 *et seq.* (1970).

[65] 402 U.S. 570, 583 (1971).

Act, the Court held that mere compliance with the Act's procedures would be meaningless if one party went through the motions without a desire to reach agreement; at a minimum, section 2, First, required the parties to bargain in good faith with the intention of making every reasonable effort toward resolving the bargaining dispute. The Court saw no occasion at that time to detail the scope of duty to bargain other than to note that the case presented did not require a determination of "whether [section] 2, First, requires more of the parties than the avoidance of 'bad faith'."[66]

On remand, the United States District Court for the Northern District of Illinois held that both Chicago & North Western and the union had not bargained in good faith.[67] While normal equity doctrines would have meant the denial of the carrier's request for an injunction, the district court believed that an injunction was warranted because of the irreparable harm caused the public by the parties' bargaining conduct. Moreover, the court stated that when the union had demonstrated that it was engaging in good faith bargaining, irrespective of whether the carrier was also fulfilling its bargaining duties, the court would vacate the injunction and allow the union to engage in self-help. On December 22, 1971, the court vacated the injunction.[68] The union immediately sought and was granted an expedited appeal. On August 1, 1972, the United States Court of Appeals held, in light of the bad-faith bargaining at all stages of the Railway Labor Act procedures, that it was necessary for the parties to repeat those steps, not merely to engage in good faith conferences as a last step as indicated by the district judge. Although the court of appeals did not spell out what would constitute good faith bargaining during the repetition of those steps, it did note that "adamant positions—crystallized during the previous bad faith sessions of the parties—must be cast aside before good faith negotiation and conciliation will succeed."[69]

[66] 402 U.S. at 579, n.11. In the same footnote the Court cautioned that the duty to bargain under the Railway Labor Act might not be the same as that under the National Labor Relations Act, and that "great circumspection should be used in going beyond cases involving desire not to reach agreement for doing so risks infringement of the strong federal labor policy against government interference with the substantive terms of collective bargaining agreements."

[67] 330 F. Supp. 646 (N.D. Ill. 1971).

[68] 336 F. Supp. 1149 (N.D. Ill. 1971).

[69] 422 F.2d 979 (7th Cir. 1970).

The court further instructed the trial court to be certain that the parties are in strictest compliance with the Act before allowing them to engage in self-help.[70]

In *Erie Lackawanna Railway Company v. Longshoremen*,[71] the United States District Court for New Jersey had the opportunity to apply the Supreme Court's decision in *Chicago & North Western* to a multi-carrier bargaining situation. As part of its section 6 demands, the union had requested that a guaranteed annual wage provision be included in the contract. During negotiations the union listened to the carrier's proposals that would have eliminated the guaranteed annual wage provision from the contract but refused to surrender on this point, although it made several minor changes in its proposal. While the negotiations were in progress, Penn Central withdrew from the multi-carrier bargaining without objection from the other carriers and entered an agreement without the guaranteed annual wage. After the exhaustion of the Act's procedures, the union struck and the company sought an injunction. Applying the principles in *Chicago & North Western*, the district court refused to issue an injunction by holding (i) that a guaranteed annual wage was a mandatory subject of bargaining; (ii) that the union bargaining position in regard to this clause did not demonstrate bad faith bargaining; and (iii) that the union had not engaged in unlawful whipsaw tactics by signing a more favorable agreement with the Penn Central, since Penn Central had voluntarily, and without objection from the other carriers, withdrawn from the multi-employer bargaining group. In refusing to issue the injunction, the court stressed the Supreme Court's caveat that federal courts should not use their powers lightly to enjoin self-help.

Chicago & North Western has ushered in a new era in labor relations in the air and rail industries. While it is too early to accurately forecast whether the courts will do a better job than an administrative agency, it is unlikely that a multitude of courts will develop the same institutional biases that have plagued state and federal agencies responsible for administering our labor laws. In addition, Senator Packwood's bill does not change the existing law in regard to unfair labor practices. While agreeing this responsibility should not be given to the NLRB, this author would have pre-

[70] *Id.*

[71] 338 F. Supp. 955 (D.N.J. 1972).

ferred the modification of the Railway Labor Act to outlaw secondary boycotts, hot cargo agreements and recognitional picketing.

III. CIVIL AERONAUTICS BOARD

A. *Petition to Revoke Certification*

The third major forum that regulates the labor relations of airlines is the Civil Aeronautics Board. Although section 401(k)(4) of the Federal Aviation Act of 1958[72] required as a condition for holding a certificate of public convenience and necessity that an air carrier must comply with the provisions of the Railway Labor Act, neither this section nor any other section of that Act explains how the CAB is to determine whether an airline is in compliance. Two questions are immediately apparent: first, should the CAB make the initial determination of whether an airline has violated the Railway Labor Act or should this determination be left to another forum; and, second, should every violation of the Railway Labor Act result in the revocation of the certification of an airline or should this penalty be imposed only for serious violations that demonstrate a carrier's complete disregard of the Act?

The carriers, unions and employees had to wait twenty years before these questions were answered. The issue was finally presented to the CAB in *Airline Pilots Association v. Southern Airways*.[73] In this case Southern Airways and the Airline Pilots Association entered into an agreement that would continue in effect until October 1, 1958, and would automatically be renewed on a year-to-year basis unless written notice of intended change was served in accordance with section 6 of the Railway Labor Act. Pursuant to the agreement, on July 30, 1959, the union served a section 6 notice on the airline.[74] On February 17, 1960, while bargaining was still in progress, the National Mediation Board formally terminated its services. On June 5, 1960, the union struck

[72] The Federal Aviation Act of 1958 § 401(k)(4), 49 U.S.C. § 1371(k)(4) (1970).

[73] 36 C.A.B. 430 (1962).

[74] In a related case, Air Line Pilots Ass'n v. Southern Airways, Inc., 44 CCH Lab. Cas. ¶ 17,460 (M.D. Tenn. 1962), *appeal dismissed without opinion* (6th Cir. 1962), the court held that the effect of the notice was to terminate the contract. *See* IAMAW v. Reeves Aleutian Airways, Inc., 330 F. Supp. 332 (D. Alas. 1971).

the carrier and Southern began hiring replacements for the striking employees.

Despite the strike, bargaining and mediation continued. In addition to the items raised by the union's section 6 notice, the carrier proposed three new items: (i) that replacement pilots be given seniority superior to any reinstated pilots; (ii) that the company be allowed to take disciplinary action, without recourse to the statutory grievance procedure, in regard to any pilot who engaged in misconduct during the strike; and (iii) that the pilots be assigned certain duties in regard to the moving and parking of aircraft. On July 28, 1960, the parties came to an impasse over the carrier's proposal regarding the moving of aircraft.

The union then filed a petition with the CAB, seeking to have Southern's certificate revoked for failure "to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes as required by [s]ection 2, First, of the Railway Labor Act."[75] The CAB's Examiner held that the Board is the proper agency to determine whether a carrier had violated the Railway Labor Act. His conclusion in this regard was based on an interpretation of sections 401(g) and 1002 of the Federal Aviation Act that require the CAB to investigate complaints and to hold hearings prior to revocation of any certificate.[76] In rejecting Southern's argument that

[75] Air line Pilots Ass'n v. Southern Airways, Inc., Docket No. 11,654, CAB Order No. E-18560 (July 5, 1962), [1960-1964 Transfer Binder] CCH Av. L. Rep. ¶ 21,297. While this litigation was in process, ALPA also filed a complaint in a federal district court under 28 U.S.C. §§ 1331 and 1337 (1970). *See* note 3 *supra*. The court refused Southern's request for a stay pending final decision by the CAB and ruled that its action was separate and different from the Board's and that any determination by the Board on factual or legal issues would be neither *res judicata* nor a guide to the court. In the CAB hearing the Board acknowledged that it had been furnished with copies of the Court's Opinion, Findings of Fact and Law and Judgment, but the Board proceeded to make its own determination of those same issues, stating that: "[b]y parity of reasoning we conclude that the Board must make its own determination on the issues of its proceeding, and that it is open to the Board to draw inferences and reach conclusions which may differ from those reached by the Court."

[76] 49 U.S.C. §§ 1482(a) and 1371(g) (1970), respectively. Section 1002(a) states that it is the "duty" of the CAB to investigate a complaint if there appears "to be any reasonable ground"; and, if the investigation renders that any person "has failed to comply with any provision of the Act or any requirement established pursuant thereto, the Administrator or the Board shall issue an appropriate order to compel such person to comply therewith." Section 401(g) provides that the Board may, after notice and hearing, suspend or revoke any certificate for "intentional failure to comply with any provision of this title," or any "condition" attaching such certificate.

the CAB's jurisdiction arises only after an unfair labor practice determination has been made by another forum, the Examiner focused only on the lack of authority of the NMB in this area and did not consider the federal courts as a possible forum to litigate these issues.[77]

By the time the case reached the Board, Southern had dropped its contention that the Board lacked jurisdiction. Nevertheless, the Board found it necessary to comment on its jurisdiction to hear the case:

> While the exact role the Board is to play in the enforcement of obligations placed on air carriers by the Railway Labor Act is unsettled—and the legislative history of section 401(k) is of little or no help—we agree with the examiner's conclusion that the Board must proceed on the premise that it was the intent of the Congress that the Board in appropriate cases is the forum to hear and determine complaints alleging violation of such obligations by air carriers. We find that the Board has jurisdiction over the complaint.[78]

Regarding the merits of the union's charge, the Board found that Southern's demands for superseniority for the replacement pilots[79] and for absolute control over discipline of the strikes[80] constituted a refusal to bargain in good faith in violation of the Railway Labor Act. Faced with the question of whether an automatic revocation must follow and realizing the disastrous consequences of this penalty, the Board imposed a more traditional remedy of directing Southern to commence good faith bargaining within thirty days. At the same time, the CAB made clear that the failure of Southern to comply with its order would result in the revocation of its certificate.[81]

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[77] 36 C.A.B. 430 at 462-67 (1962).

[78] *Id.* at 433.

[79] The Board held that during an economic strike a company may hire replacements needed to continue its business and that the company need not terminate the service of the replacements to reinstate strikers at the end of the strike. However, the Board was of the opinion that superseniority for the replacement would be *per se* discriminatory. On this point, the district court reached the opposite conclusion. 44 CCH Lab. Cas. ¶ 17,460 at page 26,221.

[80] Railway Labor Act, § 204, 45 U.S.C. § 184 (1970), requires that an air carrier and its employees establish appropriate procedures for handling grievances. In the CAB's view, the strikers who had been replaced retained the status of striking employees and were entitled to have disciplinary grivances settled in accordance with Section 204 procedures.

[81] Air Line Pilots Ass'n v. Southern Airways, Inc., 37 C.A.B. 765, 766-67

Based on both legal and policy considerations, the CAB should not have established itself as the national airlines labor relations board. Analysis of the Board's findings that it had primary jurisdiction in this area results in the inescapable conclusion that the CAB believed that it was the only forum that would or could decide the unfair labor practice issues. Since the recent *Chicago & North Western* case,[82] holding that federal courts have the jurisdiction to enjoin compliance with mandates of the Railway Labor Act, there exists no reason why the CAB should not now abstain from ruling on petitions to revoke until a judicial determination has been rendered on the merits of the violation.

The policy reasons in favor of CAB abstention are abundantly clear. First, unlike the courts, the CAB has, under its interpretation of section 401(k)(4), authority only to pass on carrier, and not on union, unfair labor practices. The CAB, by providing a forum to unions alone, has given the unions a weapon to use against the employer in bargaining. Only through abstention by the CAB can mutuality and bargaining parity be restored. Second, if the CAB were to defer to the court, the entire case would be litigated in one forum, thereby conserving Board and court resources and avoiding needless litigation expenses for the parties. Finally the Board should not embroil itself in labor disputes; the Board lacks the expertise and manpower to handle these cases.[83]

(1963). The Southern Pilots Association also sought review through the courts. In Southern Pilots Association v. CAB, 323 F.2d 288 (D.C. Cir. 1963), the court noted, with apparent approval, the action of the CAB in denying intervention to Southern Pilots Association. Following this decision, the parties entered into a contract which, in effect, granted the striking pilots seniority over all the replacements. The replaced pilots hurriedly formed their own union, filed a petition with the NMB asserting that they, rather than ALPA, were bargaining representative of the employees, and filed a petition with the CAB for a rehearing and intervention. The CAB denied petitioners' application, declaring that ". . . The Board does not consider that it can look behind the National Mediation Board's designation of ALPA as the collective bargaining agent for (the airline's) pilots or inquire into whether the union had discriminated against petitioners in its representation functions.

[82] Chicago & N.W. Ry. Co. v. United Transp. Union, 402 U.S. 570 (1971).

[83] ALEA v. CAB, 413 F.2d 1092, 1095 (D.C. Cir. 1969); Outland v. CAB, 284 F.2d 224, 228 (D.C. Cir. 1960); American-Trans Caribbean Merger, Order 71-5-30 at 4 (C.A.B. May 7, 1971). Without a day-to-day contact with the complex labor relations in the industry, the Board cannot expect to have the necessary knowledge to decide these cases on the merits. Decisions rendered on the basis of part-time acquaintance can only result in operational problems, discontent and unending litigation. In view of the CAB's own admission (which has also been recognized by the courts) that the Board "lacks expertise in labor matters,"

In the ten years since the *Southern Airways* decision, the CAB has recognized its lack of expertise to adjudicate these cases. While the Board has not overruled *Southern Airways*, it has achieved the same result by deferring to other tribunals. In *Flight Engineers' International Association, EAL Chapter v. Eastern Airlines*,[84] the Board, dismissing the complaint on the motion of the carrier, stated:

> The public interest would not be served if the Board were to proceed with a hearing solely to provide a forum for the adjustment of private grievances, particularly where an adequate remedy is available in the courts.[85]

This policy of deferral was affirmed in *IBT v. Western Airlines*,[86] the most recent CAB decision under section 401(k)(4). The complaint filed by the union alleged that Western Airlines had violated section 401(k)(4) by refusing to process a grievance that would have required Western to negotiate post-merger labor protective conditions at a time when Western's proposed merger with American was still pending before the CAB. The Director of the Bureau of Enforcement dismissed the complaint on the grounds that the dispute was either a representation dispute that could be resolved by the National Mediation Board or a contract dispute "properly settled by a suit in an appropriate court." Because the parties were still engaged in arbitration, the CAB refused to order an investigation with the following comment:

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it seems strange that the CAB felt compelled in *Southern Airways* to transform itself into a labor court.

[84] 38 CAB 1192 (1963).

[85] *Id.* at 1194. The deferral process is not limited to courts. In a case involving a dispute between ALPA and AAXICO Airways over a reinstitution of operations, ALPA v. CAB, 360 F.2d 837 (D.C. Cir. 1966), the Court of Appeals for the District of Columbia stated that the Board should be extremely reluctant to involve itself in disputes between an air carrier and its employees when the subject matter of the court complaint was in the process of resolution by the airlines system board of adjustment. Also, in ALEA v. Allegheny Airlines, Docket No. 20,038 (April 23, 1969), the CAB Bureau of Enforcement refused to process a complaint by ALEA that Allegheny, after its merger with Lake Central Airlines, had refused to bargain with ALEA as the bargaining representative of the former Lake Central fleet and passenger employees on the basis that ALEA did not represent a majority of the employees of the class in the merged carrier. The Bureau held that the matter was a representation dispute that could only be resolved by the National Mediation Board.

[86] Order 71-12-109 (CAB, December 23, 1971).

> The basic controversy reflected by the IBT complaint is essentially whether, or to what extent and in what manner, the Western labor contracts may be enforced in the event of an American-Western merger. . . . If the merger is approved, all questions relating to enforcement of the IBT contract can then be resolved by the appropriate tribunal or tribunals in light of the circumstances then present, including the results of the arbitration and negotiations now in progress. The complainant has obtained by other methods all present relief which the Board as a practical matter could be expected to grant, and this irrespective of whether the Board was the appropriate forum in which to seek enforcement action.[87]

In view of the history of section 401(k)(4) since the *Southern Airways* case, it is evident that the Board will defer unfair labor practice charges in most, if not all, instances to other forums (e.g., courts, the NMB, system boards of adjustment and arbitration). To prevent needless litigation expense the CAB should clearly state that it will entertain a section 401(k)(4) petition only after the merits of the underlying disputes have been determined by another tribunal adversely to the air carrier and only after the carrier has refused to comply with that determination. Unfortunately, Senator Packwood's bill does not address itself to the CAB's intrusion into the labor law arena; hopefully the bill will be amended to eliminate section 401(k)(4).

B. *Regulation of Group Bargaining*

Under section 412(a) of the Federal Aviation Act of 1958[88] an airline is required to file with the CAB a copy of every agreement affecting transportation. Section 412(b)[89] requires the Board to approve or disapprove these agreements based on whether the agreement is adverse to the public interest or is in violation of other provisions of the Federal Aviation Act. Because of section 401(k)(4) every agreement concerned with employees must be measured not only against section 102 of the FAA,[90] but also against the provisions of the Railway Labor Act.

The CAB has had the opportunity to examine only one agreement under these provisions:[91] the Airlines Mutual Aid Pact. Be-

[87] *Id.* at 5.

[88] Federal Aviation Act of 1958 § 412(a), 49 U.S.C. § 1382(a) (1970).

[89] Federal Aviation Act of 1958 § 412(b), 49 U.S.C. § 1382(b) (1970).

[90] Federal Aviation Act of 1958 § 102, 49 U.S.C. § 1302 (1970).

[91] On April 6, 1971, there was filed an agreement entitled "Agreement to Es-

cause the CAB began its investigation of this Pact and its various amendments thirteen years ago, it is important to discuss its history. In October 1958, the major air carriers anticipated a whipsaw strike by the unions and entered into an agreement to strengthen their bargaining position. Under their plan, payments (referred to as windfall payments) were to be made to any signatory carrier in the event the carrier's flight operations were shut down because of (i) a strike to enforce union demands in excess of or opposed to the recommendations of a Presidential Emergency Board appointed under section 10 of the Railway Labor Act; (ii) a strike undertaken before section 6 procedures had been exhausted; and (iii) strikes otherwise unlawful. The operating carriers were to pay the strike-bound carrier payments based on increased revenues attributable to the strike less applicable direct expenses. In return, the struck carrier was to make every reasonable effort to refer its passengers to the non-struck signatory carriers. On May 20, 1959, the Civil Aeronautics Board approved this agreement for a three-year period on the condition that the passenger referral clause of the Pact be deleted because it was anti-competitive.[92]

During March and April 1964, the carriers amended their plan to cover all strikes except (i) strikes called to enforce demands equal to or less than those recommended by the Presidential Emergency Board; (ii) strikes when the Emergency Board had not issued a report; and (iii) strikes involving disputes with carriers who had violated the Railway Labor Act. In addition to the so-called windfall payments, the amended Pact required the non-struck carriers to make, as a minimum payment, an additional supplemental payment if the windfall payment did not reach twenty-five per cent of the normal air transport operating revenues of the struck carrier.[93] Two other major amendments were added: one limiting participation to trunk carriers, and the other providing for arbitration to settle all the payment disputes. On July 10, 1964, a CAB Hearing Examiner, after a hearing, issued a seventy-page

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tablish the Airline Industrial Relations Conference" (AIRCO). This agreement has been docketed (Docket 23,267) under the name "Alaska Airlines, Inc., and Eleven Certificated Route Air Carriers."

[92] Six-Carrier Mutual Aid Pact, 29 CAB 168 (1959).

[93] In no event were the supplemental payments to exceed one-half of one per cent of the non-struck carrier's operating revenues for the prior year.

opinion affirming the legality of the plan and its amendments. The Board on July 10, 1964, adopted the Examiner's decision.[94]

Hearings were again held in 1968 to consider the legality of the pact. After the hearings had concluded, the carriers on October 31, 1969, again amended the Pact. Of the several amendments, the most important concerned the change in the supplemental payments formula whereby payments were to be increased to fifty per cent for the first two weeks, forty-five per cent for the third week, forty per cent for the fourth week and thirty-five per cent thereafter.[95] The new agreements eased the conditions of entry to permit any trunk carrier to join the agreement by a specified date without a waiting period and without back payment. On March 7, 1970, the Examiner, without considering the new amendments, held that the plan and its operation were lawful. On July 23, 1970, the Board approved the Examiner's decision.[96]

The six unions involved requested the Board to reconsider its order in view of the amendments and two strikes involving members of the Pact: National Airlines and Northwest Airlines. Although the Board was not persuaded that its earlier determination was in error, it remanded the case for the taking of evidence with respect to the amended agreement.[97] On January 1, 1971, the Mutual Aid Pact was amended to permit the entry of local service carriers.[98]

During the thirteen years that these proceedings have been in progress the union parties have contended that the Mutual Aid Pact was in violation of:

(i) Section 102 because the Pact would cause an imbalance in union-management power that would inevitably lead to labor strife;[99]

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[94] Mutual Aid Pact Investigation, 40 C.A.B. 559 (1964).

[95] The limit of payments from a non-struck carrier rose from one-half of one per cent to one per cent.

[96] Airline Mutual Aid Pact, Order No. 70-7-114 (C.A.B. July 23, 1970).

[97] Order No. 70-11-110 (C.A.B. Nov. 23, 1970). Although the Order states that new investigation would be limited to the amendments to the Pact, the Board in a footnote requested evidence on the "agreement's role, if any, in affecting the bargaining balance between labor and management in the air industry."

[98] The following local service carriers have joined: Air West, Frontier, North Central, Ozark, Piedmont and Mohawk.

[99] After losing before the Board in 1959 and 1964 on this point, the unions completely reversed their attack in 1970 by arguing that the Pact was not neces-

(ii) Section 2, First, because the Pact constituted a repudiation of carrier's obligation to bargain in good faith or, at a minimum, an impediment to collective bargaining; and Section 2, Second, because it would result in other carriers influencing the bargaining position of another carrier;[100] and,

(iii) Various antitrust laws because the Pact was anticompetitive.

With respect to the section 102 argument, the Board replied that the question was not whether the Mutual Aid Pact would or would not cause an imbalance, but whether any imbalance resulting would affect the development of a viable and efficient air system. Under this test the Board, in both the 1959 and 1964 cases, found that the unions had failed to demonstrate that the Pact jeopardized this statutory objective.[101] In fact the contrary was true

sary for the protection of the carriers and that its continued existence would only cause industrial strife for the public and a detrimental effect for the carriers themselves. (As to the latter point, the unions claimed that the carriers would have been better off had they accepted the I.A.M. offer in 1966 instead of resisting, accepting a strike and relying on the pact to protect them.) The Board again found no evidence to support any of these propositions. First, strike activity for the 1958-63 period was approximately the same for Pact members and non-members. Second, the carrier members had signed over 221 contracts with unions during the ten-year period. Third, even assuming the Pact caused strikes, the Board believed there was no showing that it adversely affected the air transport system. Fourth, strikes during the ten-year period again demonstrated the vulnerability of carriers and the need for protection against strikes. And fifth, there was no evidence that the Pact was crucial to the carriers' rejection of the I.A.M. offer in 1966. (As for whether the carriers should have resisted, the Board found this decision was left to the carrier by out national labor policy and the Board would not "second guess" them.) Since the Board in Order 70-11-110 framed the issue in terms of imbalance, we can anticipate the unions to return to their former arguments.

[100] During the course of the litigation, the unions have also asserted that the Pact violated other sections of the R.L.A. First, in the 1959 case, the unions claimed that by paying benefits for strikers in excess of or opposed to Emergency Board recommendations, the carriers were attempting to force a union to accept the Emergency Board's recommendations contrary to section 10 of the R.L.A., which makes acceptance or rejection of the recommendations voluntary. The Board rejected this argument, holding that there was nothing either in § 10 or its legislative history which indicated that Congress intended to prohibit private economic pressure to force acceptance of Emergency Board recommendations. In the absence of this, the Board was not inclined to graft this requirement onto the Act. Second, in the 1970 litigation, the unions contended that the pact violated § 2, Fourth (right to organize); § 2, Fifth (agreement to join or not to join a union); and 2, Eleventh (union security clause). These contentions were not put forth with any force and were summarily rejected by the Board.

[101] In 1964 litigation, the Board found that the union evidence did not play

for the Board found in the 1964 case that the strike insurance had provided a degree of stability to an industry vulnerable to strikes.

The Board also rejected the arguments that the Pact violated either sections 2, First or Second. The Board viewed the Pact as the equivalent of union strike benefits and held there was no evidence on which to assume that the Pact would operate to prevent a carrier from bargaining in good faith or to impede a prompt settlement of a strike. The Board noted that despite strike insurance benefits, a struck carrier would still suffer loss of operating revenue, fixed costs, extraordinary strike expenses and diversion of future traffic. The Board opined that these would serve as an incentive to the struck carrier to avoid strikes and, if struck, to settle promptly. The Board further found that the Pact did not create a situation in which non-struck carriers would attempt to place pressure on the struck carriers to end the strike, since the Pact on its face did not impose on a struck carrier the obligation to consult with the other carriers in regard to its relations with the striking union. Finally, the Board stated that even if the Pact interfered with the carrier's duties under the Railway Labor Act the unions should seek relief from the courts and not the Board.[102]

The unions have advanced the argument that the Pact is anti-competitive in violation of the antitrust laws. The Board found, however, that not only did the Pact tend to not monopolize or restrain competition, but that it actually aided competition by making struck carriers more viable. Moreover, the recent amendments allowing local service carriers to participate in the Pact has destroyed the unions' argument that the Pact discriminated against these carriers.

It would normally be assumed that after all these hearings the question of the legality of the Mutual Aid Pact had been resolved in favor of the carriers. Unfortunately, that is not the case. In

a significant role in any strike during the 1959-1963 period. It also rejected the union argument that any deterioration in labor relations during this period should be attributed to the Pact.

[102] The Board heavily relied on the decision in Kennedy v. Long Island R.R. Co., 211 F. Supp. 478 (S.D.N.Y. 1962), *aff'd*, 319 F.2d 366 (2d Cir. 1963), *cert. denied*, 375 U.S. 830 (1963), where the same arguments were rejected in regard to railroad strike insurance plan. *See also* Operating Engineers Local 12 (A.G.C.), 187 N.L.R.B. No. 50 (1970).

passing upon a motion[103] for reconsideration, the CAB withdrew its approval of 1969 amendments because they had not been exposed to an evidentiary hearing.[104] A new hearing was held and evidence was taken in regard to both 1969 amendments and 1970 amendments, which permitted the participation of local service carriers. On March 27, 1972, the Examiner issued his decision holding (i) that local services should not be permitted to participate in the Pact, and (ii) that the formula had to be modified to reduce the amount of benefits under the Pact. The examiner's decision was not based on the public interest criteria[105] but solely on whether benefits outweighed the disadvantages. The Examiner's decision is now before the full Board, and it is hoped that it will be reversed.

Although the carriers have emerged successful in the litigation, the question arises whether any of this litigation really is necessary. As the Board noted, the real issue presented by section 412 is whether a given agreement would affect the development of a viable and efficient system. In none of these cases did the unions present facts that would have warranted a hearing and, consequently, the Board should have perfunctorily dismissed the unions' objections. This is particularly true in the situation in which the unions have had thirteen years to establish a case. In these circumstances, it is unlikely that the unions will ever be able to present additional facts to support their allegations. Nevertheless, the CAB seems unwilling to stop this litigation.

C. *Labor Protective Conditions*

Unemployment has always been, and unfortunately continues to be, of vital concern to society. Because of the cyclical nature of the American economy and individual industries, there has been little that could be done in the past to prevent the events that give rise to unemployment or to alleviate economic suffering of the unemployed once it has occurred. With the coming of the twentieth century, however, there appeared the phenomenon of planned un-

[103] Mutual Aid Pact, Order 70-11-110 (CAB Nov. 23, 1970).

[104] The hearing was granted despite the fact that the Board stated that it did not believe its earlier decision had been in error.

[105] There are numerous examples of this in the decision. For example, on pages 31 and 32, the Examiner held that the record did not "demonstrate that the viability of any carrier had been critically threatened because of the higher level of contributions. . . ."

employment resulting from consolidation of business facilities, primarily through mergers. Many employers in these circumstances voluntarily provided protection for their employees, such as granting severance for dismissed employees and moving and transportation expenses for the relocated employees.[106]

In the midst of the depression the government intervened to protect the employees in the country's rail industry. Section 7(b) of Title I of the Emergency Railroad Transportation Act of 1933[107] prohibited the dismissal of any employees on railroad payrolls. Because of criticism by railroads and the Federal Coordinator of Railroads[108] that the "job freeze" prevented rail carriers from making organization changes necessary to becoming a viable industry, the Act was permitted to expire. Faced with the threat of new restrictive legislation, the railroads and the rail unions entered into a comprehensive employee protective arrangement entitled the "Agreement of May, 1936, Washington, D.C." and commonly referred to as the "Washington Job Protection Agreement."[109]

The agreement provided for (i) a "coordination allowance" for employees who were temporarily and permanently displaced; (ii) a displacement allowance for employees who were placed in lower-paying positions; (iii) relocation expenses for employees forced to move; and (iv) preservation of employee fringe benefits. Based on the authority of section 5(4) of the Interstate Commerce Act[110] to approve mergers "subject to such items and conditions and modifications as it shall find just and reasonable" and that "will promote the public interest," in 1939, the ICC proscribed labor protective conditions (modeled on those in the Washington Job Protection Agreement) in a railroad organization.[111] The Commission's authority was upheld by the Supreme Court in *United States v. Lowden*[112] and was formally enacted into law as section 5(2)(f) of the Transportation Act of 1940.[113]

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[106] Report of the President's Railroad Commission (1962).

[107] Act of June 16, 1933, ch. 91, § 7(b), 48 Stat. 211.

[108] *Hearings on H.R.J. Res. 319 and S.J. Res. 112 Before the Committee on Interstate and Foreign Commerce*, 74th Cong., 1st Sess. at 19-27 (1935).

[109] Act of February 28, 1920, ch. 91, § 5(4) 41 Stat. 499.

[110] *Id.*

[111] Chicago, R.I. & G. Ry. Trustee Lease, 233 I.C.C. 21 (1939).

[112] 308 U.S. 225 (1939).

[113] Interstate Commerce Act § 5, 49 U.S.C. § 5(2)(f) (1970).

Section 408 of the Federal Aviation Act of 1958[114] provides that the Civil Aeronautics Board must approve mergers and route transfers "upon such terms and modifications as it may prescribe . . . unless the Board finds that . . . the merger . . . will not be consistent with the public interest." There is a similarity between section 408 and the old section 5(4) of the Interstate Commerce Act. Just as the ICC had relied on section 5(4) to impose labor protective conditions in the railroads, the CAB in the 1950 case of *United-Western Acquisition* relied on section 408 to reach the same results in the airlines.[115] Although generally based on the protective conditions used in the rail industry, the Board refused to apply the same conditions because of differences between the two industries.[116]

During the next few years there was a gradual refinement of the Conditions. The most important change involved procedures for integration of seniority lists of the merged carriers. Under the Board rule the parties were to settle voluntarily seniority disputes, but if unsuccessful the matter would be resolved by private arbitration.[117] Other than requiring that the list be integrated in a "fair and equitable" manner, the Board left to the parties the criteria for integrating the lists.

In 1961, the Labor Protective Conditions were standardized by the Board in the *United-Capital Merger Case.*[118] Except for recent modifications,[119] these Conditions have invariably been applied

[114] 49 U.S.C. § 1378 (1970).

[115] 11 C.A.B. 701 (1950). Western Airlines had sought the Board's approval of the transfer of certain routes and property to United Airlines. ALPA intervened, requesting the Board to impose labor protective provisions. The Board at first refused ALPA's request, but after a subsequent application by the union, the Board reopened the hearing and concluded that the parties should settle the matter themselves. When this failed, the Board imposed labor protection conditions.

[116] *Id.* 11 C.A.B. at 710. *See also* Northwest-Northeast Merger, Orders 70-12-162 and 163, at 22, 28 (CAB Dec. 22, 1970).

[117] Braniff-Mid Continent Merger, 15 C.A.B. 708, 717-18 (1952). The Board's authority in this regard was upheld in American Airlines v. CAB, 445 F.2d 891 (D.C. Cir. 1971), *cert. denied,* 92 S.Ct. 681 (1972).

[118] 33 C.A.B. 307 (1961).

[119] In Allegheny-Mohawk Merger Case, Nos. 72-4-31, 32 (CAB Apr. 7, 1972), the Board refused to apply to airlines the Labor Protective Conditions imposed by the Secretary of Labor on Allegheny under the Rail Passenger Service Act of 1970. In addition, the Board rejected most of the proposed revisions in the standard Labor Protective Conditions first announced in the United-Capital Merger Case, 33 C.A.B. 307 (1961), including requests for survivability of collective bargaining contracts and increases in the amount and duration of various bene-

without change in every merger since. These Conditions do not mean, however, that the issue has diminished in importance or that it has been resolved to the satisfaction of all. Actually the reverse is true. In every merger since *United-Capital* various unions have requested that either the Conditions be scrapped in favor of negotiated conditions or that they be revised to provide more benefits to the employees. The Board has taken the position that revision in the standard conditions should only be made when required by experience indicating the need for the change, or by the particular factual circumstances in the case being decided.[120] To achieve this result, the Board has imposed on the proponent of a revision the burden of proving that the standard labor protective scheme has not afforded reasonable protection to employees about to be affected by the merger.[121]

In determining whether further modification of the standard conditions is warranted, the following should be kept in focus: (i) the primary purpose of these Conditions is to promote labor peace by removing possible causes of labor friction arising from the merging of two employee complements; and (ii) while these Conditions are designed to insure that employees are not required to bear the brunt of major route alterations that inure to the benefit of the carrier, they do not protect the employees against all losses and were not intended to place a financial strain on the carrier or to destroy the benefit of the merger. Thus, in its *American Flyers Airlines Acquisition*[122] decision, the Board stated:

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fits. However, the Board for the first time since 1962 undertook a revision of several of the Conditions. The most important of these was the change in the burden of proof in regard to eligibility for benefits. Under the new rule, an employee is entitled to benefits if the merger is the principal or primary causative factor in any change in his employment. The Board left to the arbitrator the question of whether the burden of proof should be imposed on either the carrier or the employee. The arbitrator is to make this determination in light of all relevant circumstances in the particular case before him. The other major change in the Labor Protective Conditions involved the procedures for arbitration of disputes arising under the Conditions. Under the new rules, specific provisions are made for the manner of selecting an arbitrator, expedited hearings, division of costs, time periods in which to file, and finality of any decision arrived at by the arbitrator. The parties are still free to arrive at an alternative procedure.

[120] *E.g.*, Airlift-Slick Route Transfer Case, Order E-26,933 (CAB 1968).

[121] Northwest-Northeast Merger Case, Order No. 70-12-162 and 163, at 22-23 (CAB Dec. 22, 1970).

[122] Order 71-5-80, 81 (May 18, 1971).

> While recognizing that a merger may benefit the public, the Board has also consistently recognized that this benefit should not be at the expense of leaving employees without rights. At the same time, however, it is not our purpose to maintain the *status-quo ante* for employees or to become entwined in the details of employer-employee relations. The conditions are not designed to insure that each affected employee will be doing exactly the same work, at the same location and under the same conditions after the merger that existed before. They are designed rather to insure fundamental fairness in the treatment of affected employees. . . .[123]

The maintenance of a standard policy is important if mergers, which are otherwise in the public interest, are to be consummated on reasonable grounds. Conditions that are either unpredictable or extreme are likely to constitute a significant deterrent to most mergers and thus would be contrary to the public interest in the development of a viable air transportation system adapted to the needs of commerce. Additionally, any significant deterrent to merger would not be to the benefit of the employees. Most mergers involve one economically unhealthy partner. If the weak partner could not survive through merger, then that partner would probably be forced out of business by its creditors with the net effect being that all employees of that carrier would be unemployed. If the weak carrier were allowed to merge, on the other hand, its employees will be protected through the Labor Protective Conditions and will share in the growth of the merged system.

The CAB has done more than a satisfactory job in this area; legislation is not necessary to curb administrative excesses. The Packwood bill should be amended, however, to prohibit both pre- and post-merger negotiations of the labor protective conditions. As mentioned by the Board in the *Northwest-Northeast Merger Case*,[124] negotiations of labor protective conditions (i) cause time delays; (ii) create the possibility of unequal treatment of similarly situated employees; and (iii) if unsuccessful, would mean that CAB resources in framing balanced conditions and in approving the merger were needlessly expended.[125]

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[123] *Id.*

[124] Northwest-Northeast Merger Case, Order Nos. 70-12-162 and 163, at 22-23 (1970).

[125] The most important judicial decision involves the opinion of the United States Court of Appeals for the First Circuit in *I.A.M. v. Northeast Airlines*, — F.2d — (1972). The court in this case held that Northeast Airlines could

CONCLUSION

It is evident that the subjection of the airlines to the Railway Labor Act and to the Federal Aviation Act has been a disaster. This would be true even if both Acts were administered impartially by experts familiar with airline problems. The structure and problems of the airlines require a labor law system tailored to its own needs. This can be accomplished, by making the above-recommended changes in the existing laws. Senator Packwood's bill provides a promise for a better future; but, without further amendment, it will remain only a promise.

not be required to bargain about the protection to be accorded its employees in regard to post-merger operating changes to be mandated by the Civil Aeronautics Board or to be made by Delta Airlines as the surviving carrier in the merger. The court further held that Northeast could not be required to bargain about the post-merger employment rights of Northeast employees vis-a-vis Delta employees. In essence, what the court was holding was that the non-surviving carrier in a merger had no duty to bargain about either the merger itself or about post-merger changes to be implemented by the surviving carrier.