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AIRLINE EMPLOYEE COVERAGE UNDER THE RAILWAY LABOR ACT

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MALCOLM A. MacINTYRE, in a recent article in this JOURNAL, calls the Railway Labor Act a misfit for the airlines, and one of his complaints is that "the line between 'labor' and 'management' is not only unclear, but there seems to be no method by which this can be resolved short of protracted and involved litigation"; and that under the Act there is "no clean-cut administrative manner in which 'management' or employer may be separated from 'labor' or 'employees' for purposes of labor-management relations."[1]

Admittedly, the term "employee" in the Act as it applies to the airlines is undefined.[2] The sparse legislative history of Title 2 of this Act throws no light on the question. However, as MacIntyre observes, "the National Mediation Board believes that as a matter of law it alone has the power to determine who are 'employees' for the purpose of the

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[1] Malcolm A. MacIntyre, "The Railway Labor Act—a Misfit for the Airlines," 19, *Jol. of Air L. and Com.* 289 (1952); also see James B. Frankel, "Airline Labor Policy, the Stepchild of the Railway Labor Act," 18, *Jrl. of Air L. and Com.* 461 (1951).

[2] Section 201 of the Act provides: "All of the provisions of Title 1 of this Act, except the provisions of section 3 thereof, are extended to all and shall cover every common carrier by air engaged in interstate or foreign commerce, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service." Arguably, as MacIntyre points out, this quoted section contemplates the application of Section 1, Fifth of the Act, reading: "Fifth. The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders." However, apart from the impracticability of such procedure which MacIntyre states, the jurisdiction of the Interstate Commerce Commission to make such determinations is limited by the Act to amend and interpret orders "now in effect" and "existing orders" which at no time included airline personnel and therefore, as held by the National Mediation Board (amongst other reasons), there is no requirement that the Interstate Commerce Commission must first define "employee" on an airline before the Mediation Board can assume jurisdiction in a representation dispute under the Act. *In the Matter of Representation of Employees of the Northwest Airlines, Inc., Determination* May 26, 1948.

Act."[3] Clearly, if the National Mediation Board's position on this question is sound, then it actually constitutes an agency of government established under the Railway Labor Act by which the term "employee" for the airlines can and is being defined without protracted and involved litigation.

The leading determination of the National Mediation Board is in the Northwest Airlines case.[4] At the outset, the Board rejects the contention that it is without authority to consider the matter for any purpose, stating, "An administrative agency established by the Congress to administer a statute has authority, to make initial determinations concerning the coverage of the statute. Such determinations 'belong to the usual administrative routine.' *NLRB v. Hearst Publications, Inc.*, 322 US 111, 130," The National Mediation Board then proceeds to the view that by necessary implication it has jurisdiction to determine who is an "employee" under the Act, observing that

> It is true that Section 201 does not say in so many words that the Mediation Board shall have power to determine who is an employee or subordinate official, but the Board has such jurisdiction by necessary implication. The National Labor Relations Act does not specifically authorize the National Labor Relations Board to determine who is an employee, and yet the Supreme Court has said that it is 'elementary' that the National Board has not only the right but the duty of determining in the first instance, questions of employee status in matters arising under its statute (*NLRB v. E. C. Atkins & Co.*, 331 U.S. 398). . . . It must be assumed that Congress, not having attempted to spell out any precise or particularized definition, intended to leave the problem of the application of the general language in Section 201 to an agency. The question then is: To what agency?
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> As a matter of common sense and as a matter of law, it must be presumed, in the absence of a contrary showing, that Congress intended to leave the matter to the agency which administers the particular statute (*NLRB v. E. C. Atkins & Co., supra; Phelps Dodge v. NLRB*, 313 U. S. 177; *NLRB v. Hearst Publications,*

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[3] Citing 14 National Mediation Board Annual Report 8 (1948). The Board states therein, "During 1948, the Board considered and determined a novel problem raised by Northwest Airlines, a common carrier by air subject to title II of the act. A labor organization had filed an application with the Board for investigation of a representation dispute among wage earners generally described as mechanical department foremen or supervisors of mechanics. The carrier contended that any investigation by the Board of the alleged dispute was untimely and inappropriate in the absence of an order of the Interstate Commerce Commission defining the work performed by the persons above referred to as that of employees or subordinate officials under the Railway Labor Act. The problem as thus presented questioned the right of the Board to determine whether wage earners employed by airlines are employees or subordinate officials within the meaning of the act. Following a public hearing and consideration of briefs filed by a large number of airlines and labor organizations, the Board handed down a determination with an opinion in which it found as a matter of law that it had the authority and the duty to determine who are employees or subordinate officials of carriers by air pursuant to title II of the Railway Labor Act, as amended." The board then cites determination Northwest Airlines, May 26, 1948, *supra* Note 2.

[4] *In the Matter of Representation of Employees of the Northwest Airlines, Inc., Determination of May* 26, 1948.

supra; Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41 at 49-50, and *Endicott Johnson v. Perkins*, 317 U. S. 501, 509)."[5]

In view of the overwhelming weight of the United States Supreme Court decisions relied upon by the National Mediation Board in support of its jurisdiction to determine whether particular airline personnel are embraced by the term "employee" or "subordinate official" covered by the Railway Labor Act, and in view of such actual determinations by the National Mediation Board, it cannot realistically be denied that there functions under the Railway Labor Act an agency for the determination of such matters.[6]

It is true that the Railway Labor Act does not exclude supervisors from the term "employee" or "subordinate official" covered by the Act as is provided for in the Labor Management Relations Act of 1947.[7] Actually, as held by the National Mediation Board, the Railway Labor Act upholds "the right of supervisors to engage in collective bargaining because of the inclusion therein of the term subordinate official."[8] However, although foremen, supervisors, and subordinate officials are

[5] The Mediation Board, after so establishing its authority to determine in the first instance questions of coverage arising under Section 201, rejects the view that its authority is restricted by implication, stating, "Nor can it be argued that Section 202 restricts, by implication, the Mediation Board's right to determine in the first instance questions of coverage arising under Section 201. To so maintain is to assert that Congress inferentially intended that action by the Mediation Board, which operates in the field of labor relations and which must often act with expedition, must wait upon a decision by the Interstate Commerce Commission. The mere statement of the contention carries its own refutation. It is wholly unreasonable to assume that Congress intended the power of the Mediation Board to be dependent upon, or restricted by, the administrative techniques, calendar, backlog and budgetary restrictions of another Federal agency in the mediation or arbitration of labor disputes, and which, on the face of its own statute, has no jurisdiction over air carriers or their employees." Section 202 reads: "The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of Title I of this Act, except section 3 thereof, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee," respectively, in section 1 thereof."

[6] See National Mediation Board determinations in Cases Nos. R-1706, R-1718, R-1720, R-1721, R-1729, R-1735, and R-1744, Decided April 25, 1947 (*In the Matter of Representation of Employees of the National Airlines, Inc., Pennsylvania-Central Airlines Corp.*; and *Mid-Continent Airlines, Inc., Clerical, Office, Stores, Fleet, and Passenger Service Employees*); Case No. R-2107, *Determination Re Certain Supervisory Positions, August* 17, 1949 (*In the matter of Representation of Employees of the Northwest Airlines, Inc., Mechanical Department Foremen and Supervisors of Mechanics*); Case No. R-2257, *Determination June* 25, 1952 (*In the matter of Representation of Employees of the Northwest Airlines, Inc., Coordinator Maintenance Regulations, Technicians, Instructors, Work Planners and Maintenance and Inspection Procedures Planners*).

[7] That Act provides that the term "employee . . . shall not include . . . any individual employed as a supervisor . . ." and defines "supervisor" to mean "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 61 STAT. 136 (1941) Sec. 2(3) and Sec. 2(11).

[8] Case No. R-2107, *Determination Re Certain Supervisory Positions*, August 17, 1949.

covered by the Railway Labor Act, this should offer no cause for alarm to the airline industry because the National Mediation Board remains careful to exclude bonafide airline officials from such coverage. The Board recognizes that job titles "are often misleading and because of this the more reliable test of eligibility is the duties, functions, and responsibilities of a position."[9] Thus, in a series of cases involving the classification of "station manager," the Mediation Board held: "Although there is some variance among the scheduled airlines in the designation used for such positions, the title 'station manager' appears to be used by a majority of the scheduled airlines. From the record there is clear indication that the duties and responsibilities of individuals in such positions are basically of an administrative and supervisory character. Individuals in such positions are required to act as the carrier's official representative in the city where stationed. This responsibility entails representing the airline before Government agencies, civic associations, and public groups in promotional and administrative capacities. In addition, station managers are responsible for handling the carrier's affairs at the station, including the supervision of the employees, hiring, firing, and training of workers, and for the enforcement of company rules and regulations in the conduct of operations of the station."[10] From the foregoing quotation, it would appear that the National Mediation Board employs criteria of what constitutes "management" or an "official" not too dissimilar from the criteria of "supervisor" provided in the Labor-Management Relations Act. The National Mediation Board has expressed these criteria, in borrowing from Interstate Commerce Commission decisions dealing with railroad personnel, as follows: relative rank and authority to hire, dismiss, or discipline; payment of overtime, extent of vacation, sick leave and expense allowance, the type of accommodations furnished for road inspection trips, and whether stenographic services are provided.[11] The Board apparently would not give compelling weight to some of these criteria, but would appear to accept the statement of the Interstate Commerce Commission which it quotes, that "The line of demarcation between an official and subordinate official has never been sharply drawn, and any fact that may help to a reasonable answer to the question presented should be given consideration although in and of itself it might be considered trivial, yet when all of the facts are considered as a whole the answer may be reached whether or not the employee is a subordinate official."[12]

From the foregoing, it would appear to be clear that although the line between 'labor' and 'management' is not clearly defined in the Railway Labor Act, the National Mediation Board has jurisdiction which it has exercised in making particular determinations, and that

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[9] *Ibid.*, p. 9.

[10] Cases Nos. R-1706, R-1718, R-1720, R-1721, R-1729, R-1735, and R-1744, decided April 25, 1947.

[11] Case No. R-2107, August 17, 1949.

[12] *Ibid.*

such determinations offer a practical guide to the airline industry sufficient to protect the interests of management as well as the interests of the employee. Conceivably, the National Mediation Board may limit its effectiveness in performing its primary function of mediation by participating in decision-making in a management-union dispute over coverage questions. In like matters, the Federal Mediation and Conciliation Service has refrained from involvement. But that Service has no representation – dispute functions, whereas the National Mediation Board, like the National Labor Relations Board, does determine representation questions. If the National Mediation Board should find that its mediation function is damaged by reason of its determination of representation and coverage questions, the time will then be reached for considering amendment of the Railway Labor Act on this matter.