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JUDICIAL AND REGULATORY DECISIONS

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THE AIR CARRIER'S DUTY TO BARGAIN UNDER THE RAILWAY LABOR ACT — THE NATIONAL AIRLINES STRIKE

The recent labor difficulties experienced by National Airlines have brought into sharp relief the duties of the air carrier to bargain under the Railway Labor Act, as amended.[1]

The disputes had their beginning in September, 1945 when Maston O'Neal, one of National's pilots and a member of the Air Line Pilots Association (ALPA), was involved in an accident at the Tampa, Florida, airport on one of the carrier's scheduled flights. The carrier discharged him. He demanded a review of the propriety of his discharge, such review being provided for in the agreement between the carrier and ALPA, the recognized representative of the pilots. This review resulted in a deadlock in the System Board of Adjustment, comprised of two members selected by the carrier and two by the union. There was no provision in the agreement for overcoming this impasse.[2]

In May, 1947, the National Mediation Board called the parties together, and it was agreed that the Board would appoint a neutral referee to break the deadlock. The Board subsequently appointed a member of the Civil Aeronautics Board staff. ALPA objected to this appointment because of possible bias. The appointee declined to serve. The Board then chose another referee who was refused by the carrier for no other apparent reason than that it was exercising its prerogative as it felt the union had done.[3]

By November, 1947, ALPA issued a strike notice. The National Mediation Board persuaded the pilots' union to postpone its walk-out, and the parties were once again called together for mediation of the dispute. The carrier offered to have three neutrals appointed. Before reaching an understanding ALPA insisted that one was sufficient. The president of ALPA was called away on official union business and the carrier withdrew its offer.

Meanwhile the International Association of Machinists (IAM), which had been certified in August 1947, as the legal bargaining representative of the carrier's clerks, deadlocked with the carrier in December, 1947 over the latter's demand to have the unlimited right to sub-contract work and union's demand that no sub-contracting be allowed. During the negotiation period the carrier granted its clerks, who were not as yet under any contract, a unilateral wage increase. The carrier's president made several anti-union statements to his employees which were enforced by further benefits being granted to the clerks. The IAM took a strike vote. Efforts by the National

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[1] The original Act is Title I, 44 Stat. 577 (1926), as amended by 48 Stat. 1185 (1934), 45 USCA §151 *et seq.* (1943). Title II, the air carrier provisions, was added in 1936, 49 Stat. 1189 (1936), 45 USCA §§181-188 (1940), to make the complete title, the Railway Labor Act, *as amended.*

[2] For a factual history of the dispute, see the letter written by Frank P. Douglas, chairman of the National Mediation Board, to Senator McCarran published in Aviation Week, March 22, 1948, p. 44. See also Aviation Week, March 15, 1948, p. 11. McNatt, *Labor Relations in the Air Transport Industry Under the Amended Railway Labor Act,* 45 U. of Ill. Bulletin, 64 (1948).

[3] "No reason was given to support such challenge (of the second referee) except that the Association had protested the appointment of the first designated referee." Emergency Board No. 62's Report to the President, p. 8, "In re Certain Differences between National Airlines, Inc. and certain of their employees represented by the Air Line Pilots Association, International, and the International Association of Machinists."

Mediation Board failed to bring the parties to any agreement. Arbitration was agreed to by the IAM, but on December 11, 1947, the carrier refused to accept "at this time". On January 23, 1948, the IAM clerks walked out. The Mediation Board, then, requested the carrier to reassure the striking employees that they would not be discriminated against if they returned to work which the carrier did on the following day but the clerks stayed out.[4]

On February 3, 1948, because they were apprehensive of inadequate maintenance and believed the carrier had breached its agreement of May 1947, to accept a neutral referee, the ALPA employees struck.[5] The next day the carrier notified the National Mediation Board that it would accept the appointment of one neutral to settle the two year old dispute. On the fifth, the National Mediation Board requested the parties to meet February 7, 1948, and it informed ALPA of the carrier's proposal. The union accepted this proposal by phone. On the seventh, the president of ALPA and an attorney for the president of the carrier met. The carrier informed the Board that it had discharged all its ALPA pilots the day before.[6] Further efforts to compose the differences ceased.

The carrier resumed operations with newly hired pilots, and the strike continued.[7] The Mediation Board recommended to the President of the United States that he appoint an emergency fact-finding board, pursuant to the powers given him under the Railway Labor Act, as amended, to investigate the ALPA dispute. On May 15, 1948, the President appointed an emergency board. After hearings were under way, IAM convinced the Mediation Board that its controversy be disposed of at the same time. On June 3, 1948, the President redesignated the emergency board.[8]

JURISDICTION OF EMERGENCY BOARD

This board was at once faced with a challenge of its jurisdiction.[9] Section 10 of Title 1 of the Railway Labor Act, as amended, provides:

> "If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute."[10]

It was contended by the carrier that by its resumption of scheduled flights there had been no interruption of commerce such as contemplated in the legislation.

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[4] On January 24, 1948, the IAM mechanics stopped work to avoid crossing the clerk's picket line.

[5] Aviation Week, February 16, 1948, p. 10.

[6] Aviation Week, March 15, 1948, p. 11.

[7] Aviation Week, March 8, 1948, p. 40.

[8] Emergency Board No. 62 was originally created by Executive Order No. 9958, dated May 15, 1948. The Board was redesignated on June 3, 1948 to investigate the IAM strike by Executive Order No. 9965. The Board was headed by Grady Lewis, as chairman, with Walter V. Schaefer, Professor of Law at Northwestern University Law School, and Curtis W. Roll, as members.

[9] American Aviation Daily, May 25, 1948, p. 127.

[10] 48 Stat. 1197 (1934), 45 USCA §160 (1940). This section of Title I is made applicable to air carriers by Title II, §201, 49 Stat. 1189 (1936), 45 USCA §181 (1940) which provides: "All of the provisions of title I of this Act, except the provisions of section 3 thereof, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, 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."

It may be a valid argument that this section of the Act may not apply to air carriers with the same force that it does to railroads. First, the statute speaks of "essential transportation service".

There can be no doubt that rail transportation is essential to our integrated, industrial society whose very foundation is rapid, uninterrupted communication. "Essential" when applied to the air carrier, on the other hand, is necessarily of a different degree. Air carriers are authorized to fly routes only when "such transportation is required by the public convenience and necessity."[11] Therefore, it logically follows that every air carrier certified by the Civil Aeronautics Board is, by definition, "essential" in the sense that the term is used in the statute.

Assuming, then, that an air carrier is forced to curtail its service because of labor difficulties, that the Mediation Board finds a threat to commerce and informs the President who thereupon creates an emergency fact-finding board, can a question of the emergency board's jurisdiction be raised during the investigation by the board? The present board evidently thought not, declining to rule on it.[12] The Act refers to the President's discretion. Whether this is reviewable by any court appears doubtful, especially when the only purpose it serves once exercised is to "mobilize public opinion".[13]

Even if, as the carrier contended, the board should have gone into the question of its power, the company might have had difficulty sustaining its position on the facts. It appears from the carrier's report to the CAB that in April 1948, the month before the emergency board was appointed, it was offering the public less than fifty percent of the space it had available in April, 1947.[14] Nor did this situation improve appreciably in the subsequent months.

THE ALPA CASE

There is adequate basis for concluding that the conduct of the carrier in its relations with ALPA in the O'Neal case was a violation of its statutory duty to bargain under the Railway Labor Act, as amended. The Act requires the carrier "to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes . . . in order to avoid any interruption to commerce . . ."[15] The arbitrary action of the carrier in ob-

[11] *The Civil Aeronautics Act of* 1938, §401(d)(1), 52 Stat. 937, as amended by 54 Stat. 1233 (1940), 49 USCA §481 (Supp. 1947).

[12] Although the issue was presented by both parties in their briefs to the Emergency Board, the Board did not consider it in their Report to the President.

[13] House of Representatives, Report of Committee on Interstate and Foreign Commerce, H.R. Rep. No. 328, 69th Cong., 1st Sess. (1926). As to executive discretion and its reviewability by the judiciary, see *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103, 111, 113 (1947), (grant of foreign air route); *United States v. Bush & Co.*, 310 U.S. 371, 380 (1940), (fixing tariff standards); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), (finding that prohibition of sale of arms would help reestablish peace); *Dakota Central Telephone Co. v. South Dakota*, 250 U.S. 163, 184 (1919), (determining essentialness to security and defense in seizing telephone lines); *Monongahela Bridge Co. v. United States*, 216 U.S. 177, 195 (1910), (determination of an obstruction to commerce and navigation); *Martin v. Mott*, 25 U.S. 12, 19 (1827), (ascertaining an emergency to call out the militia).

[14] CAB Recurrent Reports of Mileage and Traffic Data, April, 1948, sheets for National Air Lines, domestic and foreign service; Eastern Air Lines, domestic and foreign service; and Delta Airlines.

[15] Title I, §2, First, 48 Stat. 1186 (1934), 45 USCA §152 (1940). This section is made applicable to air carriers by Title II, §202, 49 Stat. 1189 (1936), 45 USCA §182 (1940). The Emergency Board found: "The evidence establishes that this statutory duty has not been performed by the Carrier. Over the entire period from the date of O'Neal's discharge, September 27, 1945, to the date of the strike, February 3, 1948, everyone of the many efforts to dispose of the dispute was initiated by the Association; in no instance did the Carrier take the initiative and it was induced to act at all only when confronted by the threat of a strike.

jecting to the second neutral appointed by the Mediation Board seems to typify the attitude of the carrier towards collective bargaining procedures.[16] Reasonable effort transcends capricious exercise of privileges.[17] It also appears from the facts that on at least two occasions the carrier was induced to take action only after the threat of a strike vote. This, in itself, is not unusual, but it cannot be said to be indicatory of willingness to cooperate with the recognized bargaining agent.[18]

The carrier charged as an affirmative defense that ALPA had violated the act by going on strike while the Mediation Board was in contact with the parties and attempting to prevent an interruption to essential transportation service, thereby going directly in the face of the avowed purposes of the Act.[19] The Act was passed to prevent strikes in the railroad industry which lead to interruptions in interstate commerce. However, it is doubtful that the Congress which passed the original Act intended it to restrict the employees' right to strike in any material manner in order to effect the purposes of the Act.[20] Therefore, the more compelling consideration is that the carrier's attitude was not conducive to peaceful labor relations in interstate commerce, and that it had violated its statutory duty to "exert every reasonable effort" to settle its disputes.

THE IAM CASE

The case against the carrier for violating the Railway Labor Act, as amended, by its tactics toward the IAM is well supported by decisions under

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What was sought by the Association was reasonable. It did not seek reinstatement of O'Neal. It sought only an impartial determination of the propriety of his discharge. Such a determination has not been had to this date. Failure to afford it caused the strike, and responsibility for the strike rests with the Carrier." Emergency Board No. 62's Report to the President, pp. 12-13. For a survey of the carrier's duties and obligations under the Railway Labor Act, as amended, see Elggren and McCraith, *Aviation ABC's of the Railway Labor Act*, 13 J. Air L. & C. 39 (1942).

[16] The Emergency Board, agreeing with the union that the Mediation Board's first choice was an unfortunate one, stated: "It is elementary that authority to appoint a neutral to determine a dispute is not exhausted by a single nomination and that if the first nominee does not act, successive nominations may be made. The authority is determined only when it has been effectively executed." Emergency Board No. 62's Report to the President, p. 14.

[17] The Emergency Board concluded: "The story revealed by the evidence is one of disregard for statutory and contractual obligations on the part of the Carrier. It indicates an immaturity and lack of responsibility which is not consistent with the duties imposed by Congress upon carriers in Interstate Commerce." Emergency Board No. 62's Report to the President, pp. 14-15.

[18] The Supreme Court in speaking of the duties under the statute stated: "The statute does not undertake to compel agreement between the employer and employees, but it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences — in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by section 2, First." *Virginian Ry. Co. v. Federation No.* 40, 300 U.S. 515, 548 (1937). Emergency Board No. 62's Report to the President, pp. 12-13.

[19] 48 Stat. 1186 (1934), 45 USCA §151a (1940). "The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretations or application of agreements covering rates of pay, rules, or working conditions."

[20] Note the recognized restriction on the right to strike in the Act, cited note 38 *infra*.

that Act itself and the National Labor Relations Act.[21] The carrier, by encouraging a "company union" through its offer of free legal services, went directly against the mandate of section 2, Fourth, of Title I of the Act.[22] Under this same provision any attempt on the part of the carrier's president to induce his employees to refrain from joining the union is prohibited. This sort of suasion would have constituted an unfair labor practice under the Wagner Act, and would have been evidence of a lack of good faith at "the collective bargaining table".[23] The Taft-Hartley Act unambiguously modified this sector of Congressional collective bargaining philosophy by providing in section 8(c) that such expressions unaccompanied by a "threat of reprisal or force or promise of benefits" shall not constitute an unfair labor practice or be evidence thereof.[24]

One conclusion which might be drawn is that, whereas the "employee-coercing" provisions of the Railway Labor Act and the Wagner Act are consistent manifestations of Congressional attitude on the subject, the more recent Taft-Hartley Act has set a standard for judging employer coercion different from that which is still being applied to rail and air carriers, for with the carriers, "an employer stand" on the union question may still be used as evidence of his failure to bargain collectively in good faith.[25]

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[21] *The Wagner Act*, 49 Stat. 449 (1935), 29 USCA §151 *et seq.* (1940). Cases cited note 22 *infra*.

[22] 48 Stat. 1186 (1934), 45 USCA §152 (1940). ". . . it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization. . . ."

[23] *I.A.M. v. N.L.R.B.*, 311 U.S. 72, 78 (1940); *N.L.R.B. v. Peterson*, 157 F. (2d) 514, 515 (CCA 6th 1946) *cert. denied*, 330 U.S. 838 (1947); *N.L.R.B. v. American Pearl Button Co.*, 149 F. (2d) 311, 315 (CCA 6th 1945); *N.L.R.B. v. Laister Kaufman*, 144 F. (2d) 916 (CCA 8th 1944); *N.L.R.B. v. Cleveland-Cliffs Iron Co.*, 133 F. (2d) 295, 301 (CCA 6th 1943); *N.L.R.B. v. Falk Corp.*, 102 F. (2d) 382, 389 (CCA 7th 1939). *Cf. N.L.R.B. v. Virginia Electric & Power Co.*, 314 U.S. 469, 477 (1941); cases collected in 146 A.L.R. 1017 (1943). Sinsheimer, Employer Free Speech, 14 U. of Chi. L. Rev. 617, (1947).

[24] 61 Stat. 136 (1947), 29 USCA s158 *et seq.* (Supp. 1947). Note that those industries under the provisions of the Railway Labor Act, as amended, are specifically exempted from both the Wagner Act, 49 Stat. 450 (1935), 29 USCA §152 (2) (1940), and the Taft-Hartley Act 61 Stat. 137 (1947), 29 USCA §152 (3) (Supp. 1947). The Emergency Board did not comment on the possible influence of the Taft-Hartley philosophy on the term "collective bargaining" as it is used in the Railway Labor Act, as amended.

The Board concluded: "In its dealings with the Association, National has repeatedly been guilty of conduct which violated the provisions of the Railway Labor Act. Identical conduct, in the statutory setting of the National Labor Relations Act, is uniformly held to constitute 'unfair labor practices,' and to warrant the enforced reinstatement of the striking employes. The Carrier's disregard of its statutory duty was not isolated or accidental; on the contrary, it was repeated and deliberate. And it contributed directly and immediately to the situation out of which the strike arose. It is, therefore, the recommendation of the Board that the employes who have refused to work during the pendency of the strike should be reinstated as working employees of the Carrier." Emergency Board No. 62's Report to the President, p. 28.

[25] Compare *Texas & N. O. Ry. v. Brotherhood of Railroad Clerks*, 281 U.S. 548 (1930) and *Virginia Ry. Co. v. Federation No.* 40, 84 F. (2d) 641, 643-644 (CCA 4th 1936) with the viewpoint expressed in Mulroy, *The Taft-Hartley Act in Action*, U. of Chi. L. Rev. 595, 611-615 (1948). It is not sufficient to say that the transportation industry is to be judged by a different standard than the rest of industry, for the Supreme Court has stated that the Congressional philosophy of collective bargaining as embodied in the National Labor Relations Act, is analogous to that embodied in the Railway Labor Act, as amended. "Collective bargaining was not defined by the statute which provided for it, but it generally has been considered to absorb and give statutory approval to the philosophy of

Collective bargaining, by definition, precludes unilateral action.[26] Although the carrier refused to discuss any of the employment improvements which were subsequently granted unilaterally until the matter of sub-contracting had been settled, negotigations were in progress with a certified bargaining agent. The carrier claimed that its action in raising wages and granting vacation benefits did not violate the Act in that the beneficiaries were not covered by an agreement, hence was not within the prohibitions of the Act.[27] Even though the IAM employees were not covered by a contract, such action still is indicative of a lack of bargaining collectively in good faith.[28] Section 2, Ninth, of Title I of the Railway Labor Act, as amended, makes it mandatory for an employer to "treat with" the certified representative of his employees.[29] Therefore, it appears that the carrier's unilateral action under these circumstances was a violation of its statutory duty to bargain.[30]

The carrier's most potent argument was that the IAM had violated section 5 of Title I of the Act by calling the strike January 23, 1948.[31] It was the carrier's contention that neither party could change the status quo for thirty days after the notice that mediatory efforts had failed. The Mediation Board gave such notice on the 21st of January. The IAM interpreted the statute to mean that, if this section applied to unions at all, the status quo could not be altered until thirty days after arbitration had been rejected, which, in fact, occurred some 42 days previously.

Looking at the Railway Labor Act as a whole it contemplates first, that the parties exercise reasonable efforts to compromise their differences;[32] secondly, should this fail, the Mediation Board shall attempt to bring about a reconciliation; thirdly, if there is no settlement resulting from these efforts, the Board shall endeavor "as its final required action" (except for the

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bargaining as worked out in the labor movement in the United States." *Telegraphers v. Railway Express Agency*, 321 U.S. 342, 346-347 (1944). To the same effect: *General Committee v. M.K.T.R. Co.*, 320 U.S. 323, 335 (1944); *J. I. Case v. N.L.R.B.*, 311 U.S. 514, 523-526 (1940); *Brotherhood of Railway and Steamship Clerks v. Virginia Ry. Co.*, 125 F. (2d) 853 (CCA 4th 1942).

[26] "Such unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent. If successful in securing approval for the proposed increase of wages, it might well . . . block the bargaining representative in securing further wage adjustments." *May Department Stores v. N.L.R.B.*, 326 U.S. 376, 385 (1945).

"But orderly collective bargaining requires that the employer be not permitted to go behind the designated representatives, in order to bargain with the employees themselves, prior to such a revocation" of the bargaining agent. *Medo Corp. v. N.L.R.B.*, 321 U.S. 678, 684-685 (1944).

[27] Title I, §2, Seventh, 48 Stat. 1186 (1934), 45 USCA §152 (1940) provides: "No carrier, its officer, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class *as embodied in agreements* except in the manner prescribed in such agreements. . . ." (emphasis supplied).

[28] "Most significant was the action of Cayia (the company superintendent) in announcing the vacation rule two days before the May 10th meeting (with the bargaining representative), when it was to be the subject of bargaining between the employer and the union. This action was more than merely tactless. It evidenced a wilful and deliberate contempt for the whole plan of collective bargaining." *Inland Lime & Stone Co. v. N.L.R.B.*, 119 F. (2d) 20 (CCA 7th 1941).

[29] *Virginian Ry. Co. v. Federation No.* 40, 300 U.S. 515, 545 (1937). See pp. 9-10 of McNatt article cited note 2, *supra.*

[30] "By its unilateral actions concerning matters properly the subject of collective bargaining, National Airlines violated the duty imposed upon it by statute. National's persistent and repeated violations of the duties imposed upon it by Congress in the public interest were the major factors in the development of the existing dispute." Emergency Board No. 62's Report to the President, p. 24.

[31] 48 Stat. 1195 (1934), 45 USCA §155 (1940).

[32] 48 Stat. 1186 (1934), 45 USCA §152 (1943). See Thirteenth Annual Report, National Mediation Board (1947), pp. 2, 41.

action provided for in section 10 of the Act) "to induce the parties to submit . . . to arbitration"; fourthly, if arbitration is refused, "the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, . . . no change shall be made in wages, working conditions or established practices in effect prior to the time the dispute arose."[33]

Applying the facts of the IAM case to the above summary, the question is: can the union go on strike after thirty days from the date arbitration is refused, but *before* the Mediation Board sends notice that mediatory efforts have failed?

The first inquiry necessary to finding the answer is whether the provision prohibiting change has force against the union as well as the carrier, or whether it applies to the carrier alone. Or phrased in a different manner: do the terms "working conditions" and "established practices" include strikes? Presumably, if the purposes of the Act are to be effectuated, they must.[34] The legislative intent, however, appears to the contrary. It seems that the Railway Labor Act before the 1934 amendment did not contain a clause providing for Mediation Board action when arbitration was refused.[35] Prior to the amendment the railroads made a practice of granting benefits to their employees to thwart threatening strikes. The 1934 addition to the Act was aimed at this circumvention.[36] Force is given to this reasoning by noting the difference between the clause appended in 1934 and a similar provision in section 10 of Title I of the Act.[37] The prohibition in this section is directed towards both parties to the dispute.[38] One could significantly ask why, if Congress wanted the amending clause to be binding on both parties, it did not use the same language it used in section 10 of the Act.[39]

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[33] Title I, §5, First, 48 Stat. 1186 (1934), 45 USCA §155 (1940). Also, see Title I, §7, 48 Stat. 1197 (1934), 45 USCA §157 (1940).

[34] Statute cited Note 18, *supra.*

[35] *Virginian Ry. Co. v. Federation No.* 40, 84 F. (2d) 641, 625 (CCA 4th 1936).

[36] Joseph B. Eastman, who was then Federal Coordinator of Transportation, stated, "As the present act reads, a railroad, by rejecting the Board of Mediation's final recommendation to arbitrate the dispute, is enabled to change the rates of pay, rules, or working conditions arbitrarily, prior to the issuance of an order by the President appointing a fact-finding board and maintaining the status quo for 60 days. The only way the employees can now guard against this possibility is for them to be forehanded and arm themselves with a strike vote prior to the termination of mediation, obviously a very unsatisfactory expedient, so as to enable the Board of Mediation to certify to the President that an interruption to interstate commerce threatens, thus enabling him in turn to issue an executive order before the railroad can change the status quo. The railroads have taken advantage of this unintentional hiatus in the present law in several instances. The change now proposed is designed to plug this hole." See also Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, May 22 *et seq.*, 1934, on page 50.

[37] 48 Stat. 1197 (1934), 45 USCA §160 (1940). "After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made *by the parties* to the controversy in the conditions out of which the dispute arose (emphasis supplied)."

[38] *Texas & N. O. Ry. Co. v. Brotherhood of Railroad Clerks,* 281 U.S. 548 565-567 (1930). ("It is thus apparent that Congress, in the legislation of 1926, while elaborating a plan for amicable adjustments and voluntary arbitration of disputes between common carriers and their employees, thought it necessary to impose, and did impose, certain definite obligations enforceable by judicial proceedings.")

[39] For the Congressional intent of §10 see Hearings before the House of Representatives Committee on Interstate and Foreign Commerce, H.R. Rep. No. 328, 69th Cong., 1st Sess. (1926). *Cf.* Emergency Board No. 62's Report to the President, pp. 24-26 (the Board felt that §5 was not binding on both parties, that "wages, working conditions, and established practices" were within the exclusive control of the carrier.)

For the purposes of argument assuming that the section 5 amendment is meant to be binding on both the parties, then, when does the thirty day period begin to run? Does it begin after arbitration is refused or after the Mediation Board sends its notice? Grammatically, "if arbitration . . . shall be refused" is the introductory clause to the provision, and would seem to be a condition precedent to the two following conditions, namely, that the Board shall give notice of its failure of mediatory efforts, and secondly, that no changes shall be made in the rates of pay, working conditions, etc. This would mean that the thirty days would begin to run from the date arbitration is refused. The words "and for thirty days" are followed by the word "thereafter" which must refer to the Board's giving notice, which is found in the same clause. What was presupposed, then, was that notice of the failure of mediatory efforts and the refusal of arbitration were to be simultaneous. The giving of notice by the Mediation Board must be a ministerial duty to inform the parties. Failure of the Board to execute this duty probably was not intended to bind the parties. Therefore, from the facts of this case, *i.e.*, where the refusal to arbitrate came more than thirty days before the notice that the Board's efforts had failed, the union, even if it were bound by this provision, would not violate the Act by going on strike when it did.

CONCLUSION

It seems evident that the carrier violated applicable provisions of the Railway Labor Act, as the Emergency Board so found.[40] The carrier's arguments which would have read Taft-Hartley leniency into the Act applicable to air carriers have dissipated in view of recent Congressional activity in the field of labor law unless some Taft-Hartley policy is retained in the new bill. Section 401(1) (4) of the Civil Aeronautics Act provides: "It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with title II of the Railway Labor Act, as amended.[41] Given a violation of the Act, the ramifications of this statute are open to speculation.[42]

WALTER S. DAVIS, JR.*

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[40] "A) The Board, therefore, recommends that the striking pilots be reinstated as working employes. b) The Board further recommends that paragraph (m), page 23, of the agreement between National Airlines, Inc., and the Air Line Pilots in the service of the National Airlines, Inc., effective December 9, 1941, be amended and supplemented to the end that in case the said System Board of Adjustment becomes deadlocked and unable to reach a decision on any matter properly coming before it, either party may thereupon petition the National Mediation Board for the appointment of a neutral referee to sit with the System Board of Adjustment, as a member thereof. Such System Board of Adjustment as then constituted shall hear the parties with reference to the dispute pending before it, de novo, and a majority vote of the Board shall be final and conclusive between the parties. c) The Board also recommends that the O'Neal dispute be finally determined pursuant to the agreement of the parties dated May 14, 1947, by the System Board of Adjustment augmented by a neutral member to be appointed by the National Mediation Board." Emergency Board No. 62's Report to the President, pp. 15-16.

[41] 52 Stat. 937 (1938), 49 USCA §481 (1943).

[42] The pilots strike remained unsettled. On September 28, 1948, the CAB initiated a formal investigation to consider the advisability of awarding National's routes to other carriers. CAB Order, Serial E-2025. Subsequently, the pilot strike was settled by mediation in which James M. Landis, former Chairman of CAB, played a major role. American Aviation Daily, Nov. 26, 1948, p. 136. The settlement involved a plan whereby deadlocks in the system board of adjustment will be abolished by the appointment of an arbiter. Mr. Behncke, President of ALPA, indicated that this procedure might be written into all future airline contracts.

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