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THE RAILWAY LABOR ACT — A MISFIT FOR THE AIRLINES

By MALCOLM A. MACINTYRE


LABOR-MANAGEMENT relations in the United States are today governed by two statutes, the Railway Labor Act, as amended,¹ and the Labor Management Relations Act of 1947 (Taft-Hartley Act)² which amended the National Labor Relations Act (Wagner Act).³ Few realize that common carriers by air are governed by the Railway Labor Act which was extended to cover them and their employees in 1936.⁴ This statute was initially enacted in 1926 and embodied principles developed over a long period of years within the railroad industry. During the 20's and 30's it represented the most advanced and successful example of labor legislation but was predicated upon the pattern of relationship and stability of organized labor that existed in the railroad industry.⁵

The Wagner Act, and its successor the Taft-Hartley Act, have now emerged as the dominant law of industrial relations. The policies of the Railway Labor Act are substantially different in many respects from those of the Wagner Act and the Taft-Hartley Act. While it may be appropriate for different policies to be applied to labor-management relations in the railroad field than to such relationships generally, it is appropriate to re-examine the application of the Railway Labor Act to common carriers by air since its extension to them has not been a complete success. This has been due not only to problems created rather than solved by the Railway Labor Act but also to basic difficulties in the statute itself which have recently become more apparent, particularly when contrasted with the Wagner Act and the Taft-Hartley Act.

⁵ See Byrer, "The Railway Labor Act and the National Labor Relations Act, a comparison," 44 W. Va. L.Q. 1 (1937). This comparison of the two statutes evidences considerable distrust of the cumulative features of the National Labor Relations Act and faith in the established procedures of the Railway Labor Act.
The Railway Labor Act is exceedingly clear in terms of the railroad carriers and subsidiaries thereof on which duties and responsibilities are imposed. The Interstate Commerce Commission is explicitly vested with authority to determine who are "employees" so far as the railroads are concerned. Certain companies controlled by the railroad carriers are made subject to the Act and those only. Such clarity of coverage does not exist in the case of the airlines.

In extending the Act to the airlines, Section 202 provided that the rights and duties of the Act should extend to the employees of a common carrier by air "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." Such definition of the term "employee" is restricted, among other things, to one "who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission". In addition, Section 201 of the Act provides that the rights and duties of the original Act are extended to

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6 45 U.S.C. 151, First (1946) provides: "The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier': Provided, however, That the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term 'carrier' shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities."

7 45 U.S.C. 151, Fifth (1946) provides: "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 authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: Provided, however, That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission. The term 'employee' shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple."


9 Supra, Note 7.
"every air pilot or any other person who performs work as an employee or subordinate official of such carrier or carriers * * *."\(^\text{10}\)

It can be argued that the Interstate Commerce Commission is empowered to determine who are the "employees" of the air carriers subject to the Act. But this would not seem to make practical sense when the agency primarily concerned with its administration is the National Mediation Board and the Civil Aeronautics Board is the agency designated by law to control airline operations and such economic phases thereof as are to be regulated.\(^\text{11}\) It may be equally argued that Sections 201 and 202, read together, have the simple effect of creating an objective standard with respect to which no agency has any power of administrative determination. Compoundng the confusion, the National Mediation Board believes that as a matter of law it alone has the power to determine who are "employees" for the purposes of the Act.\(^\text{12}\)

It is unfortunate that such ambiguous statutory language exists for many vital questions depend upon the orderly determination of those who are "employees" subject to the Act. Nobody knows where management ends and "employees" begin. The extent to which personnel employed by an airline are subject to the Railroad and Airline Wage Board established by the Defense Production Act of 1950, as amended, is dependent upon the extent to which they are "employees" subject to the Railway Labor Act."\(^\text{13}\) The same uncertainty exists in relation to personnel employed by corporations owned or controlled by common carriers by air. The literal definitions applicable to railroads in Section 1, first, of the Act would exempt any subsidiaries or commonly controlled corporations unless they are engaged in activities related essentially to the handling of property transported by the airline.\(^\text{14}\) It has been held by the Court of Appeals for the Eighth Circuit that personnel employed by a common carrier by air to modify bombers for the Air Forces and therefore not engaged in an activity directly related to the furnishing of air transportation were subject to the Fair Labor Standards Act of 1938 notwithstanding the express exemption provided by such Act in respect to any employees covered by the Railway Labor Act.\(^\text{15}\)

There is therefore no clear-cut administrative manner in which

\(\text{\textsuperscript{10}} 45 \text{ U.S.C. 181 (1946).}\)
\(\text{\textsuperscript{11}} 52 \text{ Stat. 977 (1938), 49 U.S.C. \S 401 et seq. (1946).}\)
\(\text{\textsuperscript{12}} \text{See 14 National Mediation Board Annual Report 8 (1948).}\)
\(\text{\textsuperscript{13}} \text{See Northwest Airlines, Inc. v. Jackson, 185 F. 2d 74 (8th Cir. 1950) in which the court held that employees of Northwest Airlines, Inc. employed in a bomber modification plant during the war were not exempt from the Fair Labor Standards Act of 1938 which contained an exemption from its provisions as to employees subject to the Railway Labor Act. The court held that the activities involved were not such as to bring the particular employees within the Railway Labor Act, even though the employer was an airline and obviously its employees directly engaged in air transportation were under the Railway Labor Act and, therefore, exempt from the Fair Labor Standards Act of 1938.}\)
\(\text{\textsuperscript{14}} \text{See Sec. 105 of the Defense Production Act Amendments of 1951, 50 U.S.C.A. App. \S 2103.}\)
\(\text{\textsuperscript{15}} \text{See Note 6 supra.}\)
"management" or "employer" may be separated from "labor" or "employees" for purposes of labor-management relations. While, some employees of air carriers or their subsidiaries are probably governed by the Labor-Management Relations Act of 1947, most are governed by the Railway Labor Act and others are in a completely uncertain category. Such ambiguity and division of jurisdiction is hardly conducive to good labor relations and places management in the awkward position of adhering to the differing policies of the two statutes hereafter discussed as well as resolving the question of applicability.

**REPRESENTATION AND RECOGNITION**

The Railway Labor Act makes it unlawful for an employer not to recognize representatives of his employees for collective bargaining purposes. He must make and maintain agreements negotiated with such representatives acting on behalf of his employees. The statute was, however, adopted at a time when unions were generally recognized in the railroad industry. Consequently, no suitable machinery was set up for situations where there had previously been no organized union. The statute did, however, contemplate that there might be jurisdictional problems as between two competing unions and Section 2, ninth, of the Act made it the duty of the National Mediation Board to investigate and certify the authorized representatives of a carrier's employees "if any dispute shall arise among a carrier's employees as to who are the representatives * * *." 17

Historically, when the Act was extended to the airlines in 1936 only the pilots were organized into a union. As a consequence, the National Mediation Board strained to expand its jurisdiction beyond that of jurisdictional disputes and adopted the concept that when a group of employees requested recognition there was a dispute "among a carrier's employees as to who are the representatives." This concept was based on the assumption that since some employees wished a union and others presumably did not, a controversy among employees must be assumed to exist. However, the language of the statute excludes the employer as a party to the election procedure. Initially at least the National Mediation Board did not even bother to provide a ballot that permitted an alternative vote. Even today the form of ballot does not provide a "no union" alternative but only the alternative heading "Other Organizations or Individuals" the use of which requires a spelling out by the voter of an affirmative choice or his ballot

18 The Air Lines Pilots Association (ALPA) was formed in 1930 and by 1932 included in its membership three-fourths of the nation's scheduled airline pilots. Northrup, "Collective Bargaining by Airline Pilots" 61 Q.J. Econ. 533, 554 (1947).
19 See Chicago & So. Airlines, Inc. National Mediation Board Release No. 1827 (June 4, 1947). See also McNulty v. National Mediation Board et al., 18 F. Supp. 494 (DC, ND New York, 1936), in which the court found that an election conducted by the National Mediation Board under the discretionary powers con-
is voided. Once having invoked such a strained construction of the Act to cover situations not clearly contemplated, the National Mediation Board has had to go further and informally adopt collateral policies in respect to a minimum time within which it will not reopen any certification made by it and a minimum number of employees, i.e., a majority, who must have voted before it will certify any union as the representative of any group of employees.

Such a course of events has highlighted a further rigidity affecting the determination of bargaining units. Railway labor is organized along horizontal rather than vertical lines. This was recognized as the existing method of organization in Section 2, fourth, of the Act, which gives "the majority of any craft or class of employees" the right to determine the representatives of the "craft or class." As a consequence, the National Mediation Board has found itself in any event without authority to certify a union as representative of an industrial unit so that horizontal organization along the lines established in the railroads has in fact been the sole method of organization within the airlines. The rigid application of the craft type of union structure is in sharp contrast to the variety of organization permitted under the Wagner Act and the Taft-Hartley Act.

The Supreme Court has ruled in two cases that there is no judicial review of the certification by the National Mediation Board as to bargaining representatives designated under Section 2, ninth. The employer has been excluded as a party to any such proceedings but even those who are parties are therefore barred from any right to review whatsoever. The extension of such power, judicially determined to be final, to matters not initially contemplated to be within such power is hardly a satisfactory method of administration, however well motivated the extension of power.

Mediatory Process

The Railway Labor Act contemplates what might be called a series of "cooling-off" phases in the negotiation of agreements. Indicted on it by subdivision Ninth of Section 2 of the Railway Labor Act was unfair in that the form of ballot used did not present alternatives appropriate to the controversy. The court dismissed the complaint seeking a mandatory injunction to enforce the order of the National Mediation Board recognizing the particular union because of the unfair ballot. At the same time the court dismissed the cross-complaint of the railroad to enjoin such order on the ground that the employer did not come into court with clean hands.


21 American Airlines Employees NMB Release No. R 1447 (Oct. 1, 1945). This decision relies to a great extent on Switchmen's Union v. NMB, 135 F. 2d 785 (1943), rev'd on other grounds, 320 U.S. 297 (1943) which contains an extended discussion of the precise content of the phrase "craft or class" and distinguishes it from the broader authority conferred on the National Labor Relations Board to decide whether the appropriate unit shall be the "employer unit, craft unit, plant unit, or subdivision thereof." 49 Stat. 449 (1935), 29 U.S.C. §159(b) (1946).


tially, the parties must make every effort to reach agreement between themselves. If they are unable to do so, the National Mediation Board at the request of either party, or on its own motion, shall proffer its services in an attempt to mediate the controversy. It must then offer arbitration if agreement is not reached. Finally, failing acceptance of the offer to arbitrate, the National Mediation Board may request the appointment of a Presidential Emergency Board. To preserve the status quo during this process, certain restraints are provided, the extent and nature of which are unclear in some respects and, where clear, somewhat inequitable.

After notice of initiation of negotiations and until ten days after such conferences have ended or until the National Mediation Board has determined that its role as mediator has ended, if mediation is requested or proffered, “rates of pay, rules or working conditions shall not be altered by the carrier.” But, if mediation is undertaken by the National Mediation Board and notice is given to the parties that mediation has failed, then for “thirty days no change shall be made in the rates of pay, rules or working conditions or established practices in effect prior to the time the dispute arose.” The inclusion of the words “by the carrier” in respect to the initial period may be argued to justify the conclusion that the union is then free to strike. But such a line of reasoning should also mean that the union is not free to strike during the thirty days subsequent to mediation when the words “by the carrier” are omitted. The history and spirit of the Act would not seem to support such an impractical version whereby a party is free to strike when efforts towards settlement are being made but not free to strike when they are concluded.

One of the purposes of the 30-day truce subsequent to mediation is to permit the creation of a Presidential Emergency Board which may be appointed under the Act when mediations have failed and the President deems it appropriate. It is very clear under the provision authorizing such boards that so long as such board is in existence and, in fact, for thirty days after it has made its report to the President, no strike, lockout or other change in relationship of the parties is anticipated. As to this period, the provision is that “no change except by agreement shall be made by the parties to the controversy in the conditions out of which the dispute arose.”

There are therefore three different descriptions of the “cooling-off” that is enjoined for the three different periods of time. Not only does the changed phraseology raise questions as to who is enjoined but also what is enjoined. For the first period, it is clearly “rates of pay, rules

26 Ibid.
or working conditions." For the second period, it is "rates of pay, rules, working conditions and established practices." Finally, for the last period, it is "the conditions out of which the dispute arose."

It seems difficult indeed to justify the differing descriptions of scope and applicability as to parties for the three periods of time when restraints are intended to be imposed since the results are presumably intended to be identical. Unhappily, the different descriptions have led to considerable and substantial differences of interpretation.

In one instance, the introduction of a new type airplane into service while a Presidential Emergency Board was sitting was alleged by the union to be a violation of the Act since it would constitute a change "in the conditions out of which the dispute arose." The previous contract between the union and the company involved had contemplated the operation of such type airplane and contained formulas for pay and working conditions with respect thereto. The company's position was that, although such previous contract had by its terms ended, the relationship that it established for purposes of rates of pay and working conditions remained binding on both parties so as to justify the operation of an airplane that had been contemplated to be operated under the contract even though previously not placed in service.

Such inconsistency and ambiguity of language not only lead to very serious practical difficulties, but leave the parties with no effective or expeditious manner of definite interpretation. It is very likely that the only party that could resort to the courts to enforce the cooling-off periods would be the government. The Norris-LaGuardia Act\(^\text{81}\) forbidding injunctions in labor disputes probably prevents both the employer and the union from resort to courts by way of injunction

\(^\text{81}\) Section 8 of the Norris-LaGuardia Act (29 U.S.C.A. 108) provides as follows:

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

and Section 7 of such Act (29 U.S.C.A. 107) provides as a precondition to the issuance of any injunction in a labor dispute the following findings of fact:

"(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

"(b) That substantial and irreparable injury to complainant's property will follow;

"(c) That as to each item of relief granted greater injury will be inflicted upon defendants by the granting of relief;

"(d) That complainant has no adequate remedy at law; and

"(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."
RAILWAY LABOR ACT — AIRLINE MISFIT

which alone could expeditiously resolve the issues. The government would very likely not be a proper party unless it had taken possession of the airlines as it can do in time of war. The courts are, however, somewhat sympathetic to avoid this bar to employers and unions as is indicated by the decision of the Supreme Court in Virginian Railway v. System Federation No. 40, 300 U.S. 1515 (1937) in which an injunction was granted to a union and the Norris-LaGuardia Act held inapplicable on the ground that the provision of the Railway Labor Act sought to be enforced was amended in 1934 and could not "be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act." The same position was taken in Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232 (1949) granting an injunction to prevent discrimination against negro employees, although no reasons for the inapplicability of the Norris-LaGuardia Act were stated.

In any event, the mediatory process culminating in the recommendations of a Presidential Emergency Board depends upon public opinion to buttress the acceptance by both parties of any such recommendations. This original intention has been undermined through the increasing intervention, as a court of appeal, of the executive branch of the government which first occurred in 1941. In three recent instances, the recommendations of Presidential Emergency Boards in airline disputes did not bring about settlements of the disputes. Even the executive branch of the government was unable to secure agreements between the railroads and the unions in 1943 and 1948 until the government had taken possession of the railroads. A complete breakdown of the concepts of the Act finally occurred in January, 1951 when a "mysterious sickness" paralyzed the railroad switchmen after a Presidential Emergency Board had made its recommendations, the Secretary of the Army had seized the railroads and an apparent settlement had been made under direct presidential supervision.

COLLECTIVE BARGAINING AGREEMENTS

Above all else, it would seem that a law governing labor-management relations should create a framework for clear-cut bargaining and stability of agreement once made. This the Railway Labor Act does not do.

32 See Brotherhood of Railroad Trainmen v. Toledo, Peoria and Western Railroad, 321 U.S. 50 (1944) in which it was held that an employer who sought to settle a dispute by negotiations or mediation but refused to submit it to arbitration under the Labor Act is deprived of any right he might otherwise have to an injunction since in Norris-LaGuardia Act, supra, Footnote 31, it cannot be construed "to require reasonable effort by only one conciliatory device when others are available."


34 See Northrup, supra, note 18 at 558 and 562 concerning the Trans-World Airlines 1946 pay dispute and the National Airlines strike of 1948. In addition the recommendations of the Presidential Emergency Board established in 1951 to consider the American Airlines dispute with its pilots were not accepted by the union. See the even exhaustive summary of the breakdown of the Emergency Board concept in Frankel's note "Airline Labor Policy, The Stepchild of the Railway Labor Act," 18 J. Air L. & Com. 461 ·(1951).

35 See Footnote (33) supra.
There is in the first place, a major question under the Act as to whether an agreement made thereunder can provide, by its terms, for a fixed date of termination. The Labor Management Relations Act of 1947 on the other hand expressly authorizes such agreements but provides for at least a sixty-day notice of termination.\textsuperscript{36}

It is the custom for airline union agreements to be written for a fixed term, renewable unless notice of an intended change is given as required under Section 6 of the Act.\textsuperscript{37} On the other hand, it is the custom for railroad union agreements to be by their terms of indefinite duration with the right to serve notices of intended change as so required by Section 6 of the Act. This latter custom is consistent with the theory advanced by some that fixed term contracts are of questionable validity under the Act. The reasoning is that a right, as well as an obligation, to give notice of intended changes is created by Section 6 of this Act so as, in effect, to entitle the terms of any contract to be reopened at any time — and that such right cannot be waived.\textsuperscript{38}

The difficulty with the theory is that it creates the greater problem as to when, if ever, an agreement ends. It would presumably end when superseded by a new agreement, but it equally presumably is still in effect even after the mediatory process is concluded and the employer and employees are free to indulge in strikes or lockouts as they see fit. This leads to the illogical position that both parties are bound to an agreement as to wages, but, on the other hand, are free to engage in strikes or lockouts notwithstanding such agreement.

Such a result would neither seem to make good law nor good sense and quite apart from its illogic would not seem to strengthen the stability that flows from the binding nature of an agreement so long as it is in force. Furthermore, it seems equally impractical to consider fixed term agreements invalid when at the same time as a corollary their invalidity is based upon a right to renegotiate terms the day after they have been agreed to and, subject only to the mediatory process, to be free to engage in a strike or lockout even before the intended period of agreement has run.

The question is far from an academic one not only because of its psychological effect upon the stability of relationships but because the legal rights and obligations of the parties are quite different if a strike or lockout occurs. If an agreement that has terminated by its

\textsuperscript{36} The Taft-Hartley Act makes it an unfair labor practice to terminate a contract unless notice is given sixty days prior to its expiration date. 61 Stat. 136 (1947), 29 U.S.C. §158(d) (Supp. 1950).

\textsuperscript{37} 45 U.S.C. 156 (1946).

\textsuperscript{38} The contention apparently is that the provisions of subdivision First of Section 2 making it the duty of carriers "to make and maintain agreements concerning rates of pay, rules and working conditions," must be read with the provisions of Section 6 reciting that carriers and representatives of employees shall give at least 30 days' written notice of "an intended change in agreements affecting rates of pay, rules or working conditions." It is then contended that so read together any agreements made (1) may not waive any rights to reopen for changes during a fixed period of time, and (2) must, in effect, be contracts of indefinite duration.
terms is still in effect through operation of law because of the invalidity of its termination provision, the employer may not be free to hire permanent replacements or take other steps available to him when free from contractual obligations. Similar disabilities can fall upon a union under the same circumstances.

In the second place, the scope of matters that are obliged to be negotiated by collective bargaining is indefinite and there is no administrative tribunal to which the parties can turn for expert adjudication of the problem when it arises. It was pointed out in Inland Steel Co. v. National Labor Relations Board, 170 F. 2d 247 (7th Cir. 1948; certiorari denied 336 U.S. 960) that the obligations to bargain under Section 2, first, of the Railway Labor Act covered "rates of pay, rules and working conditions," whereas the Labor-Management Relations Act of 1947 covered "rates of pay, wages, hours of employment or other conditions of employment." The court specifically commented that the provisions of the Labor-Management Relations Act of 1947 were broader and more particularly that the word "wages" included something more than "rates of pay." There is considerable reason to believe that the issue of what must be negotiated in good faith will arise with more frequency as more and more fringe benefits and like rights are attempted to be negotiated. There would seem to be very little reason why there should be two separate national policies in respect to the scope of bargaining, particularly when applied to companies which may in part be under the jurisdiction of each of the statutes involved.

GRIEVANCES

There is no concept of an "unfair labor practice" under the Railway Labor Act, much less any governmental agency to which as a matter of right practices or acts leading to labor-management controversies can be submitted for administrative determinations. There is, however, a distinction attempted to be made between what might be called major matters of controversy between a carrier and its employees and minor controversies.

Major controversies are in essence rates of pay, rules and working conditions, concerning changes in any of which the Act contemplates voluntary settlement by negotiation and the mediatory processes of the Act. Minor controversies are by implication classified as grievances or interpretations of the application of agreements concerning rates of pay, rules or working conditions. As to this latter class of controversies so defined elaborate machinery is provided for settlement through what is called a National Railroad Adjustment Board, composed equally of management and labor, in the case of the railroads, and

39 The National Labor Relations Board has been involved in other aspects of the same problem. See Aluminum Ore. Co. v. NLRB, 131 F. 2d 485 (4th Cir. 1942); NLRB v. J. H. Allison Co., 165 F. 2d 766 (6th Cir. 1948).
40 45 U.S.C. 155 First (a) (b) (1946).
by individual boards, similarly composed and set up jointly by a union and an airline in the case of the air carriers. The National Mediation Board may, but has not, set up a single agency for the airlines similar to the National Railroad Adjustment Board although it has the power to do so.

While the general purpose of this differentiation in controversies that may arise is clear, there are two very basic defects. In the first place, the distinction between a "grievance" and the matters contemplated to be negotiated has become more and more obscure. Very little light has ever been cast on the question of what is a "grievance" by any tribunals — judicial, administrative or otherwise. It is perhaps understandable that this should be so. Parties to labor disputes considering "grievances" desire to dispose of such controversies without injecting highly technical arguments in respect to their nature. But as industry grows more complicated and unions more sophisticated the issues that are encompassed by "grievance" shift from those of a personalized nature of little or no precedent to those involving principles of a far reaching nature. As an example, the right of an employer to subcontract his work, which is a fundamental right of management unless curtailed by agreement, can, when exercised, directly cause a loss of jobs or consequential shifts of assignment which may, with some equity, be considered "grievances." Again, the concept of "grievance" may be virtually unlimited in the mind of one person and yet equally sincerely be limited to more minor issues in the mind of still another person.

Since the Adjustment Boards created under the Act are primarily composed of laymen there is, rightly from their viewpoint, a disposition to settle whatever may be placed before them as a "grievance" on the basis of the particular effect upon the particular persons involved without regard to precedent or principle. More and more this leads to an overlapping into the area of matters that should be treated by negotiation and continually obscures rather than clarifies the concept of "grievance."

On the other end of the scale there are matters which, while clearly not matters for negotiation under the Act, may still not be worthy of being treated as a "grievance." Personal whims and dislikes of others are good examples. In many instances, it would seem unwise to provide by law that any matter which in the sole opinion of one individual was a "grievance" should necessarily and as of right be entitled to be

45 See Hughes Tool Company v. National Labor Relations Board, 15 L.R.R.M. 852 (CCA 5th 1945), in which the court distinguished "grievances" from "rates of pay, wages, hours of employment and other conditions of employment" as to which collective bargaining was imposed by the National Relations Act. See also the attempted definition of "grievance" in Texas & P.R. Co. v. Brotherhood of Railway Trainmen, 60 F. Supp. 263 (W.D. La., 1945) and also the opinion of Rutledge, J. in East Joliet R.R. Co. v. Burley et al. 325 U.S. 711 (1945) in which he attempts to differentiate between disputes over "grievances" and disputes over the formation of collective bargaining agreements or efforts to secure them.
heard before a formal tribunal and thereby treated as a matter requiring semi-judicial determination.

One effect of the Railway Labor Act is, therefore, to create an overlap between matters requiring negotiation and on the other hand matters requiring semi-judicial determination through agencies created for that purpose. A collateral effect caused also by the concept of "grievance" is to place an importance upon some controversies which may not be deserved.

Furthermore the supposedly binding procedure imposed for the handling of "grievances" has constitutional limitations. It has been held by the Court of Appeals for the District of Columbia that the decisions of system boards created by the airlines as required by the Act are not binding if the "grievance" concerns a person not a member of the union whose representatives together with those of the employer comprise the system board that heard the "grievance."46

R**EMEDIAL FORUM**

The greatest weakness of the Railway Labor Act probably is its failure to provide a forum of an administrative nature for interpretations and enforcement of the obligations imposed on the employers and employees that are subject to the Act.

Section 2 of the Act establishes certain general duties and rights for both employers and their employees.47 They must both make every reasonable effort to enter into agreements governing rates of pay, rules and working conditions. They must not interfere with one another in the free choice of representatives. They must confer on reasonable notice when disputes of a major character arise. Employees are given the right "to organize and bargain collectively through representatives of their own choosing."

Certain duties are imposed on the employers alone. They must not interfere with the right of their employees to reason and bargain. They must treat with the duly certified representatives of their employees. These rights and duties are substantially analogous to those arising under the Labor-Management Relations Act of 1947.48

That Act, however, creates the National Labor Relations Board with exclusive primary jurisdiction to investigate and issue cease and desist orders for the correction of unfair labor practices and otherwise to administer and interpret the Act.49 No such forum exists within the framework of the Railway Labor Act.

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46 See Edwards v. Capital Airlines, Inc. et al., 176 F. 2d 755 (D.C., C.A. 1949; cert. denied 338 U.S. 885) in which an appeal was allowed from a decision of a System Board of Adjustment set up by contract between the union and the airline employer under a provision that decisions should be "final and binding" upon the ground that the appellants were non-union employees unrepresented on such System Board of Adjustment, union members of which had a conflicting and different interest than that of the non-union employees.

47 See Footnote 16 supra.


49 These orders may be enforced in the courts of appeal. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
Enforcement and interpretation of the provisions of the Railway Labor Act involves a patchwork of possible method and in some instances no method at all. The Supreme Court has taken the position that the courts alone have jurisdiction to enforce what it calls the "commands" of the union, not its "policies." The duties on the part of carriers and representatives of employees to make and maintain agreements and settle disputes are apparently "policies" only. The certification by the National Mediation Board of a union as the representative of the employees of a particular craft or class is on the other hand a command.\textsuperscript{50} It is also the only matter under the Act in respect to which the National Mediation Board is given express power of administrative determination.\textsuperscript{51}

The distinction between "command" and "policy" is, however, one whose practical application can for the most part only be resolved at the risk of criminal penalties or by seeking an equitable remedy of injunction that may well be barred by the Norris-LaGuardia Act.\textsuperscript{52} Under the circumstances, there are likely to remain unresolved many practical questions whose solution by an administrative agency would ease tensions that are otherwise bound to encumber labor-management relations. Do the unions have a duty to bargain with the carriers?\textsuperscript{53} Is a unilateral wage increase during collective bargaining an employer unfair labor practice?\textsuperscript{54} Such questions as these that have actually arisen but remained unresolved are only symptomatic of the many other questions that are inherent in the language of the Act.

\textsuperscript{50} See \textit{General Committee v. Missouri-Kansas-Texas R.R. Company et al.}, 320 U.S. 323 (1943) at p. 337, where the Court, after pointing out that certification of a bargaining agent by the National Mediation Board was a "command" enforceable in the courts whereas the provisions of subdivision First of Section 2 imposing a duty on carriers to make and maintain agreements was a "policy," went on to state that:

"In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforceable in the courts should be implied. Unless that test is made the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be expected where Congress still places such great reliance on the voluntary process of solution, mediation and arbitration. * * * Courts should not rush in where Congress has not chosen to tread."

\textsuperscript{51} There is, however, some jurisdiction granted under the Railway Labor Act to the National Mediation Board to interpret collective bargaining agreement. Subdivision Second of Section 5 (45 U.S.C.A. 155) provides as follows:

"In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this Act, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days."

\textsuperscript{52} See Footnote 32, supra.


\textsuperscript{54} Note, 16 J. Air L. & Com. 113 (1949).
Section 2, tenth, of the Act, makes a willful violation of most of the duties prescribed by that section a misdemeanor in the case of the employer and provides for penalties and fines or imprisonment. The criminal sanction is not applied to willful violations on the part of a union or the employees, but it is more than possible for the employer to be risking criminal action when the ambiguity of the Act itself may be at stake. Further, from the point of view of the employer, an even more serious risk where bona fide differences of interpretation arise is contained in the Civil Aeronautics Act of 1938, which provides in Section 401(1) that "it shall be a condition precedent to the holding of a certificate of any air carrier that such carrier shall comply with Title II of the Railway Labor Act, as amended."

The failure to provide administrative machinery for expeditious interpretation of the Act as well as a forum for its enforcement is, therefore, paralleled by the existence of prospective penalties completely disproportionate to the controversies of interpretation that may arise in good faith. Revocation of a carrier's license would no doubt effectively penalize the carrier but would also remove the employees' possibility of employment. Criminal trials to invoke fines and imprisonment are hardly suitable for either prompt or sensible determination of matters of interpretation. In short, the cure is worse than the disease and no doctor has been prescribed to whom the patients may turn.

CONCLUSION

It is clear that in extending the Railway Labor Act to common carriers by air, problems have been created for the airlines that do not exist in the case of railroads. 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. The framework for recognition and representation in an industry not yet stabilized as to its function nor unionized in a set pattern is inadequate. The ability to achieve periods of stable relationships is

55 Sec. 2, Tenth, of the Railway Labor Act makes a failure or refusal of a carrier and its officers or agents to comply with the terms of certain provisions only of that Section to be misdemeanors punishable by a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both, for each offense and each day during which the offense continues. The provisions that are so subject to criminal punishment are those with respect to freedom from coercion by the employer of a selection of representatives of the employees, right of the employees to organize and bargain collectively, prohibition against an employer requiring any person seeking employment to agree not to join a labor organization, the prohibition against the carrier changing rates of pay rules of working conditions embodied in agreements except as permitted by the Act, and the requirement that each carrier shall by printed notice notify its employees that all disputes will be handled in accordance with the requirements of the Act.

56 52 Stat. 991 (1938), 49 U.S.C. 481 (1)(4) (1946). See also Kahn, "The National Airlines Strike," 19 J. Air L. & Com. 11, (1952), in which he points out that as a consequence of a complaint filed with the Civil Aeronautics Board felt it had a duty to determine whether the carrier had violated the Railway Labor Act.
uncertain because of the possible invalidity of agreements binding by their terms for a fixed period. The attempted differentiation of major and minor disputes, hinged around the indefinite concept of "grievance" as a minor dispute, leads only to confusion not susceptible to expert clarification through the informal joint boards imposed upon the airlines.

Above all else, the lack of a remedial forum for both employees and employers that can expertly administer the relationships intended by the Act and both interpret and enforce its provisions is a basic weakness. The difficult choice of remedies by an aggrieved party, and indeed the lack of them in many instances, coupled with the existence of penalties disproportionate to the potential crime of an erroneous interpretation of ambiguous provisions, is archaic and inequitable to all concerned. Such a framework would not seem to be conducive to the development of the most sensible labor-management relations in a new and growing industry, however satisfactory in the more stabilized railroad industry.

Clarification of the framework created for the airlines by the Railway Labor Act inevitably raises the question whether it would not be simpler to place them under the dominant labor law of the land rather than to continue to treat them as an appendage to the railroads. There would seem to be little advantage in the split jurisdiction that the airlines face. There would seem to be substantial advantage in removing them from the jurisdiction of the Railway Labor Act. A remedial forum would be created. Stability of contract would be assured. Scope of bargaining would be the same as in labor relations generally. Mediatory processes would still be available as would fact-finding boards, but in a manner more equitable to all. Organization could be more flexible and responsive to the growing pains and changes in the industry through discretionary administrative authority. Other attendant advantages would accrue in the way of immediate application of more modern concepts, such as the union shop and check-off, which had been prohibited under the Railway Labor Act until specifically permitted by amendment in 1951.\(^7\)

In short, the ambiguities and inequities in the application to the airlines of the Railway Labor Act would for the most part be resolved by the simple expedient of applying to them the Labor-Management Relations Act of 1947, which represents the dominant law governing industrial relations and will more likely always represent and reflect the more modern concepts applicable to labor-management relations supported by experience and public opinion.

\(^7\) Public Law No. 914, 81st Cong., 2d Sess. (Jan. 10, 1951).