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Hit and Run Strikes - Protected Activity or Suicidal Actions under the Railway Labor Act

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HIT AND RUN STRIKES—PROTECTED ACTIVITY OR SUICIDAL ACTIONS UNDER THE RAILWAY LABOR ACT?

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I. INTRODUCTION

THE RAILWAY LABOR Act (RLA)\(^1\) is one of the more arcane statutes governing labor relations. Because of the limited number of employers subject to the RLA, few practitioners, and even fewer judges, understand its purpose and properly interpret its provisions. In recent times, most people have heard about the RLA in connection with labor disputes in the airline industry.

In the past year, two airline labor disputes have highlighted the problems with interpreting the RLA and determining which actions by unions should be given protected status and which should be prohibited. In June of 1993, the flight attendants at Alaska Airlines obtained the right to strike. However, instead of calling for a general strike, in which all flight attendants would walk off the job, the union initiated a campaign to “Create Havoc Around Our System”\(^2\), referred to as CHAOS. This campaign consisted of intermittent and sporadic work stoppages at unpredictable times.

The second dispute involved American Airlines flight

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attendants who walked off the job just prior to Thanksgiving Day. If President Clinton had not forced the carrier to commit to arbitration and end the strike, the strike would have lasted only a few more days. In addition, the union indicated that they might call additional general strikes in the future. Whether or not this intermittent activity would have been illegal was never determined.

In order to properly analyze the legitimacy of intermittent and partial strikes under the RLA, it is necessary to review the legislative history of the RLA and the decisions under the National Labor Relations Act\(^3\) (NLRA), the labor statute applicable to most other employers in the United States. Although decisions under the NLRA are not automatically applicable to the RLA, many of those decisions analyze concepts that arise under both statutes, and the courts frequently rely upon previous NLRA decisions to guide them in the interpretation of the RLA.

Based upon this review, a strong argument must be made that intermittent and partial strikes should gain no protection under the RLA. Furthermore, employers should be free to discipline or discharge employees who engage in such activity and should be free to obtain injunctive relief to enable them to continue to operate in a manner consistent with that required by the authors of the RLA.

### II. LEGISLATIVE HISTORY OF THE RLA

In the late 1800s, the railroads performed a critical function in this country and it was essential that uninterrupted service be provided. One of the most common interruptions about which the country was concerned were strikes by one or more railroad unions. As early as 1888, legislation was passed aimed at preventing labor unions from severely disrupting the economy.\(^4\) This, and many


other legislative attempts, however, failed to ensure that labor disputes were settled short of strikes.\(^5\)

In 1922, after a particularly devastating national strike, President Harding, in an attempt to force Congress to pass more meaningful legislation declared “the law creating the Railroad Labor Board is inadequate . . . . It cannot halt a strike. . . .”\(^6\) Although many bills were submitted to Congress after President Harding’s plea, none became law.

After many frustrating attempts to pass a law to prevent strikes more effectively in the industry, the representatives of labor and management met and drafted legislation to which they could both agree. The result was the RLA, which has been described as a “product of negotiations and conferences between a representative committee” of labor and management.\(^7\) The bill was passed by Congress with very few changes.

The RLA defined several general duties, the first being:

\[\text{[T]he duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.}\]

It is clear, based upon the legislative history, the experiences under the previous statutes, and President Harding’s comments, that the primary purpose of the RLA was to avoid strikes. It is interesting to note, however, that the RLA does not contain the word “strike.” While the RLA implies that a union will have the right to strike after exhausting all of the procedures contained in the

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\(^5\) See Erdman Law, 30 Stat. 424 (1898); Newlands Law, 38 Stat. 103 (1913); Transportation Act of 1920, 41 Stat. 456 (1920).

\(^6\) 62 Cong. Rec. 214 (1922).


RLA designed to have the parties reach agreement, it never specifically grants labor organizations the right to strike.⁹

Despite the wide support the RLA received from the carriers, there were some that attempted to circumvent the Board of Mediation, set up in the RLA, by creating company unions to represent employees. In finding that a carrier violated the RLA by negotiating only with a company union, the Supreme Court held not only that the courts had jurisdiction over RLA disputes, but that the rights granted the parties under the RLA were judicially enforceable.¹⁰

Even after the Texas & New Orleans decision, carriers continued to encourage the formation of company unions. In addition, carriers were reluctant to submit disciplinary cases to the arbitration boards, so a backlog of grievances began to develop. In order to solve these problems and to preserve the integrity of the RLA, the Act was amended in 1934 to ensure that employees had freedom of choice in determining who the representative would be, and to ensure that there was a system for the adjustment of grievances. The RLA was amended to include the following provision, which remains part of the law today, setting forth the purposes of the act:

(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

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⁹ Unlike the RLA, the NLRA specifically recognizes and preserves the right to strike:

Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.


the purposes of orderly settlement of all disputes concerning rates of pay, rules or working conditions; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; and (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.\textsuperscript{11}

As the Supreme Court observed, it could not be clearer that "the major purpose of Congress in passing the Railway Labor Act was 'to provide machinery to prevent strikes.'"\textsuperscript{12}

In 1936, when there was still a question as to the constitutionality of the NLRA, Congress amended the RLA to include air carriers within the scope of coverage.\textsuperscript{13} Although there are differences in the method of the adjustment of grievances, the same procedures for negotiat-

\textsuperscript{11} 45 U.S.C. § 151a (1988). While the legislative history concerning the last four provisions is considerable, there is almost no mention of the reason for including the first provision. There can be no doubt, however, that it strongly reinforces the desire to avoid strikes.

Unlike the RLA, the NLRA is not designed primarily to prohibit strikes. The purposes of the NLRA are set forth in the following section:

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.


\textsuperscript{12} Texas \& N.O. R.R., 281 U.S. at 565 (citation omitted).

ing agreements and the same desire to avoid interruption of service apply to the airline industry.

III. THE RIGHT TO STRIKE

The right of employees in the private sector to strike is universally recognized as one of the greatest economic weapons available to labor and one that receives statutory protection. It is the quid pro quo for the employer's ability to implement new terms and conditions of employment when negotiations prove unsuccessful. That right, however, is not absolute. In particular, throughout the years a theory has developed that denies employees who engage in sporadic striking the protections of the NLRA. In order to determine whether and how that theory should apply to RLA labor disputes, it is necessary to understand fully the background and development of that theory under the NLRA.

A. THE NLRA

An intermittent or partial strike, sometimes called a "quickie" strike, does not receive the protection afforded the typical strike, where workers walk off the job and stay off. Therefore, an intermittent striker will not be entitled to the same statutory protection afforded regular strikers. Under the NLRA, employers may discipline, and even discharge, employees who engage in intermittent or partial strikes.

One of the first NLRA cases to analyze the status of re-
current striking was *American Manufacturing Concern.*17 In
*American Manufacturing* the union demanded that the em-
ployer reduce the existing 45-hour week to a 40-hour
week. In support of its demand, the union instructed its
150 bargaining unit employees to walk off the job one
hour before the normal quitting time each day. After
learning about this plan, the employer posted notices stat-
ing that the workday did not end before 4:30 p.m. and
that any employee leaving the plant without permission
during working hours would be discharged. On that day
and the next four consecutive working days, several em-
ployees walked out of the plant before the shift was over
without permission, each intending to return for work on
the following day. Each day, the employer discharged the
employees who left work early. A general order to strike
was subsequently issued by the union.

In finding the employer's actions violative of the NLRA,
the National Labor Relations Board (Board) rejected the
argument that the walkouts did not constitute a protected
strike under the NLRA, stating:

We do not agree with the respondent in its contention that
no strike existed prior to [the general order to strike]. A
strike exists when a group of employees ceases work in or-
der to secure compliance with a demand for higher wages,
shorter hours, or other conditions of employment . . . .
The cessation of work by a group is no less a strike be-
cause the group itself may not have considered its action
to constitute a strike. Nor is the cessation of work any less
a strike because it occurs at the moment the work would
have ceased if the demand for the shorter working day had
been granted. Nor does the fact that the persons who
walked out desired to return the following day in order to
work for 8 hours alter the strike character of their activity,
since a refusal to work the number of hours required by an

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17 *N.L.R.B.* 753 (1938).
employer is tantamount to an absolute refusal to work.\footnote{Id. at 759. The Board also held that the employer restrained employees in violation of the NLRA by posting the warning notice "as a tactical step designed to coerce the employees into resuming work or to deter those remaining at work from going out on strike." Id. at 760.}

This original analysis by the Board would have protected virtually any walkout of any duration each and every time it was reported.\footnote{See also The Good Coal Co., 12 N.L.R.B. 136 (1939), aff'd, 110 F.2d 501 (6th Cir.), cert. denied, 310 U.S. 630 (1940) (finding employer violated Section 8(a)(3) of the NLRA by discharging employees who refused to work on Labor Day, even though there was a company rule against remaining away from work without permission); Cudahy Packing Co., 29 N.L.R.B. 837 (1941) (finding three work stoppages of between 10 and 20 minutes each on a single day to be protected strikes).} The courts, however, refused to enforce many of the Board's early orders applying such analysis.

For example, in \textit{NLRB v. Fansteel Metallurgical Corp.} the Supreme Court reversed the Board's finding that employees had engaged in a protected work stoppage consisting of a sitdown strike in violation of a state court injunction against trespass and violence by the employees. In \textit{NLRB v. Sands Manufacturing Co.} the Supreme Court reversed the Board's finding that a strike in protest of the employer's decision to apply the departmental seniority provisions of its contract with the union was protected. And in \textit{Southern Steamship Co. v. NLRB}, a divided Supreme Court reversed the Board's finding that employees were engaged in a protected strike when they refused to follow orders while aboard ship, which arguably constituted a violation of the Federal Mutiny Act.

Lower courts also refused to enforce Board rulings finding intermittent strikes to be protected with specific reference to the concept of intermittent strikes. The Seventh Circuit, in \textit{C. G. Conn, Ltd. v. NLRB}, resoundingly rejected the position of the Board that employees were engaged in protected activity where, in protest of overtime hours and wage rates, they refused, like the employ-
Undoubtedly, when [the company] refused to comply with [the employees’] request [for an increase in overtime rates], there were two courses open. First, they could continue to work, and negotiate further with the [employer], or second, they could strike in protest. They did neither, or perhaps it would be more accurate to say that they attempted to do both at the same time. . . . It seems that this might properly be designated as a strike on the installment plan.

We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him. That is plainly what was sought to be done in this instance. It is not a situation in which employees ceased work in protest against conditions imposed by the employer, but one in which employees sought and intended to continue work upon their own notions of the terms which should prevail. If they had a right to fix the hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment.²⁴

In a series of cases decided in the late 1940s, the Board began to depart from its dogmatic approach to strike activity deemed protected by the NLRA. In Pinaud, Inc.²⁵ certain warehouse employees commenced a strike against the employer. In order to continue operations during the strike, the employer ordered one of its nonbargaining unit employees to assist in the performance of struck work.²⁶ The employee refused to perform the extra work as she did not want to be a strikebreaker. She was discharged by the employer for her refusal. The Board found the employer’s discharge of the employee for her support of the strike violated the NLRA, but expressly

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²⁴ Id. at 397.
²⁵ 51 N.L.R.B. 235 (1943).
²⁶ In NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345 (1938), the Supreme Court specifically acknowledged an employer’s right to take reasonable steps to ensure continued operations during an economic strike, including the right to hire permanent replacements for the striking employees.
noted that had the employer chosen to do so, it "was privileged, as an incident of an employer's right to replace economic strikers, to give [the employee] an election either to work as instructed or not to work and leave the premises."^{27}

A similar result was reached by the Board in *Gardner-Denver Co.*,^{28} which concerned a labor dispute that occurred after an employee was discharged for refusing to accept a reduction in her piece-work rate. Following the discharge, the employer assigned the disputed work to another bargaining unit employee who, in furtherance of the union's position, left the job. The following day, the employee attempted to return, but the employer refused to take her back on the basis that it would not rehire an employee who refused a work assignment.

The Board again found a violation of the NLRA for the employer's refusal to reinstate a striking employee, but specifically noted:

This is not to say, however, that . . . respondent had to acquiesce in [the employee's] refusal to perform [the work]. By refusing to obey the respondent's direction, [the employee] assumed a position analogous to that of employees who go on strike because of a labor dispute not caused by unfair labor practices. In such a case the employer may insist that the striking employees do his bidding or leave the plant, and if they refuse to obey his direction, he is privileged to replace them in order that he may carry on his business. The *Mackay case*, *supra*, 304 U.S. at 354. But where the striking employees apply for reinstatement *on his terms* before the employer has exercised his privilege of replacement, he may not deny them reinstatement merely because they went on strike.^{29}

These cases illustrate the development of a more refined concept—while employees are absolutely free to engage in a complete withholding of work, they are not

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^{27} 51 N.L.R.B. at 235-36.
^{28} 58 N.L.R.B. 81 (1944).
^{29} *Id.* at 82-83.
privileged to engage in strike activity that is unlawful, in violation of contract, or that constitutes an abrogation of the right to establish the terms and conditions under which they would work. As applied to the partial or intermittent strike, this concept became more concrete between 1945 and 1955.

One of the more significant opinions is that of the Fourth Circuit in Home Beneficial Life Insurance Co. v. NLRB. In Home Beneficial the company maintained a rule requiring its sales employees to report to their respective offices each morning. Following a breakdown in contract negotiations, the union notified the company that its sales employees had voted to report to their offices only on Wednesdays and Thursdays. Before implementing this plan, however, the union called a strike. A number of sales employees continued to work, but adhered to the earlier plan to report to their offices only on Wednesdays and Thursdays. The company subsequently terminated all of its sales employees, which the Board found to be improper.

In partially reversing the Board’s decision, the Fourth Circuit distinguished between those employees who struck and those who worked according to their own plan. As to the latter group, the Fourth Circuit relied upon the opinion in C. G. Conn, Ltd. to find that they were legitimately discharged for attempting to dictate the terms under which they would work.

Shortly after Home Beneficial was issued, the Supreme Court decided United Automobile Workers v. Wisconsin Employment Relations Board (Briggs-Stratton), which involved the union’s challenge to the constitutionality of a Wisconsin statute that had been applied to prohibit its use of an economic self-help measure. As described by the Supreme Court, the

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30 159 F.2d 280 (4th Cir.), cert. denied, 332 U.S. 758 (1947).
31 Home Beneficial, 159 F.2d at 285.
32 Id. at 286.
33 336 U.S. 245 (1949) [hereinafter Briggs-Stratton].
The union called twenty-six such meetings over a period of approximately five months.

In rejecting the union's contention that its conduct constituted protected strike activity under the NLRA, the Court characterized the union's conduct as an "intermittent unannounced stoppage of work" which in comparable cases had been denied the protection of the NLRA. The Court concluded, therefore, that Wisconsin was free to regulate the union's conduct under its police powers since no protected conduct was involved.

The NLRB began following and expanding upon Briggs-Stratton in a series of cases finding partial and intermittent strikes to constitute unprotected employee conduct. In Pacific Telephone & Telegraph Co. the Board refused to find that the employer violated the NLRA when it failed to reinstate immediately certain employees who had participated in a "hit and run" work stoppage. Following a breakdown in contract negotiations, the Communications Workers of America (CWA), representing the traffic employees, announced in a newsletter that it would embark on a program of repeated, short work stoppages designed to "harass the company into a state of confusion." A fellow union, representing the employer's tollmen, advised its members in writing to honor the CWA picket lines.

34 Id. at 249.
35 Id. at 253.
36 Id. While Briggs-Stratton was subsequently overruled in other respects by Lodge 76, Int'l Assoc. of Machinists v. Wisconsin Employment Relations Bd., 427 U.S. 132 (1976), its discussion of the unprotected nature of intermittent strikes remains vital today.
37 107 N.L.R.B. 1547 (1954).
38 Id. at 1548.
When the strike began, CWA employees in more than 200 of the employer’s offices participated in the program of sporadic refusals to work and intermittent picketing. Wherever CWA picket lines were established, the tollmen also refused to work. To avoid a complete disruption of its operation, the employer formed an emergency crew of supervisors and assigned them to work 12-hour days. As a result of this supervisory coverage, many tollmen seeking reinstatement after the cessation of picketing by the CWA were told that they were not needed immediately and should report to work at a later time.

In dismissing the complaint, the Board in Pacific Telephone relied on Briggs-Stratton to find the CWA action was unsupported as “a condition that would be neither strike nor work” and was not protected. Because the tollmen joined in the unprotected strike of the traffic employees, the employer did not violate the NLRA when it refused to immediately reinstate them to work.

In Kohler Co. the issue was whether a work stoppage in the nature of a sick out constituted protected activity. The employer shut down the fans in its shop as part of an experiment to measure dust accumulation. Because of the high heat and discomfort occasioned by the shutdown, the employees met and voted not to complete a work shift anytime “they felt ill or otherwise felt that they could not ‘take it any longer.’” They informed the employer in writing that such would be the case until the fans were functional.

When the fans were not turned on the next workday, 87 of the 190 employees left their shifts early to visit the company medical department for examination. Fifty were instructed to return to work, but only thirty-eight returned. The other employees left the plant. The employer discharged those employees who left and unfair labor practices were promptly filed against the employer.

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59 Id. at 1549.
60 108 N.L.R.B. 207 (1954), enforced, 220 F.2d 3 (7th Cir. 1955).
61 Id. at 213.
In rejecting the contention that the twelve employees were engaged in a protected strike, both the Board and the court relied on *C. G. Conn* to find that the employees had not voted to strike. Rather, they had voted to engage in a number of recurrent walkouts in support of their position. The Seventh Circuit further noted that whereas each of the twelve employees maintained that he left the job because he was sick, the company's medical department showed each was fit for work. Thus "[i]f these men were sick, it was a personal, individual matter unless it was feigned illness to bring them within the terms of the [employees' letter of demand]."\(^2\)

The Court rejected the employees' contention that *C.G. Conn* was distinguishable as they engaged in only a single work stoppage rather than recurrent walkouts, noting:

> [T]he letter which was sent by these men to the Company also threatened a course of conduct on each succeeding day until their demands were met. After receiving such information it was not necessary for the Company to keep the men on the payroll until they had repeatedly refused to finish working their shifts.\(^3\)

The Board issued other noteworthy decisions shortly after *Kohler*, including *Valley City Furniture Co.*,\(^4\) which involved a union plan to refuse to work overtime until the employer agreed to negotiate over other matters. When informed of the union's plan to cease work at 3:30 p.m. that day and each day thereafter, company representatives told employees that they would be expected to work the entire scheduled shift which was to end at 4:30 p.m. A number of employees ignored this instruction and walked out at 3:30 p.m.

On the following morning, the employees who left early were refused admittance to the job unless they agreed to submit to personal interviews without the presence of a union representative, to ensure that the employees under-

\(^{42}\) Id.
\(^{43}\) Id. at 210.
\(^{44}\) 110 N.L.R.B. 1589, enforced, 230 F.2d 947 (6th Cir. 1956).
stood they would not be permitted to leave again at 3:30 p.m. The employees refused to meet with the employer and were not reinstated.

In rejecting the contention that the employees were engaged in a protected strike, the Board noted that the union refused to work the overtime hours set by the employer, engaged in one work stoppage, and communicated its intention to continue such tactics. More importantly, the Board noted that "[n]owhere . . . does the record reveal any change in the Union's intentions." Accordingly, the Board found that the union planned to engage in a partial strike, which was unprotected. The court stated, "[t]he vice in such a strike derives from two sources. First, the Union sought to bring about a condition that would be neither strike nor work. And, second, in doing so, the Union in effect was attempting to dictate the terms and conditions of employment."

The decisions in Valley City Furniture Co., Kohler, and Pacific Telephone brought the analysis of the Board more closely in line with the opinions of the federal courts and held partial refusals to work and plans to engage in recurrent work stoppages unprotected under the NLRA. The principles established in these early cases continue to apply today. While the principles governing these cases have remained fairly constant, they are not necessarily easily applied. In part, this is due to presumption that a

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45 Id. at 1594.
46 Id.
47 Id. at 1594-95; see also Roseville Dodge, Inc. v. NLRB, 882 F.2d 1355, 1359 (8th Cir. 1989) (noting employees are not protected when they seek to draw wages while putting economic pressure on their employer).
48 See, e.g., Excavation Constr., Inc. v. NLRB, 600 F.2d 1015 (4th Cir. 1981) (involving agreement among employees not to work weekends unless overtime was paid); Highlands Hosp. Corp., 278 N.L.R.B. 1097 (1986) (involving refusal by security guards to perform regularly assigned maintenance duties); Audubon Health Care Ctr., 268 N.L.R.B. 135 (1983) (involving refusal by nurses' aides to perform objectionable portion of their regular patient care duties); John S. Swift Co., 124 N.L.R.B. 394 (1959), enforced, 277 F.2d 641 (5th Cir. 1960) (involving refusals to work overtime pursuant to union announced plan); Honolulu Rapid Transit Co., 110 N.L.R.B. 1806 (1954) (involving a refusal to work weekends during a 2½ month period).
single, concerted refusal to work is a protected strike. This presumption may be rebutted only with evidence demonstrating that the stoppage is part of an intermittent or partial job action that is inconsistent with the genuine performance by the employees of their normal work duties. Thus, absent evidence to the contrary, a walkout by employees for a period of one day or less is presumed to be a protected strike.

In *Johnnie Johnson Tire Co.* the administrative law judge discussed the concept of partial or recurrent strikes in the context of rejecting the employer’s claim that its employees were engaged in such an unprotected work stoppage:

A partial strike involves employees refusing to work but remaining in their work areas or withholding their labor from certain portions of their work while continuing to perform other portions. The latter situation occurred in the *Audubon* case. A strike may also be deemed to be a partial one if its intermittent and recurrent. . . The actions of the employees herein do not fall into any of these categories. The work stoppage here was a one time affair of very short duration. There was no effort by the employees to dictate to the employer what portions of their job duties they would perform. Moreover, there is no evidence that the employees intended the short work stoppage to be an initial step in further intermittent and recurring work stoppages. Also, there was no pattern of prior work stoppages shown which would indicate that the work stoppage here was partial in nature. I therefore find that the work stoppage here was not a partial strike and

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\(^{50}\) See NLRB v. Gulf-Wandes Corp., 595 F.2d 1074, 1078 (5th Cir. 1979) (finding six employees who refused to work overtime on a Saturday engaged in concerted activity “directed at changing employer working conditions” and were protected from discharge); Shelly & Anderson Furniture Mfg. Co. v. NLRB, 497 F.2d 1200 (9th Cir. 1974) (holding employer violated the NLRA by locking out 33 employees who engaged in a protected, peaceful 10 to 15 minute protest of employer’s bargaining position at the beginning of the shift); NLRB v. Buzza-Car- dozo, 205 F.2d 889 (9th Cir. 1953) (holding employees who notified the company that they would walk off the job the following day in protest of a bonus-incentive wage plan instituted by the employer were protected by the NLRA).

was not unprotected. 52

Apart from the presumed protected nature of strike activity, the partial/recurrent strike cases have become difficult due to the fact-intensive nature of the necessary inquiries. For example, in NLRB v. Blades Manufacturing Corp., 53 the Board and the Eighth Circuit disagreed with respect to the status to be accorded three walkouts occasioned by the employer's unlawful refusal to discuss employee grievances with the union, rather than the employees themselves. The record revealed that the walkouts occurred immediately following three distinct incidents in which the employer refused to discuss separate grievances filed by each of the three employees. The administrative law judge had found the activity to be unprotected recurrent striking under Briggs-Stratton. The Board, however, disagreed and reversed the administrative law judge. In so doing, the Board distinguished Briggs-Stratton on the basis that the walkouts there were unannounced and of much greater frequency. 54 It further noted that in Blades the employer had an opportunity to bargain in good faith before each instance and could have avoided the walkouts. 55

In denying enforcement of the Board's order, the Eighth Circuit focused on the factual findings of the administrative law judge. It recited four of the findings that, in its' view, mandated a conclusion that the employees' walkouts were part of an intermittent strike:

(1) The Union’s letter admitting past concerted activity at the time the Company was complaining of production slowdowns and warning of future concerted activities by the employees unless the Company recognized the Union;
(2) A recommendation by the Union organizer at a union meeting that the employees “walk out for a day” to get the Company to curtail its issuance of disciplinary warning

52 Id. at 295.
53 144 N.L.R.B. 561 (1964), enforcement denied, 344 F.2d 998 (8th Cir. 1965).
54 Id. at 566.
55 Id.
slips and layoffs or thereby obtain adjustment of these grievances with the Union;
(3) The employees agreeing in advance to walk out for the remainder of the shift each time the Company refused to recognize the Union and adjust a grievance on a collective basis; and
(4) An employee's admission to his supervisor that he was not "putting out a day's work" until the Company recognized the Union plus other credited evidence of production slowdowns during this period.56

As evidenced by the differing interpretations of the facts in Blades, whether a strike is protected or unprotected is a decision based on an analysis of all available evidence. Nevertheless, in First National Bank of Omaha,57 the administrative law judge attempted to distill from the cases the essential ingredients generally used in each analysis. First National Bank of Omaha concerned the concerted refusal of five bank employees to remain at work until 7:00 p.m., the end of the shift. They left the job one-half hour early and were discharged the following morning by the bank. In finding that the employees' walkout was a protected strike rather than an intermittent work stoppage, the administrative law judge began the analysis by recognizing that a single strike of limited duration is protected under the NLRA.58 He distinguished this situation from unprotected strikes, however, on the basis that in those cases employees engaging in unprotected activity attempted to "simultaneously walk off their jobs but retain the benefits of working."59 Even more importantly, however, the administrative law judge relied heavily on the fact that the bank discharged the striking employees before ascertaining whether they intended to strike again and without warning them of the consequences of their actions, which seemed to introduce an entirely new evidentiary issue to be analyzed in such cases. After canvass-

57 171 N.L.R.B. 1145 (1968), enforced, 413 F.2d 921 (8th Cir. 1969).
58 Id. at 1151.
59 Id.
ing the major Board decisions in the area, the administrative law judge commented:

In Swift, as in Valley City and Honolulu Rapid Transit, the employer was aware that the employees had decided to adopt the tactics of recurrent or intermittent walkouts as a means of forcing concessions in bargaining. In all three cases, also, the employees had been warned that continuance of such a tactic would bring about the use of counter-measures designed to blunt the pressures being brought to bear. I believe that these were the critical elements in all three cases, and that the absence of one or both might well have produced a different result.60

Both the Board and the Eighth Circuit approved the administrative law judge’s analysis, though neither commented specifically on his determination of which were the “critical elements” in their current strike cases. The decided cases, however, make apparent that the Board and the courts do not require that employees first be warned as to the possibility of discipline for engaging in unprotected strike activity as a prerequisite to discharging employees engaged in an unprotected strike.61

In sustaining the Board’s order in First National Bank of Omaha, however, the Eighth Circuit rejected the Board’s suggestion that the employer had an obligation, either to clarify what the employees intended, or to warn them about the consequences of their actions before discharging them. But, the Eighth Circuit did comment on the difficult nature of determining whether a strike is entitled to the protections of the NLRA, particularly in the context of an overtime dispute, stating:

60 Id. at 1150.
61 The administrative law judge’s softened interpretation of the “unprotected strike” cases was occasioned by his review of the concurring opinion in Honolulu Rapid Transit, in which two of the four members reviewing the employer’s conduct in suspending recurrent strikers declined to decide “that any given form of unprotected strike activity gives the employer license to engage in any and all forms of retaliatory or unlawfully motivated discrimination.” 110 N.L.R.B. at 1812-13 (footnote omitted). This dicta has not been utilized to hold an employer liable for the discharge or discipline of an unprotected striker in other cases.
We recognize the difficulty of drawing a line between protected and unprotected activity in such situations. The task is even more difficult when the walkout occurs at or near the end of a regular day, and the employees return to work the next morning. The line is one which must nevertheless be drawn. Employees have the same right to engage in concerted activity to bring about a change in overtime policy as they do to bring about a change in wages or other working conditions. They have as much right to strike on this issue as any other, and they are not required to institute the strike at any particular time of the day or to maintain it for any particular period of time to be entitled to the protection of the Act. The test in each case is whether the employees have assumed the status of strikers. They cannot continue to work the regular hours of employment and refuse to work overtime.62

Cases following First National Bank of Omaha have recognized the difficulty in determining whether a work stoppage constitutes a protected or a partial or intermittent strike. In NLRB v. Leprino Cheese Co.63 the court rejected the contention that unorganized employees were engaged in an unprotected partial strike because they punched out early on Christmas day, rather than working the long day scheduled by the company. In so doing, the court acknowledged the fact that the employees intended to return to work the following morning required application of the line of cases holding that an employee may not choose his own working conditions under the guise of a strike.64 Nevertheless, the court found determinative the fact that the employees were discharged immediately upon leaving the work place on Christmas, and, consequently, that their intent to return the following day was not, under the circumstances, sufficient to make the walkout a partial strike.65

62 First Nat'l Bank of Omaha, 413 F.2d at 925.
64 Id. at 186.
65 Id.
In *NLRB v. Robertson Industries* the Ninth Circuit examined the question of whether two one-day work stoppages within a three-month period were sufficient to support a finding of an intermittent strike. The record revealed that in November of 1973, fifteen to twenty of the employer's unorganized employees ceased work to protest being overworked. The employees returned to work after the employer threatened to discharge them. In February of 1974, a number of the employees, including some night-shift employees, failed to come to work in order to attend a union organizational meeting at which several topics, including the employees' adverse working conditions, were discussed. The employer fired all the employees who were absent from work.

In sustaining the Board's finding that the employer had violated the NLRA, the Ninth Circuit rejected the employer's contention that the employees' strike was an unprotected, intermittent work stoppage. Relying on *Shelly & Anderson Furniture*, the court found that "[t]wo one-day work stoppages in three months do not give rise to a repeated pattern of half-strikes." The court also noted the evidence supported the Board's conclusion that the union meeting was called to address the employees' dissatisfaction with working conditions, and that both day and night-shift employees refrained from working on the date of the union meeting (which took place during day-shift working hours). The timing and content of the meeting gave credence to the finding that the employees were striking over the employer's conduct, rather than simply taking off work to attend a union meeting, which would not have, in and of itself, constituted a protected activity.

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66 560 F.2d 396 (9th Cir. 1976).
67 Id. at 399.
68 497 F.2d 1200 (9th Cir. 1974); see supra note 46.
69 Robertson, 560 F.2d at 399.
70 Id.
71 Id. The Eighth Circuit also took note of the criteria required for protection of concerted activity established in *Shelly & Anderson*:

In order to be protected . . . the concerted activity must satisfy the following elements:
Another significant case is *NLRB v. Lasaponara & Sons, Inc.* where the employer was held to have violated the NLRA by discharging six employees who refused to work on the religious holiday of Palm Sunday, a very active business day for the employer. Prior to the holiday, the employees gave the employer a petition signed by twenty employees protesting the need to work on the holiday. The employer refused to give the employees the day off. When six employees failed to report on Palm Sunday, the employer took no immediate action, but two months later discharged them for their refusal to work.

In rejecting the employer's contention that it was free to discharge those employees for their refusal to work on Palm Sunday, the court stated:

The one day strike or work stoppage by the discharged employees in support of their petition protesting the Palm Sunday schedule is statutorily protected because it constituted concerted activity aimed at changing working conditions at the plant. While the strike undoubtedly brought inconvenience and economic loss to the Company in view of its unusually heavy production schedule due to the Easter season, such a result is obviously the very object of any concerted employee action protected by the Act. Although it is true that not all concerted employee activities are protected by Section 7, the economic pressure brought to bear here, unlike that present in the narrow class of cases relied on by respondents, clearly failed to reach a degree so grossly disproportionate to the goal sought to be achieved that it renders the conduct unprotected and thereby justifies discharge of the participating

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560 F.2d at 398-99 (quoting *Shelly & Anderson*, 497 F.2d at 1202-03).

In addition, the Board has held an employee's refusal to come to work merely to attend a union meeting is unprotected conduct. *Gulf Coast Oil Co.*, 97 N.L.R.B. 1513, 1515 (1952).

541 F.2d 992 (2d Cir. 1976), cert. denied, 430 U.S. 914 (1977).

Id. at 997-99.
employees.\textsuperscript{74}

From an examination of the foregoing authorities, the following principles emerge with respect to when a work stoppage should be protected or not under the NLRA:

1. The Board's initial reaction was to permit partial and intermittent strikes, yet it was forced to alter that position after the courts determined such activity was not protected.

2. No statutory prohibition of partial or intermittent strikes exists. Rather, the unprotected status is based upon the finding that partial or intermittent strikes are not consistent with the philosophy of putting economic pressure on an employer through withholding the economic benefits of work performed.

3. A concerted stoppage of work by employees is presumed to be protected under the NLRA until, or unless, it is found to be for an improper objective, or is conducted in a manner deemed unlawful, in breach of contract, or otherwise indefensible.

4. A one-time strike, consisting of a complete cessation of work by the employees, is also presumptively protected whether the strike is of brief duration (e.g., ten to fifteen minutes) or continues over a more substantial period of time.

5. While employees are free to engage in a total cessation of their work to accomplish legitimate bargaining or other objectives, they are not protected if they pick and choose among the terms of employment that they will honor and those that they will refuse to perform as struck work. In other words, employees cannot expect to be paid for striking.

6. An employee will generally be found to be engaging in unprotected activity if the cessation of work is, or will be, pursuant to a plan of action calling for repeated work stoppages in furtherance of some concerted or union objective.

\textsuperscript{74} Id. at 998 (citations omitted).
7. The mere fact that employees have struck on more than one occasion during the period of a labor dispute is not, in and of itself, sufficient to show a recurrent strike. Where employees have sufficient independent grounds for calling more than one strike action in a relatively short period of time, the actions will be presumed to be protected, independent work stoppages.

8. Where the circumstances demonstrate that the activity has been, or will be, recurrent, an employer is justified in treating the strike as employee misconduct subject to discipline.

Overall, it is clear that while the right to call one or more quick or short duration strikes clearly exists in appropriate circumstances, once the right accrues, it should be fully exercised, completely and absolutely to protest an employer's actions.\(^75\)

**B. The Railway Labor Act**

The application of the intermittent strike doctrine to the RLA first requires an analysis of how labor organizations gain the right to exercise self-help. In the context of major disputes, the right to strike during the self-help period is the inevitable alternative in a statutory scheme that deliberately denies the final power to compel arbitration of a major dispute.\(^77\) The right to strike under the RLA, however, is similar to that under the NLRA in that it is not an unrestricted right.

The right to exercise self-help under the RLA does not ripen as quickly as under the NLRA. Under the NLRA,\(^77\)

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\(^76\) There are three types of disputes under the RLA. "Major" disputes involve changes in the rates of pay, rules, and working conditions for represented employees. "Minor" disputes involve the adjustment of grievances. The third category is "omitted" disputes, which are neither "major" nor "minor" disputes. Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 723-24 (1945).

once an agreement expires, if the parties are at impasse they are free to engage in self-help. This procedure does not apply under the RLA, as, pursuant to the Section 6 process under the RLA, the parties are required to exhaust procedures that are "long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." The primary objective of the RLA is "to prevent, if possible, wasteful strikes and interruptions of interstate commerce." As a corollary, at the other end of that "long and drawn out" process, after the procedures of the RLA have been exhausted, to permit an open-ended self-help right would collide with the primary purpose of the RLA.

If a strike would, if called immediately after termination of the statutory procedure, be permissible, a strike conducted at a considerable temporal distance from the completion of those procedures may violate the RLA. Although the precedent in this area is less than consistent, one principle emerges from the case law. This principle is that exhaustion of the RLA's procedures does not give a union a perpetual right to strike that continues, regardless of whether circumstances have changed during the time that has elapsed since the release from mediation.

Probably the most elegant statement of this principle was made by Judge Moore in the dissenting opinion in Pan American:

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80 In addition, even when the right to strike has accrued, it may be subject to reasonable limitations, such as providing appropriate notice to the employer of the intention to strike, before it may be exercised. Delaware & H.R.R. v. United Transp. Union, 450 F.2d 603 (D.C. Cir.), cert. denied, 403 U.S. 911 (1971).
The mere fact that a proceeding based upon Section 6 notices in April, 1960, has gone through the various prescribed steps should not entitle the flight engineers to receive one "strike coupon" good in perpetuity which may be dusted off and redeemed at will in future years by a strike regardless of the then situation and the specific controversies then dividing the parties.83

After the implementation of new terms by a carrier, significant changes will alter the relationship between the carrier and union. Most importantly, such a case would be the quintessential example of changed circumstances if the union acquiesces to those changes made by the carrier. Based upon that fact, it would be logical to argue that the dispute has come to an end, and the right to strike no longer exists.

If a union waits a considerable period after implementation to strike, the union should be enjoined on the basis that it has relinquished its right to strike through inaction. Generally, unions either strike shortly after completion of the required procedures or they do not strike. In cases where a strike is delayed for a substantial amount of time after the self-help period begins, there is invariably a compelling explanation. Often the explanation is that the carrier also has not resorted to self-help, typically pursuant to a moratorium agreement, in which both sides agree not to resort to self-help while they continue to negotiate.84 Since such agreements include the parties' mutual reservation of their rights, resort to self-help upon the expiration of the moratorium is clearly permissible.

The issue of whether one party, in the absence of an agreement, may lose its right of self-help through inaction and conduct designed to lead the other party to rely on its decision not to strike was addressed in Pittsburgh & Lake Erie Railroad v. Brotherhood of Railroad Trainmen.85 In that

83 Pan American, 306 F.2d at 852.
case, the carrier faced a notice of a general strike approximately three and one-half months into the self-help period. The court found the delay not unreasonable, but noted that, at some point, the right to strike must end:

It is conceivable that an "old" dispute involving the same set of facts could become a "new" dispute if one or both of the parties slept on the rights (in this instance the right to strike) for a considerable period of time. Laches could bar the pleas or previous mediation. To allow the interruption of a vital public service with in fact no warning could cause great harm to those dependent on the service. But to hold that the strike must be called on the exact expiration date of the provisions of the Act would also be against public policy. Continuation of negotiations for a reasonable period should be encouraged. Here we find no unreasonable delay on the part of the Union so as to make this dispute subject to a new enforcement of the procedures of the Act.\(^6\)

\(\text{at 686 (holding that after } 1\frac{1}{2} \text{ years of unilaterally implemented computerization, during which the union did not strike, the union lost its right to strike over an issue that had unquestionably been the subject of prior mediation and release).}\)

\(^6\) Pittsburgh & Lake Erie, 179 F. Supp. at 277-78. The RLA provides no express limitation period within which a carrier, or a union, must exercise self-help rights, or be deemed to have lost them. However, a logical argument exists to adopt the prevailing limitations period for most federal labor issues, namely the six-month bar contained in Section 10(b) of the National Labor Relations Act. 29 U.S.C. § 160(b) (1988); see DelCostello v. International Bd. of Teamsters, 462 U.S. 151 (1983) (holding the six month limitation period applied to duty of fair representation suits).

Following the Court's ruling in DelCostello, a number of courts applied the six-month limitations period to cases under the RLA. See, e.g., International Ass’n of Machinists & Aerospace Workers v. Aloha Airlines, Inc., 790 F.2d 727 (9th Cir.); cert. denied, 479 U.S. 931 (1986); Robinson v. Pan American World Airways, Inc., 777 F.2d 84 (2d Cir. 1985) (expressly adopting the DelCostello limitation period in a case by airline employees alleging that they were discharged for their pro-union activities in violation of the RLA); Brotherhood of Locomotive Eng’rs v. Atchison, T.& S.F. Ry., 768 F.2d 914 (7th Cir. 1985) (applying DelCostello to an alleged refusal to bargain under Section 2 of the Act); Dozier v. Trans World Airlines, Inc., 760 F.2d 849, 851 (7th Cir. 1985); United Indep. Flight Officers v. United Air Lines, Inc., 756 F.2d 1262 (7th Cir. 1985); Linder v. Berge, 739 F.2d 686, 689 (1st Cir. 1984); Barnett v. United Air Lines, Inc., 738 F.2d 358, 363-64 (10th Cir.); cert. denied, 469 U.S. 1087 (1984); Sisco v. Consolidated Rail Corp., 732 F.2d 1188 (3d Cir. 1984) (applying a six-month limitation for duty of fair representation claims).

Accordingly, a strong argument exists that the right to strike under the RLA could terminate if not exercised within six months of release.
In addition to losing the right to engage in protected activity, clearly there are certain activities, such as wildcat strikes, slowdowns, and strikes before the negotiation procedures are completed, that receive no protection under the RLA: "While [the RLA] contains no express prohibition against strikes, it has been construed by numerous courts, including the Supreme Court, to impliedly prohibit strikes in various situations, though not in all."\(^{87}\)

From these cases and principles, the following statements can be made about the right to strike under the RLA:

1. The major purpose of the RLA is to provide mechanisms for the adjustment of all disputes, both grievances and negotiation of new agreements, which avoids, to the maximum extent possible, strikes by labor organizations.

2. The right to strike does "expire," thus recognizing the policy favoring the maintenance of agreements between the parties.

3. Not all strikes are protected under the RLA.

4. Violations of the RLA may be enjoined by federal courts.

5. If a strike is not protected, a carrier may obtain injunctive relief to prohibit employees from engaging in the unprotected strike.

Once the NLRA principles regarding intermittent and partial strikes are applied in the RLA context, it should be clear that such strikes are not permitted under the RLA and should be prevented through the use of injunctive relief. When there is no clear answer to an issue under the RLA, the Supreme Court has condoned turning to the

\(^{87}\) Louisville & N.R.R. v. Bass, 328 F. Supp. 732, 746 (W.D. Ky. 1971) (citations omitted) (holding employees engaged in an unlawful wildcat strike); see also Long Island R.R. v. System Fed'n No. 156, 289 F. Supp. 119, 126 (E.D.N.Y. 1968) (holding employee slowdown violated RLA); 45 U.S.C. § 354(a-2)(iii) (1988), which provides that employees engaging in strikes that violate the provisions of the RLA are not entitled to unemployment benefits. The statute was passed in 1938, with the prohibition originally codified at § 355(f). Clearly, since shortly after passage of the 1934 amendments, Congress has believed that certain strikes violate the RLA.
NLRA "for assistance in construing" the RLA.\textsuperscript{88} Application of any NLRA provision, however, requires analysis of both the statutory provisions and the purposes behind each statute.

On the issue of intermittent strikes, it should be noted that the RLA has a much stronger policy of prohibiting strikes. In fact, the NLRA specifically protects the right to strike, while the RLA does not even contain the word "strike."\textsuperscript{89} Therefore, to the extent that a partial or intermittent strike interrupts commerce and the carrier's ability to operate, such strikes would fly in the face of the statutory purpose of "avoid[ing] any interruption to commerce or to the operation of any carrier engaged therein."\textsuperscript{90}

Under the NLRA, as set forth above, the policy against intermittent strikes is based upon the principle that such strikes are not consistent with the philosophy of putting economic pressure on an employer by not receiving the economic benefits of working employees. In the RLA context, the balancing of the rights between employers and employees is not the critical inquiry. Rather the "primary consideration . . . [is] the public need for a reliable, safe, and convenient transportation service."\textsuperscript{91}

As the public learned during the 1993 American Airlines labor dispute, a strike can have devastating effects on a nationwide transportation system. Even after the strike concluded, it took the carrier several days to put its system back in order to operate at 100\%. Just imagine what the effect could have been if the flight attendants had been able to strike on every third day. Such intermittent activity would clearly have impinged upon the public need for an efficient transportation system. Therefore, holding

\textsuperscript{89} See supra note 9 and accompanying text.
\textsuperscript{91} Long Island R.R., 289 F. Supp. at 126.
intermittent strikes to be unprotected has more support under the RLA than under the NLRA.

Based upon the statutory purposes of the RLA, one would assume that intermittent or partial strikes would be unprotected under the RLA. As such, a carrier confronted with this kind of activity should be entitled to injunctive relief to stop such activities. Unfortunately, without engaging in much analysis, at least two courts have held that intermittent activity is permissible under the RLA.\textsuperscript{92}

IV. JUDICIAL DECISIONS

Unlike the NLRA, there is no administrative agency charged with enforcement and interpretation of the RLA. Therefore, the federal courts have been charged with this duty.\textsuperscript{93} Also unlike the NLRA, there have been very few instances under the RLA in which employees have attempted to engage in partial or intermittent strikes. Thus, it is especially important that the courts understand the judicial history of the RLA and the rationale for the NLRA decisions in this area, and then apply that understanding to their rulings.

In \textit{Pan American World Airways, Inc. v. International Brotherhood of Teamsters}\textsuperscript{94} the Second Circuit held that Pan Am was not entitled to injunctive relief to prevent the International Brotherhood of Teamsters (IBT) from engaging in intermittent work stoppages.\textsuperscript{95} The IBT obtained the right to strike against Pan Am on February 21, 1988. No action was taken, however, until June 29, 1989, when the


\textsuperscript{93} See, e.g., \textit{Burlington N.R.R. v. Brotherhood of Maintenance of Way Employees}, 481 U.S. 429, 448 (1987) (noting that one difference between the RLA and the NLRA is that employers subject to the NLRA cannot seek injunctive relief for statutory violations as the National Labor Relations Board is provided with that authority).

\textsuperscript{94} 894 F.2d 36 (2d Cir. 1990).

\textsuperscript{95} \textit{Id.} at 37.
"IBT began a series of intermittent job actions at various Pan Am facilities consisting primarily of hour-long work stoppages for union employee meetings and assemblies."96

Unlike most of the NLRA cases, this one did not require intensive factual inquiry to determine if the employees were engaging in an intermittent strike action. It is clear that such actions were contemplated and undertaken by the union. As noted in NLRA cases, the IBT was attempting to create a situation that was neither strike nor work, which clearly constitutes unprotected activity under the NLRA. Accordingly, the court only analyzed whether such activity was protected, not whether it was intermittent.

The court first held that a new status quo had not been created by the mere passage of time, even though sixteen months passed between accrual of the right to strike and the exercise of that right:

The RLA, however, does not include a time limit within which either party must use or lose its right to self-help. The courts have no business making up such a limit out of thin air, and they have even less reason to adopt a rule that may tilt the balance of economic power in favor of one party.97

The court did not acknowledge or attempt to distinguish those cases finding that the right to strike could indeed be waived if not exercised within a reasonable amount of

96 Id. at 38.
97 Id. at 40. The court continued, "[b]ecause only the employer can impose unilateral terms and conditions of employment, the establishment of a new status quo requiring exhaustion of 'major dispute' procedures would seem, under Pan Am's theory, to lie largely in the carriers' hands." Id. Unfortunately, this analysis makes very little sense, since the court held that the union's right to strike never expires. Id. at 36. It is difficult, therefore, to fathom how the employer could unilaterally establish a new status quo if it could not do so by operating under new terms and conditions of employment for sixteen months. The only explanation must be that if the carrier had not implemented the changes, the right to strike would not have accrued. Such a theory, however, has no logical basis in the statute.
time. In addition, there is absolutely no recognition of the fact that the RLA was designed to avoid strikes, encourage agreement, and, whenever possible, avoid disruption of transportation systems.

The court also implied that there was no manner in which it could establish an appropriate time limit. As set forth above, however, courts have almost universally imported the six month statute of limitations from the NLRA cases to RLA cases. Therefore, in finding that the union had waived its right to strike after six months, the court would not be "making up such a limit out of thin air" and could have legally justified such a time limit.

Second, the court refused to import the NLRA principles on intermittent and partial strikes for three reasons: (1) injunctive relief was prohibited by the Norris-LaGuardia Act; (2) the RLA did not have an agency that could create a rule against intermittent strikes; and (3) intermittent strikes were not unfair labor practices under the NLRA. Those reasons, however, fail to recognize the purposes of the RLA and the interplay between the NLRA and RLA.

With regard to the Norris-LaGuardia argument, the Second Circuit misplaced its reliance upon Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees. That case concerned whether secondary strike activity was prohibited by the RLA. Unlike the NLRA, the RLA does not portend to be an all encompassing regulation of labor management relations in the railroad and airline industries. Rather, it is concerned primarily with the adjustment of disputes between a carrier and its employees. The NLRA, on the other hand, contains many limitations on the relationships between unions and employers, even when the unions do not represent any of an employer's employees. In particular, the

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98 See supra notes 74-75 and accompanying text.
99 Pan Am, 894 F.2d at 40.
NLRA makes it an unfair labor practice, in certain narrow circumstances, to engage in secondary picketing.\textsuperscript{102}

There is no prohibition against secondary activity in the RLA, nor is there any hint that the statute is intended to apply to relations concerning other employers. Application of that NLRA principle was therefore not warranted. Thus, the Second Circuit's reliance upon\textit{Burlington Northern} to support the argument that Norris-LaGuardia prohibits the issuance of an injunction is misplaced.

As set forth above, judicial enforcement is the only method for enforcement of RLA duties and obligations.\textsuperscript{103} In addition, that enforcement extends to the issuance of injunctions in order to prevent strikes which violate the RLA.\textsuperscript{104} The Second Circuit failed to acknowledge that the Norris-LaGuardia Act specifically recognizes the ability of courts to issue injunctions when "unlawful acts have been threatened and will be committed unless restrained."\textsuperscript{105} Therefore, if the strike were an unlawful exercise of self-help, Norris-LaGuardia would not prohibit the issuance of an injunction.\textsuperscript{106} As set forth below, however, the intermittent strike should have been considered unlawful under the RLA, which would authorize the issuance of injunctive relief.

In addition, if a carrier can demonstrate that the strike does or would violate other provisions of the RLA, it may also be enjoined. Prior to the beginning of the Eastern Airlines/IAM strike in 1989, many unions announced that they would engage in secondary strikes in support of the unions at Eastern. In response to those announcements, many carriers obtained injunctions prohibiting secondary strikes until a determination was made, pursuant to the applicable arbitration provisions, as to whether sympathy

\textsuperscript{103} See supra note 10 and accompanying text.
\textsuperscript{104} See supra note 79 and accompanying text.
\textsuperscript{106} See, e.g., United Air Lines, Inc. v. Teamsters Airline Div., 874 F.2d 110, 113-14 (2d Cir. 1989) (noting that secondary strike activity may be enjoined if the primary strike to which it relates is unlawful).
strikes were permissible under the no-strike clause.\textsuperscript{107} The courts determined that permitting a sympathy strike could damage the minor dispute resolution mechanism required by the RLA; therefore, it would be unlawful for the unions to strike without first obtaining a decision on the application of the no-strike clause from the appropriate arbitration board.

Another reason espoused by the Second Circuit in \textit{Pan Am} was that the "Supreme Court has emphasized ... that NLRA principles 'cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes.'"\textsuperscript{108} The only difference noted by the court was that the NLRA provided for an administrative agency to govern its interpretation, and it was that agency that was responsible for the intermittent work stoppage rule. However, it was not the Board that originally created the rule against intermittent work stoppages. The Board originally held that such activity was protected. Only after being reversed by several courts of appeal did the Board change its opinion.\textsuperscript{109} The Second Circuit had the facts reversed, and cited no additional authority for not importing the NLRA principles.

The statutory differences, when properly analyzed, demonstrate that there is even more reason for the rule against intermittent work stoppages to apply under the RLA. Like the RLA, the NLRA has no express provisions against such work stoppages. Therefore, a proper analysis requires evaluation of the purposes underlying the statute and the right to strike, which, under the RLA indicate such activity should be prohibited.


\textsuperscript{109} See \textit{supra} notes 17-19 and accompanying text.
The RLA was designed specifically to avoid strikes and any disruption of commerce. Even if the parties do obtain the right to exercise self-help, it comes only after a long, drawn-out process, with many steps and the use of a third party, designed to allow sufficient time to reach agreement and avoid strikes. To allow a labor organization to disrupt commerce frequently and intermittently is in direct contravention of the stated statutory goals.

The Second Circuit's final reason for not prohibiting the intermittent strikes was that since such action was not an unfair labor practice, an injunction could not issue under the NLRA. Once again, however, the court failed to acknowledge the differences between the statutory schemes. The Supreme Court has recognized that the difference between the RLA and the NLRA results in RLA employers being able to seek injunctive relief that is otherwise denied to NLRA employers due to the existence of the Board. Since an RLA carrier could not seek a remedy through an unfair labor practice proceeding, applying this difference to the issue of intermittent strikes demonstrates injunctive relief must be appropriate.

Pan Am did not appeal the Second Circuit decision. Therefore, for several years, this decision was the only published one with regard to intermittent strikes under the RLA. At least one other court has now adopted this decision without questioning it or analyzing the RLA purposes or principles.

In Association of Flight Attendants v. Alaska Airlines the court upheld the union's use of intermittent and partial strikes. Once again, there was no question that the activities in which the union engaged were intermittent. The carrier argued that the activity was unprotected, while the union argued that it was protected. The court recognized that an employer's response depends upon whether the

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110 See supra note 84 and accompanying text.
112 Id. at *1; see supra discussion part I.
activity is protected or unprotected. The court, however, refused to decide that issue. Without performing any independent analysis, the court cited the Second Circuit's decision and merely stated, "[s]imilarly, this court finds it would be improvident to import such distinctions from the NLRA into the RLA and thus declines to determine whether the CHAOS work stoppages would be considered protected or unprotected activity under the RLA." Since it refused to determine whether the activities were protected, it is difficult to understand how the court was able to determine the legality of the carrier's actions, particularly since it held that employees could not be discharged for engaging in CHAOS activity.

Shortly after the issuance of this opinion, Alaska Airlines and its flight attendants reached agreement. Therefore, the parties will probably not appeal this decision. The import of these two decisions on intermittent strikes is foreboding for carriers.

The RLA labor organizations are now well aware that the use of intermittent strikes has not been prohibited by either court which has addressed the issue. In addition, the organizations recognize that their activities can cause considerable problems for carriers, particularly if the carrier intends to respond by replacing employees who participate in the activity. Yet, based upon the analysis of the RLA and its history, intermittent activity should be labeled as unprotected.

Carriers should continue to fight such activity, relying upon the legislative history of the RLA to support their position. As set forth at the beginning of this article, many federal judges are not familiar with the provisions of the RLA or its history. Therefore, educating judges is necessary. In addition, carriers will bear the burden of

113 Id. at *10.
114 The court did, however, acknowledge that the carrier had the right to permanently replace any employees who engaged in CHAOS behavior and that employees who had been permanently replaced could not claim entitlement to other positions which were vacant as the result of CHAOS activity. Id. at *16-17.
distinguishing the previous opinions, which, given the lack of analysis in the opinions, will require diligence in the education process. For reasons set forth herein carriers should be able to level the playing field and obtain judicial relief against such activity. Upon a finding that intermittent activity is not protected and is entitled to judicial relief, employees will find that engaging in such behavior will result in immediate discharge and will look more like suicidal actions than protected activity.
Panel Discussion