Judicial Review of System Board Awards under the Railway Labor Act: Some Problems and Opinions

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BY JACK L. KRONERT†

I. THE CONTRACT AS A STANDARD FOR REVIEW

IT IS IMPOSSIBLE to speak of “system board” awards, without distinguishing between the Railway Labor Act’s (hereinafter Act or RLA), two separate titles.¹ System boards are the norm in the air transport industry; they are, and prior to 1955, were the exception in the railroad industry, although they have been permitted since 1934. The 1966 amendments, however, made it possible for either side to compel the formation of what amounts to an ad hoc system board of adjustment simply by making the demand.² This provision has been virtually ignored thus far for reasons that escape me in view of the continuing delay in three of the four divisions of the National Railway Adjustment Board (hereinafter Board or NRAB).³

At the same time that Congress provided for unilateral, non-consensual establishment of these ad hoc boards, it also changed the Act substantially with regard to the enforceability and reviewability of NRAB awards.⁴ The provisions for enforcement of these new ad hoc system board awards are identical to the amended provision for enforcement of NRAB awards. Curiously enough, however, when the 1966 amendments were passed no mention was made of the standards for review or the methods for enforcement of ordinary Title I system board awards. The Act remains silent on that point.⁵

As to NRAB awards, section 3, First (p) and (q) were changed in order to make Board awards enforceable (they are “final and binding” under section 3, First (m) whether money awards or not)⁶ and “conclu-

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² Id. at § 3 Second.

³ The Report of the National Mediation Board for 1967 states that it “anticipates that Public Law (PL) Boards will eventually supplant the Special Board of Adjustment Procedure . . .” as well as reduce NRAB caseload. Id. at 61. But the figures reveal no appreciable decline in NRAB delay in the divisions where it has been a problem, nor any great use of this new device. See Report of NMB 1968 at 44.

⁴ Railway Labor Act § 3(m) and (p), 44 Stat. 577 (1926), as amended, 45 U.S.C. § 153(m) and (p) (1964).

⁵ Id. at § 3 Second. This section was not amended in regard to regular system boards. There is no statutory guide provided as to the reviewability or enforceability of their awards, although there are express provisions for enforceability of special board awards.

⁶ Id. at § 3 (m). But see Hanson v. Chesapeake & O. R.R., 291 F. Supp. 401 (S.D.W.Va. 1968) (1966 amendments [80 Stat. 208] for judicial determination of which employers are entitled to the award but the court can define the amounts of a “claim” sustained).
sive on the parties." Court interference is precluded "except for failure of the division to comply with the requirements of this Chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order."9

A Title II system board of adjustment resembles in many respects a tripartite arbitration board that might be established under the National Labor Relations Act (hereinafter cited NLRA). Unlike an NLRA board, however, it is established pursuant to statutory command, despite the fact that it appears to be voluntary.9 Yet, the contract pursuant to which it is established presumably defines the scope of its jurisdiction. Its jurisdiction is often defined less broadly, or at least more ambiguously, than that of the NRAB. Since the contract establishing the Title II board is frequently drafted by labor lawyers, more familiar with the NLRA than with the RLA, it may reflect the language typical of arbitration agreements; that is, jurisdiction is limited to disputes involving the terms of the agreement.10

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7 Id. at § 3 (p) & (q).
8 Id.
9 Id. at § 204; this section mandates the establishment of these Boards. See International Association of Machinists v. Central Airlines, Inc., 372 U.S. 682, 686-87 (1963).
10 Id. The statutory language describes the jurisdiction of the Boards to include "disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions . . . . [Emphasis added.]" The jurisdiction of system boards of adjustment may not exceed that "which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of [§ 3 (First) (i)]." Id. That section also speaks of "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. § 3 (First) (i). [Emphasis added.]" A survey of the contracts of three major airlines indicates some disparity in structures. The ALPA contracts with American, and Pan American and TWA generally parallel the statutory language. In the agreement between Pan American World Airways, Inc. and TWU for Airline Mechanics and Ground Service Employees, 23 Dec. 1966, there are some suggestive differences between the general granting clause, Article 23, stating that "Any grievance not adjusted in the manner provided for . . . . above or any grievance . . . . involving a violation of the Railway Labor Act or the interpretation or application of his (sic) Agreement, shall be referred to the appropriate Adjustment Board . . . ." Id. at 31. [Emphasis added.], and the specific agreement clause establishing the Board itself which on its face at least may circumscribe jurisdiction to less than the full statutory amount: "[E]ach Board shall have jurisdiction only on disputes between the Company and the Union or any employee or employees governed by Systems Agreements growing out of grievances involving interpretation or application of such Agreements." Id. at 16-17.

The Agreement between the Pan American World Airways Inc., and the Teamsters, Representing Service Supply Clerks and Lead Service Supply Clerks in Airline Operations and Missile Support Operations, January 27, 1967, is also revelatory of this problem. That contract establishes both a System Adjustment Board and special Field Boards and in the main granting clause, Article 19 (a), says that "Grievances which may be properly referred to them shall be handled by Adjustment Boards as follows" and then goes on to define all of the grievances. Id. at 26 [Emphasis added.]. In section (d) of 19 jurisdiction is stated to be "only over disputes between the Company and the Union or any employee or employees governed by this Agreement, growing out of grievances involving a violation of the Railway Labor Act, or the interpretation or application of this agreement." Id. at 27 [Emphasis added.]. The question may involve what constitutes a grievance not involving breach of the Railway Labor Act? Cf. Agreement between Pan American World Airways, Inc., and the Air Transport Division Brotherhood of Railway Clerks, Representing Clerical and Related Employees, 1 Jan. 1965, at 30-31.

Assuming the foregoing contracts are typical there is a group of contracts containing language which limit System Board jurisdiction to something less than the full statutory limit, or at least are ambiguous as in the grievances as to violation of the Railway Labor Act cases.

Of course, the issue arises in any case because the parties may draft language that would present the question of whether their intent to limit the jurisdiction fouls some statutory purpose. The fact that most agreements define a "grievance" more broadly for purposes of the grievance procedure does not affect this problem because it is entirely possible that some grievances are not intended to go to this final step.
At the outset, then, we have the basis for a differentiation between the scope of judicial review applicable both to an NRAB award and to a Title II system board award. NRAB jurisdiction extends to "disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions." Title II boards have identical statutory jurisdiction which cover "disputes of the character specified in this section." A question arises whether, when the parties draft the board jurisdiction more narrowly than the statutory "grievances or disputes arising out of the interpretation or application of agreements . . . ." they take "grievances" out of the "minor disputes" area. There is another question concerning whether the Title I provisions for enforcement, including the limitations expressly placed on judicial review of NRAB awards, carry over to enforcement and review of system board awards. The statute does not explicitly effect a carryover, except in the limited situation of special boards established after the 1966 amendments.

Underlying these issues is the preliminary one of whether these matters are to be determined by federal or state law. On that issue, the Supreme Court, in International Ass'n of Machinists v. Central Airlines, held that an airline system board award is enforceable in the federal courts under either 28 U.S.C. §§ 1331 or 1337. Although that was the only question squarely presented by Machinists, the Court used the occasion to comment on some of the problems involved here. The Court made it clear that the contracts, and the adjustment boards provided for under Title II, are "creations of federal law and bound to the statute and its policy."

The Court went on:

... [T]he Sec. 204 contract, like the Labor Management Relations Act Sec. 301 contract, is a federal contract and is therefore governed and enforceable by federal law, in the federal courts.

The Court continued:

More specifically, the provisions of a Sec. 204 contract, such as those governing the composition of the adjustment board, the procedures to be employed as to notice and hearing or for breaking deadlocks, or the finality to be accorded board awards, are to be judged against the Act and its purposes and enforced or invalidated in a fashion consistent with the statutory scheme. There may be, for example, any number of provisions with regard to the finality of an award that would satisfy the requirements of Sec. 204 but we are quite sure that some such provision is requisite to a Sec. 204 contract and that the federal law would look with favor upon contractual provisions affording some degree of finality to system board awards.
What then, is the federal law as to the scope of judicial review of Title II system board awards? In view of what the Court said in Machinists, decided prior to the 1966 amendments, it is fair to ask whether it is to be defined by the scope of judicial review provided for in the 1966 amendments to Title I. Title I is certainly a reasonable source of "federal law," perhaps even of that applicable to Title II board awards. On the other hand, there is considerable force to the argument that Congress, presumably aware of the Supreme Court's view, expressly chose not to change Title II. Does this, without more, carry any conviction when arguing against a carryover? At least by implication, the soundest argument credits less the absence of Congressional action than the implicit rejection of any carryover in the comment by Mr. Justice White that "there may be any number of provisions with regard to the finality of an award. . . ." Any number may include incorporation of a standard similar to Title I's standard, but incorporation of some provision for finality is, in the Court's view, all that the Act requires. Nothing in the 1966 amendments or their history tempers that judgment.

Obviously, in most cases, these fine distinctions will not matter. Whether the test is the one evolving in the federal courts since the "Trilogy" or whether it is one adapted from the 1966 amendments would not, in most cases, compel deviation in the ultimate decision.

Incorporation of the Title I standards (as a matter of choice of federal law) encounters other obstacles. There is some question whether that statutory standard is logical in a Title II case. If we translate the provisions to apply to Title II board awards, we see that the first standard, that is the one that permits upsetting an NRAB award for failure of the division to comply with the requirements of the Act, is irrelevant in Title II cases. Since the only carryover to section 204 is jurisdictional (and that may be only permissive), the other provisions of section 3, including the requirements of notice and so forth, are not part of Title II. Thus, assuming this is what the phrase "requirements of the Act" refers to, this first element of the standards of review is really irrelevant to review of system board awards under Title II. Failure of the order "to conform, or confine itself, to matters within the scope of the division's jurisdiction," if translated to mean "system board's jurisdiction," as defined by the contract, might be a meaningful standard. Of course, that innocuous looking language conceals a difficult problem. If the parties' contract limits the system board's jurisdiction to matters arising under the contract, and if this is read as something less than that permitted by section 204, which only mandates the formation of such boards "not exceeding the jurisdiction which may be lawfully exercised by system . . . boards of adjustment, under the authority of section 3, Title I of this Act,"

This resistance is apparently bottomed on the notion that arbitrators must stick to the confines of the arbitration agreement, in accordance with a strict reading of the Enterprise test which stipulates that the award "draws its essence from the collective bargaining agreement." System board awards would be covered by such a test if they were regarded as limited by the contract language establishing them. But the Enterprise test would not reach the awards if system board jurisdiction was held to reach as far as the Act allows no matter what the parties say in their agreement. In short, it is entirely possible, and I am sure astute counsel are aware, that the courts will have to decide this troublesome question when raised as a defense to the system board's jurisdiction.

If attention is directed to the parties' intent, as reflected in the contractual language, to the permissive language of Title II, and to the flexibility within the limits of finality limned by Mr. Justice White's language in Machinists, it might reasonably be concluded that it is entirely consistent with federal law to permit a narrower jurisdiction for system boards than for those of the NRAB, or even Title I system boards. On the other hand, what in the Act suggests that there is an advantage in having a difference in the standard of "minor dispute" jurisdiction under Title I and under Title II? In this connection, two propositions may well be urged. The first is that Justice White's statement on finality, although it is permissive on means, only goes to that one particular issue; and the second is that, since a section 204 contract is, in his language, a "federal contract" which is "bound to the statute and its policies," the issue is whether "the statute and its policies" negate any contractual effort to narrow a system board's jurisdiction. In one sense this issue does not affect "finality." But since the limits on judicial review would be the same, in another, and more important way, it does affect "finality," because anything short of the permitted jurisdiction opens the door to judicial review, and intermeddling in the name of enforcing the parties' contractual intent—a logically compelling gambit under the Enterprise-Torrington test, at least until the Supreme Court has a chance to test it.

This brings us to the central problem. Under the guise of deciding the issue of jurisdiction we are really deciding the key issue of reviewability and the standards of review. The only real inroad on arbitral suzerainty has been in the area of judicial scrutiny of arbitrability and contractual intent, and the decision of the issue presented involves both of those points.

I would think that the argument against permitting the parties to restrict the system board's jurisdiction could draw support from at least

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19 Torrington Co. v. Metal Prod. Workers Union, 362 F.2d 677 (2d Cir. 1966). See Local 342 UAW v. T.R.W., Inc., 402 F.2d 727 (6th Cir. 1968). In denying enforcement of the arbitrator's award of reinstatement, the court held that the company's right under the agreement to selectively discharge participants in an illegal work stoppage was not subject to the arbitrator's views of fundamental fairness. For the arbitrator to deny this right unless the company explained the selective discharge to the arbitrator's satisfaction was to add terms to a negotiated agreement or to nullify certain provisions of that agreement. See generally P. Hays, LABOR ARBITRATION: A DISSENTING VIEW (1966).


21 Id.
two other sources. At the outset is the obvious one that the parties' language in phrasing the scope of system board jurisdiction, like so much language of this type, does not really reflect any intent to narrow the statutory board jurisdiction. To the raised eyebrow let me ask how many of you have thought through the difference between a "grievance" and a dispute arising out of the interpretation and application of the terms of a collective bargaining agreement, at least before drafting the last agreement you worked on? The question of intent here appears to be somewhat fictional; and at least insofar as the actual parties' intent goes, I would guess that the language in most system board contracts does not reflect any relevant bargaining history. Even assuming that it does, we return to Justice White's admonition that any view of these agreements must take into account the "statute and its policies." Is it reasonable to conclude that it aids the policies of the statute to encourage a Torrington trend? If so, what policies are enhanced? Clearly neither the policy of providing for "prompt disposition of disputes," set forth in the chapter heading, and in section 2, nor, for that matter, any other of the purposes set forth in section 2, all of which are incorporated by reference to air carriers in Title II, section 202. Nor is there any indication that Congress intended, or would have intended, a double standard to apply as between rail and air carriers in this connection. In fact, there is no reason to assume that such a difference would find any justification at all. Viewed practically, a finding that something such as a "past practice" is not arbitrable under a system board's jurisdiction would create other problems in the administration of the Act. Such a finding could lead to the conclusion that a dispute about a past practice is a "major dispute" under section 6 of the Act, since by definition it would not be a "minor dispute." Ordinarily, this would mean that the union could invoke all the major dispute provisions of the statute whenever the employer changed a past practice, and even get an injunction barring such a change. Conversely, the employer would be in breach of the Act for not serving a "section 6 notice" prior to unilateral change of a past practice. This result, in my judgment, neither comports with the overall administration of the RLA, nor makes sense in a practical context. Proliferation of issues that can mushroom into major disputes does not assist the administration of the Act, particularly when this type of issue is more readily resolvable under arbitration machinery. It is doubtful that this is what the parties themselves intended, let alone what the Act contemplates. In part, the danger that a contest on arbitrability may lead to

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29 Id. at § 202.
30 Id. at § 6. Of course it could be viewed as neither. See McGuinn, Injunctive Powers of the Federal Courts in Cases Involving Disputes Under the Railway Labor Act, 50 Geo. L.J. 46 (1961). If a dispute is neither major or minor, it may not be a labor dispute within the meaning of Norris-LaGuardia Act § 13(c), 47 Stat. 73 (1932), as amended, 29 U.S.C. § 113(c) (1964) and may be enjoinalble in spite of Norris-LaGuardia. See Brotherhood of Railway Clerks v. A.T.&S.F. R.R., — F. Supp. — (N.D. Ill. May 8, 1964) (Since the issue was not a major or minor dispute, it did not lie within the exclusive jurisdiction of the NRAB and violated no law or agreement; thus it was held that the action of the company was not enjoinalble.).
31 See United Industrial Workers v. Galveston Wharves, 351 F.2d 183 (5th Cir. 1965).
this Pyrrhic victory for the carrier may explain the lack of a reported decision on that issue. But I am informed that the carriers raise the issue often before the arbitrators, and, ultimately, it will reach a court. Once that happens, we shall have the issue I have been discussing in all its glory.

Despite the arguments, however, the issue is there; and in view of the tension that is emerging between the courts and the arbitration process, particularly in that area of arbitrability involving intent of the parties, it is entirely possible that some courts will not see what I consider to be the sharp differences in statutory context referred to in this discussion—more particularly, the vast and perhaps weird consequences of taking certain disputes out of the "minor disputes" area and making them subject to the "major disputes" procedures of the RLA.

Thus, the two issues of jurisdiction and judicial review are intertwined. If the courts decide the issue of jurisdiction against contractual "intent" when it is short of the statutory standard, they will simultaneously shut the door on judicial review. Arbitrability will be virtually automatic, and it may well be that the federal law embodied in the 1966 amendments will then provide an adequate standard, not only for review of system board awards; it may also become a meaningful standard under the NRLA. Surely no one will quarrel with the fraud and corruption test.

II. Jurisdictional Disputes

The RLA makes no express provisions for the resolution of jurisdictional disputes, particularly when they arise in the form of work-assignment grievances. For years they would be processed to the NRAB by one or another union—normally the one deprived of work it thought belonged to its members. The situation developed that from time to time the carrier could be subject to conflicting awards or claims based on the same work. In 1966, the Supreme Court attacked this problem in Transportation-Communication Employees Union v. Union Pacific R.R. wherein it held that "the Board" had the duty to decide the "entire dispute," in an intra-divisional jurisdictional dispute involving the clerks and the telegraphers each of whom had laid claim to the disputed work under their respective collective agreements. In that particular case, the telegraphers filed the claim when the carrier assigned what they considered to be their work to the clerks. The Third Division of the NRAB held for the telegraphers, reading only the telegraphers' contract and neither considering the clerks' contract nor hearing their claim. This was consistent with the history of these particular disputes in the Third Division. The Supreme Court, in an extremely broad holding, held that the Board has the duty to consider both collective bargaining agreements in such cases and "exercise its exclusive jurisdiction" to resolve the entire dispute in one proceeding, giving ap-
propriate notice to the "uninvolved" union, i.e., the union that got the work, whether they default or not.

This decision is loaded with problems for the airlines and their system boards. *Transportation-Communication* itself represents a curious way of resolving the problem even on the facts in that case. Apart from Justice Fortas' criticism that the Court had spun a philosophy of "one job—one union" despite the possibility that the situation and the parties may really contemplate "one job—two or more unions"—a possibility that at least one court says is reconcilable with Justice Black's view—\(^{29}\) the holding leaves the resolution of this type of jurisdictional dispute in the hands of the employer. So long as the old philosophy prevailed, the unions were content to go along with whichever union pressed a grievance so that the division would deadlock, and an arbitrator would decide the issue. Now the holding in *Transportation-Communication*, by what Justice Fortas pejoratively—and properly—labeled an ipse dixit, requires the unions to assert their claim on notice or be foreclosed on a theory akin to res judicata. In an intradivisional dispute, like the one involved in *Transportation-Communication*, when either the clerks or the telegraphers makes its claim, the other affected union or unions with representatives on that Division will have to assert its own claim as a matter of pragmatic self-interest, thereby leaving the resolution of any deadlock in the hands of the employer members of that division! I assume here that there is no pre-arranged "fix" so that if one rival union votes with the other, the employers agree in advance to deadlock the Division. This is one possibility, but a risky one. Thus, on the facts of *Transportation-Communication*, which rehearse the old clerks-telegraphers fights,\(^{30}\) the mechanics of resolution for this type of jurisdictional dispute leaves a great deal to be desired. Although the Supreme Court's opinion is redolent with poetry about the impropriety of having a "merry-go-round" with first one union obtaining an award, then another, and even though the Court is properly indignant over the apparent endlessness of these disputes, the sorry fact is that when the Court's opinion is put to the test, it may result in a method for resolving jurisdictional disputes that no one ever intended. The employer makes the ultimate decision. Yet, that is the effect in any intradivisional dispute unless the unions resolve it among themselves. However, there is a danger as well as a deterrent to this. Not only does union agreement require that one union look bad in the eyes of its constituents by abandoning a seemingly sound claim for work in an industry of declining job opportunities, but it leaves the distinct possibility that the carrier will still be able to exert leverage, even after one union abandons its claim, because the remaining union will not be sure that an arbitrator will hold in its favor based on its contract alone. Under the mandate of the Court in *Transportation-Communication*, the arbitrator must consider the contract, and practices and usages, of the abdicating union as well. It is true that most


arbitrators will place great weight on the fact that the “other” union has abandoned its claim. But the carrier is not bound to lay aside its views; it can still fight the claim.

And there are other possibilities. One is that the union that has been awarded the work may refuse to fight the “out” union’s claim, leaving the carrier in the position of having to fight to avoid a redundant back pay award; another involves a situation in which the wrong union abdicates when the claim is over contracted out work.\footnote{See Brotherhood of R.R. Signalmen v. Southern Ry. Co., 380 F.2d 59 (4th Cir.), cert. denied, 389 U.S. 968 (1967).} I am sure this does not begin to exhaust the possibilities. Thus, application of the Court’s methods to the intradivisional situation is likely to produce problems that will return to haunt the courts. If the Supreme Court could be oblivious to these obvious problems in deciding Transportation-Communication, what can we expect as a result of the philosophy of that case?

With that as a background, we now turn to the area most apposite to the airline situation, the interdivisional dispute. Signalmen press a claim before the Third Division; electrical workers press their claim before the Second Division. This is the problem that epitomizes the non-RLA and airline situation. Or assume that the IBEW does not press its claim—it has the work. What then? Can the Third Division, by giving notice to the IBEW, bind it to its decision? Mr. Justice Black did not face this problem. Does “the Board” exist for these purposes? It can be argued that there is no “board” capable of doing anything in an interdivisional jurisdictional dispute. The statutory language is clear: Section 3, First (h) provides that the “Adjustment Board shall be composed of four divisions whose proceedings shall be independent of one another . . . [Emphasis added.]”\footnote{Id. at § 3 (First) (h).} It then proceeds to define the four divisions, each of which is “[T]o have jurisdiction over disputes involving . . .” and then it defines the classes of employees.\footnote{Id. at § 3 (First) (i).} Section 3, First (i) provides for referral of a dispute “by petition of the parties or by either party to the appropriate division of the Adjustment Board . . . [Emphasis added.]”\footnote{Id. at § 3 (First) (j).} The notice provisions of section 3, First (j) refer to the duty of the “several divisions” to give notice,\footnote{Id. at § 3 (First) (p).} not the Board proper. It is the order of a Division that is enforceable under section 3, First (p).\footnote{Id. at § 3 (First) (p).} What is more, as we noted earlier, failure of an order to conform “to matters within the scope of the division’s jurisdiction”\footnote{Id. at § 3 (First) (p).} is an express ground on which a district court can refuse to grant enforcement of a Board award. It would be repetitious to continue this analysis; clearly the section contemplates Board action through, and only through, its Divisions.

Is it within one Division’s jurisdiction, as that jurisdiction is defined in section 3, First (h), to consider the contracts of the employees in another
Division? Assuming the Court's opinion is read to answer in the affirmative, and assuming that the Division must do so consistent with its function to decide any particular claim, the real question is whether it is consistent with the structure of the Act, due process and orderly resolution of these disputes, for example, to bind the Third Division jurisdiction over the claim of a Second Division union? For one thing the IBEW, in our hypothetical, does not have a representative on the Third Division. Assume that the Third Division hears the signalmen's claim, considers the IBEW contract, even hears the IBEW representative, and then unanimously decides against the IBEW and for the signalmen obviating even the necessity for an arbitrator. Would that be fair? Is the self-interest of the carrier representative on a particular Division against unnecessary claims sufficient protection for the unrepresented union? We can multiply the possibilities; the problem only becomes more bizarre. Even if the Board deadlocks, the "out" union cannot fairly be found to have been represented on this tribunal. As a matter of industrial reality, that is a most significant fact. I think Justice Black's opinion in Transportation-Communication needs serious qualification. Even if it is limited to intradivisional disputes, it is questionable. It can have no efficacy in the interdivisional area unless we ignore all the practical problems I have suggested. My guess is that it will breed a host of problems for the courts in enforcement proceedings. They must remain aware of the hidden practical problems that I have barely outlined and not let their gaze be glazed by the siren song of industrial peace.

Although the airline system board situation resembles the interdivisional dilemma in many ways, there may be enough of a difference, due to the statutory structure of the NRAB, to permit Justice Black's admonitions to be more effective under Title II than Title I. An airline system board is a hostile agency as far as the non-participating union is concerned; it has no experience with other contracts, nor is the "out" union represented on it.

Are there sufficient differences, however, between the airline system board and the NRAB interdivisional dispute to warrant application of the underlying approach presented by Transportation-Communication? Preliminarily, we must agree with the point made by Justice Black, that the jurisdictional case should be resolved in one proceeding and at one time. This makes sense. The merry-go-round to which he refers is a joke. But the solution has to be fair, one that guarantees everyone his day in court in a real sense, and moreover, need not turn on the philosophy of Transportation-Communication, namely "one job—one man." At least one case has already arisen in which it is undeniable that both contracts involved were relevant to the job, and that both unions were entitled to the work.\(^{28}\) The key message of Transportation-Communication is that there should be one proceeding and it should resolve the whole dispute, but it

need not find that only one union is entitled to the disputed work. On that issue, Justice Fortas makes much the sounder argument and may in the long run be found to be correct.

Assuming that the possibility of a finding for both unions exists, is it feasible to have one board in a system board structure resolve these disputes? Many of the same problems that exist in the interdivisional dispute situation, exist here. In the first place, the system board cannot be used as a rubber stamp. For example, assume the carrier assigns the disputed work to the machinists, then after rumbles from the clerks, it files a grievance with the machinists' system board, with notice to the clerks to confirm its work assignment to the machinists. A bipartite system board award holding that the carrier did the right thing leaves something to be desired, even assuming that they go through the motions, read the clerks' contract into the record, and assuming further, that the clerks' representative appears and argues his case. This is just one kind of situation in which the *Transportation-Communication* solution is problematical.

Another such situation would exist when the "out" union files a claim; the "in" union lies back, is notified of its right to appear and does not. Now the "out" Board cannot find that the company did anything wrong—not without an arbitrator, or a masochistic company representative—so the arbitrator enters. Should this arbitrator—designated under one contract to decide a claim under that contract, chosen by the agreement of the parties to that contract—resolve the disputes that affect the rights of another party to another contract, even assuming, for the sake of argument, that the other party comes before the arbitrator and makes its case? Conversely, could anyone fault the "other" union for refusing to appear and rely on this theoretically hostile body? This case is somewhat distinguishable from the NLRA situation in which the arbitrator generally sits alone. Here, there is a board, and as a practical matter, the arbitrator's ear is available to the members of that board, not the pleading party. It may be that there are arbitrators who can decide the issue in such a case consistent with Justice Black's mandate, viewing all contracts and claims from an Olympian vantage point; however, they are, I suspect, in a minority.

There is the further question of whether that is really what the parties and the affected employees want. I wonder whether the clerks, for example, would be satisfied to have their job rights determined by an arbitrator chosen by the machinists and the employer. I wonder further whether a district judge will be satisfied, notwithstanding formal compliance with *Transportation-Communication*, that this was a fair procedure, or, whether the judge will not be prone to find the proceeding marred by some technical defect, be it in the notice given the "out" union, the hearing that was held, the way the award was rendered, or some other ground. On the face of it, this is not a satisfying remedy; there is an inherent tension between the goal of resolving a jurisdictional dispute in one proceeding, reflected
in the Black opinion, and the inappropriateness of the airline system board as the forum for attaining this goal.

Recently, the District Court in the Southern District of New York, in *Columbia Broadcasting System v. American Recording and Broadcasting Ass'n*, ordered both unions before the same arbitrator when one union presented its claim to arbitration and the employer presented a claim to a rival grievance procedure. This is one way to resolve the *Carey v. Westinghouse* situation, as well as the RLA Title II case. Significantly, the court in *CBS* found authority for what it did in *Transportation-Communication*.

Perhaps this is an augury of the answer in RLA Title II situations. If a court were to order both boards to meet together, agree on an arbitrator and then submit to his jurisdiction, the philosophy of *Transportation-Communication* would be fulfilled. I understand that the parties themselves, in at least two situations involving the Pilots and Flight Engineers on Pan American, worked out an agreement providing for just such a result. I gather that the agreement was reached to avoid some of the complications I have discussed as implicit in the *Transportation-Communication* mandate. In passing, I wonder whether such an agreement does not also open the door, certainly as to the losing union, to litigation on *Humphrey v. Moore* grounds. A court ordered solution, as in *CBS*, at least mitigates the likelihood of such a suit.

Even assuming a *CBS* solution, or private agreement along the same lines, one of the most difficult problems created by the mechanics of the situation has to do with contract construction. The court in *Transportation-Communication* spoke rhetorically about the collective agreement. After quoting *Warior & Gulf* regarding the calling into being of a new common law of the industry or plant, the Court said:

> In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements. This is particularly true when the agreement is resorted for the purpose of settling a jurisdictional dispute over work assignments.

For purposes of judicial review, however, the Court in *Enterprise Wheel* made it clear that any arbitral award must draw its support from the collective agreement. In the jurisdictional disputes area, the Court is willing, apparently, to give the arbitrator somewhat more scope than he might be entitled to in the other areas. But the problems may become extremely complex; for example, the contracting out problem litigated in *Brother-

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41 See *Pan American World Airways, Inc. Special Pilot-Engineer System Board of Adjustment Agreement*, on file at author's office, New York University School of Law, providing for a special board composed of two members from ALPA, two from FEIA, two from the company and one neutral, with jurisdiction to decide a single specific case. Both unions and the company were to be bound. *Id.* at 3-4.
hood of R.R. Signalmen v. Southern R.R., in which one of the signalmen's claims was that the work given out belonged to them under their scope rule. Both agreements expressly recognized the right of the carrier to assign line work, the work contracted out in this case, to the other craft! Needless to say, each agreement claims the work for itself as well. The claim by the signalmen was that the work was given not to the IBEW, the other craft involved, but to an outside contractor; the IBEW had not made its claim as of the time of the litigation. From which contract does the arbitrator draw his inspiration in this case?

I am illustrating only one difficulty inherent in arbitral resolution of these RLA jurisdictional disputes. The CBS solution resolves solely the procedural problem; it does not resolve the many substantive problems. The courts, therefore, will have a difficult problem on review. What measure does the reviewing body apply? As a practical matter, an arbitrator can make as rational an allocation of work in a work assignment dispute as anyone else, certainly as well as the NLRB. But there is a significant difference between the scope of judicial review of an arbitrator's action and the decisions of an administrative agency. If, unlike the NLRB, he is going to be held to some meaningful contract standard, the courts are going to have their hands full in a situation in which both unions have a colorable claim.

In a situation in which both unions have a colorable claim to disputed work, to work "contracted out" or to a new position like that involved in Transportation-Communication, what standards does the arbitrator himself apply? Words like "practice, usage and custom pertaining" to such agreements—Justice Black's words—avail little in these situations, particularly, if they are unique, as they often are, or if the practices, usages and customs are either ambiguous or contradictory. Furthermore, if the motivating criterion is the theoretical one urged by Justice Black, that is, if the arbitrator feels he must choose between the two competing unions, would not this conflict with a fair estimate of one union's claim that its contract, if interpreted in terms of the work its people perform, entitled it to the jobs? In other words, doesn't the "one job—one union" principle itself prevent application of the Enterprise Wheel contract test to this matter that supposedly requires "interpretation or application" of the contracts involved? Will the courts, then, have to evolve a new doctrine, bred of sheer expediency, to sustain such awards even when it is obvious that the arbitrator just made an arbitrary choice? And is such an approach consistent with the contract basis for review enunciated in the section 301 cases, and seemingly endorsed in Justice Black's opinion?

To conclude, then, on jurisdictional disputes, the Transportation-Communication case establishes a standard for airline system board performance; but due to the lack of statutory standards for system board review as well as the difficulties inherent in system board resolution of such controversies, adherence to that standard, whether voluntary or not, will pose

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complicated problems on judicial review. What is more, voluntary solutions may be forestalled by fear of "breach of duty of fair representation" suits so that reluctant unions may have to be dragged in by a CBS type order. Even then, the Courts will still have to fashion some basis for review since there is nothing whatever in Title I to help, and since adherence to the contract, or custom and practice, can only be a tautologous test. Since courts shun frankness about expediency—which might otherwise be their best method in these cases—it is difficult to imagine where they can look for help. These cases are generally not subject to neutral solution on grounds other than expediency, and do not belong before arbiters if these arbiters are expected to use ascertainable and fair standards for decision. Of course, one could hope that the Court would limit Transport-Communication to NRAB intradivisional situations, thus leaving the way open for resolution of interdivisional and system board situations in some other way. But what other way? That is, as we law professors like to say, a good question. And most practically in this situation, the typical law professor's retort is appropriate: What do you, the people who have a daily working acquaintance with the problem, think?

III. SOME RECENT PROBLEMS AND A FURTHER INQUIRY

The problems adumbrated above as to judicial review of certain types of system board awards are only suggestive. There are other types of problems, too—problems that have kept the myth of non-reviewability intact by extending the litigated issues beyond the scope of board jurisdiction. Problems like those presented in Glover,55 and Brady56 are examples of that tendency. I had hoped, at one time, that jurisdictional disputes would also fall into that class,57 but it may be too late for that.

Similarly, we do not yet know the answer to some key questions that bear on standards for review. Does Chicago River58 apply to Title II system boards? Does Louisville & Nashville R.R.59 apply to system board awards? If so, and I would venture that the courts would so extend them, despite the obviously closer similarity that these boards possess to NLRA boards than to the NRAB, the lack of alternatives to the parties and the force of these awards compel attention to a careful attempt to formulate review standards.

It is time, then, to ask some questions and to hope for some answers. Some of them have been raised by previous speakers. The adjustment board

56 Brady v. Trans-World Airlines, 401 F.2d 87 (3d Cir.), cert. denied, 393 U.S. 1048 (Jan. 21, 1969). (Since the Railway Labor Act does not authorize system adjustment boards to hear an employee's fair representation dispute against his union, the Board's decision does not bar a court review of the hostile discrimination. But since reinstatement and backpay were awarded by the Court for company and union violation of Section 2 (Fourth) (Eleventh), no award could or should be made for the lack of fair representation, when the employee had failed to exhaust his internal remedies on the claim of hostile discrimination by the union).
structure is cumbersome, expensive, time consuming and, in many cases, just another step in the grievance procedure. As I have pointed out before,¹⁹ the adjustment concept just does not work in difficult grievances in the railroad industry. We do not know, however, what is happening in our system boards. Do they “adjust,” or just take time? Do they follow precedent? Do they even attempt to function as they are thought to, or are they just a front for playing games? There is no scholarship in this area, no real data on which to begin to make suggestions or proposals. If there is anything in the system board experience of value to American labor and management, no one knows about it. We know of some of the problems in the NRAB, thanks to the NMB annual reports, but we have no idea what is going on in the airlines. If, as I suspect, there is little positive to be said about system boards except habit, perhaps it is time to get rid of them in favor of a typical arbitration structure, thus unifying our federal labor structure and, incidentally, perhaps eliminating some of the problems of judicial review referred to in this discussion. But in any event, it is time for disclosure and for systematic analysis; the courts need the facts to assist them in making decisions, and the industry could help itself by self-study and improvement. With all the concern in the nation today about labor relations, the airline experience is relevant, if not typical, and I am sure there is no problem about funding such studies. Without meaningful information we academics cannot play our role, nor can anyone 33 years old—really the second oldest tripartite arbitration structure in the country. Congress also is entitled to this information, and, in fact, maybe that is where the study should originate. But surely it is time enough after 33 years to judge the experience. Such a study is long overdue.

¹⁹ See Kroner, note 50 supra.