1969

Procedural Reform in Labor Law - A Preliminary Paper

Charles J. Morris

Follow this and additional works at: https://scholar.smu.edu/jalc

Recommended Citation
https://scholar.smu.edu/jalc/vol35/iss4/2

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
PROCEDURAL REFORM IN LABOR LAW —
A PRELIMINARY PAPER*

By Charles J. Morris†

CONTENTS

I.  INTRODUCTION

II.  THE NATURE OF THE PROBLEM
    A.  Centrality Of Collective Bargaining
    B.  Similarity Of Substantive Law Under Railway Labor Act And
        Labor-Management Relations Act
    C.  The Basic Structure Of Existing Law
    D.  The Procedural Jungle
        1.  Tribunals under the RLA
            a.  National Mediation Board
            b.  National Railroad Adjustment Board
            c.  Special Boards of Adjustment
            d.  Public Law Boards
            e.  Airline Adjustment Boards
            f.  Federal District Courts
            g.  State Courts
            h.  Civil Aeronautics Board
        2.  Tribunals under the LMRA
            a.  National Labor Relations Board
            b.  General Counsel
            c.  Federal Mediation and Conciliation Service
            d.  Voluntary Arbitration
            e.  Federal District Courts
            f.  State Courts

III.  SPECIFIC PROBLEM AREAS
    A.  Problems Under The RLA
    B.  Problems Under The LMRA

IV.  A WORKING HYPOTHESIS FOR PROCEDURAL REFORM
    A.  General Structure
    B.  The National Labor Representation Board
    C.  The General Labor Counsel
    D.  The United States Labor Court
    E.  The National Mediation Service

V.  TESTING THE HYPOTHESIS

VI.  CONCLUSION

* A shorter version of this paper was presented in a session entitled "Labor Legislation for the
  Airlines—a Critique," at the Symposium on Air Transport Labor Relations sponsored by the
  Journal of Air Law and Commerce in Dallas, Texas, on 28 March 1969. See Morris, Labor Law
† B.A., Temple University; J.D., Columbia University; Professor of Law, Southern Methodist
  University.
I. Introduction

THE GENIUS of the Anglo-American legal system is its capacity for change. When old legal forms have become inflexibly encrusted with institutional barnacles to the point where they no longer can provide effective and acceptable legal solutions, the old form is either modified or replaced. It is not so much that the old form has become incapable of handling the problems for which it was originally intended, rather that the problems for which it is currently being used are different, and the old form lacks the capacity to adapt to changes in the environment. Legal history teaches that new methods or devices have often been engrafted on an old form, and adequate flexibility has thereby been achieved. On other occasions, however, either by legislative action or by common law development, relatively new jurisprudential forms have emerged. Both of these processes have been at work since the beginning of the system. Thus, when the Court of King’s Bench became more concerned with the forms of action than with the substance of actions, the Court of Chancery and its equity jurisdiction evolved to meet the need for a more responsive system of remedies.\(^1\) Several centuries later the Field Code, and later procedural codes modeled after it, accomplished a substantial merger of law and equity.\(^2\) And the adoption and subsequent influence of the Federal Rules of Civil Procedure,\(^3\) emphasizing simplification and functionalism, marked still another landmark in procedural reform. The vast growth in both administrative law and the practice of arbitration are further examples of the phenomenal regenerative power of our legal system.

The focus of this paper is on the current need for procedural reform in one area of the system—the administration and enforcement of labor law under the Labor-Management Relations Act (LMRA)\(^4\) and the Railway Labor Act (RLA)\(^5\). The analysis which follows and the reforms which are suggested comprise a working hypothesis—or perhaps more accurately a trial balloon. The conclusions are only tentative and will require further study and testing. With these reservations, the highlights of the evidence and the procedural modifications to which they seem to point will be examined.

II. The Nature of the Problem

A. Centrality Of Collective Bargaining

Collective bargaining is where we begin the analysis, because collective bargaining is central to the federal scheme which regulates the relationship of employees to management; it is the stated policy upon which both the

---

\(^1\) See generally, F. JAMES, CIVIL PROCEDURE, Chap. 1 (1965).
\(^3\) FED. R. CIV. P. 1 et seq.
Railway Labor Act and the National Labor Relations Act (NLRA) are premised. The familiar statutory phrases are basic: Encouragement of "the practice and procedure of collective bargaining;" and establishment of a "duty . . . to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions . . . ." Both statutes use identical language to guarantee employees the right to "bargain collectively through representatives of their own choosing." Thus, collective bargaining is the essence of the statutes; all of the provisions in these laws are structured either to protect or to regulate collective bargaining. For example, the unfair labor practices under the Taft-Hartley Act are designed essentially to: (1) Protect employees in their right to join unions, subject to freedom of choice, in order that they may share in the collective bargaining process; (2) protect employees from unions when unions abuse bargaining power; (3) establish and define a legal obligation to bargain between the employer and the union representing a majority of the employees in an appropriate bargaining unit; and (4) curb those union practices deemed excessive, for example, certain secondary activity and picketing for organization and recognition—practices which might otherwise inordinately reinforce union bargaining power. The Railway Labor Act has comparable though not identical substantive provisions. Whether by Congressional intent or by judicial construction, except for the absence of secondary boycott prohibitions in the RLA, there is little difference in the substantive duties and obligations which the two statutes require employers and unions to exercise toward each other and toward employees. The important difference lies in procedure. Thus, the theme of substantive identity and procedural diversity runs through the legal history of the two statutes.

B. Similarity Of Substantive Law Under Railway Labor Act And Labor-Management Relations Act

Several familiar examples illustrate the similarity in substantive requirements of the two Acts:

In 1943 the Supreme Court decided two cases which confirmed the supremacy of the collective bargaining agreement over the individual

---

14 Id. §§118(b)(1)(A), 118(b)(2).
15 Id. §§118(a)(3), 118(b)(2).
16 Id. §§118(b)(4), 118(b)(7), 118(e), 117.
contract of employment—J. I. Case v. NLRB,16 which arose under the NLRA, and Telegraphers v. Railway Express Agency,17 which arose under the RLA. The law announced by the Court was identical under both statutes: A contract of employment between an employer and an individual employee could not supersede the terms of a collective bargaining agreement executed by the employer and the majority representative of the employees.

In Textile Workers v. Lincoln Mills,18 the Court established the enforceability of a collective bargaining agreement as a matter of federal substantive law under section 301 of Taft-Hartley.19 Later, in Machinists Union v. Central Airlines,20 it held that an airline system board contract under section 204 of the Railway Labor Act,21 “like the Labor-Management Relations Act § 301 contract, is a federal contract and is therefore governed and enforceable by federal law, in the federal courts.”

The doctrine of fair representation,22 although not spelled out by either statute, was first announced under the RLA by the Supreme Court in 1944 in Steele v. Louisville & N.R.R.24 Nine years later, in Ford Motor Co. v. Huffman,25 the Court also found the doctrine subsisting in the Taft-Hartley Act, although the National Labor Relations Board (NLRB) waited until 1962 before deciding that a union’s breach of this duty constituted an unfair labor practice.26 Except for substantial differences in means of enforcement, the fair representation doctrine under both statutes appears to be basically the same.27

When both the NLRB and the Supreme Court determined in the Fibreboard case28 that contracting out of bargaining unit work which resulted in a lay-off of employees was a mandatory subject of bargaining, they were but following a precedent already established in a railroad case, Telegraphers v. Chicago & N.W.R. Co.29 In Telegraphers the Court had held a union’s demand that station agent jobs not be abolished except by

18 321 U.S. 332 (1944).
23 Railway Labor Act § 204, 49 Stat. 1189, 45 U.S.C. § 184 (1964): “It shall be the duty of every carrier and of its employees, acting through their representatives . . . to establish a board of adjustment . . . not exceeding the jurisdiction which may lawfully be exercised by system, group, or regional boards of adjustment, under authority of section 153 of this title.”
24 372 U.S. at 692.
26 323 U.S. 192 (1944).
29 "The statutory duty of fair representation was developed over 20 years ago in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act, . . . and was soon extended to unions certified under the N.L.R.A. . . . ." Vaca v. Sipes, 386 U.S. 171, 177 (1966). “[T]he Board adopted and applied the doctrine as it had been developed by the federal courts.” Id. at 181.
agreement of the union and the carrier to be a bargainable issue that "plainly referred to 'conditions of employment'."

The foregoing examples are typical of a frequently exercised tendency to find the same rights and obligations under both statutes. But it is not my purpose either to prove or disprove a general similarity in the statutes. Certainly there are many differences. For instance, under the Railway Labor Act collective agreements may continue for indefinite duration, even surviving changes in bargaining representatives. Contrary to the NLRA rule, a new RLA representative must accept its predecessor's agreement, and can obtain changes in that agreement only after completion of bargaining in accordance with section 6 procedures. "The effect of § 6 is to prolong agreements subject to its provisions regardless of what they may say as to termination." However, even this difference is more apparent than real. Although the NLRB guarantees that a newly-elected successor union under Taft-Hartley is entitled to bargain for a fresh agreement, the employer is not allowed to make unilateral changes in wages and working conditions prior to a bargaining impasse; in effect, the substantive provisions of the prior agreement continue. The NLRB's prohibition against pre-impasse unilateral changes is thus strikingly similar to the status quo requirements which sections 5, 6 and 10 of the RLA impose on carriers, although Taft-Hartley imposes no comparable restriction on a union engaging in a pre-impasse strike, except in those rare instances where a union runs afoul of the sixty-day notice provision of section 8 (d).

An area in which the statutes are totally different is in the treatment accorded secondary boycotts. The Railway Labor Act is silent on the subject, as was the original Wagner Act. The 1947 and 1959 amendments to the National Labor Relations Act, however, created an intricate system of "taboos" which prohibits most forms of secondary picketing, outlaws "hot cargo" agreements, and provides for private damage suits for injuries caused by unlawful secondary activity. Acknowledging the

---

30 Id. at 336.
38 Id. § 8(e), 29 U.S.C. § 158(e).
continuing vitality of the Norris-LaGuardia Act, the Supreme Court has declined to confer judicial extension of secondary boycott prohibitions to union conduct governed by the RLA. Significantly, notwithstanding the absence of such prohibitions, unions operating under the RLA usually have not felt the need to engage in secondary boycott activity.

The description which emerges is that despite some dissimilarities, the substantive legal relationships prevailing between a union and an employer toward each other, and also toward employees, display a general likeness under both the Railway Labor Act and the National Labor Relations Act. The differences which do exist—and they are striking—are rooted primarily in history and in procedure.

C. The Basic Structure Of Existing Law

My purpose in calling attention to substantive similarities was only to set the stage for an assault on procedural diversity. Diversity as such would not be objectionable if the procedures under each statute were not inherently inadequate. It is my hypothesis that the existing procedures for the administration and enforcement of the nation's principal labor laws tend to delay and often defeat the efficient and just application of the rights and duties promised by those laws.

Every 12 years since 1935, the NLRA has received a major Congressional overhaul. Conditions may again be ripe at the end of the current 12-year period—1971—for Congress to act. Action would be desirable if the resulting legislation were the product of a quality of statesmanship not heretofore visible in the passage of the Wagner, Taft-Hartley, and Landrum-Griffin Acts. By contrast, the various stages of the Railway Labor Act were enacted as a result of a high degree of cooperation, which seemed to develop at appropriate times, between unions and management on the railroads. Such cooperation never prevailed in the enactment of the National Labor Relations Act and its amendments, and probably it will never exist as long as proposed amendments are

---

45 Id. The picketing at the Jacksonville terminal was an exception precisely because the labor dispute with the Florida East Coast Railway Co. was being handled locally rather than nationally. Traditionally, the railroads and the unions with whom they deal have engaged in industry-wide bargaining, i.e., "national handling" of major issues. See Bhd. of R.R. Trainmen v. Atlantic Coast Line R.R. Co., 383 F.2d 225 (D.C. Cir. 1967), cert. denied, 389 U.S. 1047 (1968).
46 Id. For example, it is not uncommon on the railroads for a minority union to handle grievances for its members under the collective bargaining agreement of the majority union which formally represents the employees of the craft or class. Cf. Locomotive Engineers v. Denver & R.G.W.RR, 290 F. Supp. 612 (D. Colo. 1968), aff'd, — F.2d — (10th Cir. 1969) [71 L.R.R.M. 2690].
identifiable as either anti-labor or pro-labor. Being essentially an optimist, however, I suggest that legislative cooperation between labor and management is not impossible. Cooperation might be attained if it were widely recognized and accepted that the basic structure of collective bargaining in American labor law is already firmly established—a conclusion I believe to be valid.

The essentials of this basic structure may be simply stated: (1) Employees in an appropriate unit shall have an opportunity, through majority designation, to be represented exclusively by a labor union for purposes of collective bargaining, including grievance handling. (2) The employer and this union are required to bargain in good faith as to wages and other conditions of employment and to reduce their bargain to a contract. (3) The contract is judicially enforceable, though in most instances some form of arbitration is the primary means of enforcement. (4) The economic weapons which the parties may use to establish or influence collective bargaining, including strikes, lockouts, secondary boycotts, picketing and handbilling, are subject to limitations which are now reasonably well defined, at least under the National Labor Relations Act. (5) Neither the employer nor the union may discriminate against employees in the exercise of the foregoing rights and obligations. That is the structure. Everything else is detail and refinement.

Organized labor should now understand and accept the fact that history is not likely to reverse itself and remove restrictions on secondary boycotts; management should now understand that the clock is not likely to be turned back to pre-Wagner Act days when employers (other than railroads) had no legal obligation to deal with unions and union adherents could be fired at will. Consequently, it is too late to debate the underlying philosophy of collective bargaining.

I do not mean to imply that the law under these statutes is settled or that all of the rules have been stabilized. The opposite is true. Practitioners and teachers are still dependent on loose-leaf services because of the frequency with which the decisional law changes. Many legal details, of both legislative and judicial origin, are in a state of flux. This is to be expected in a dynamic society where interpretation of rules of law must necessarily give and bend to adapt to changes in technology and other developments in the economy. Yet in the times immediately ahead, I hope that Congress will not involve itself in the sterile process of second-guessing the NLRB and the Supreme Court as to the proper interpretation which should be given to broad substantive provisions in the statutes. The strength of these statutes may lie in their generality, which allows them to be adapted to a myriad of changing situations. I hope that congressional attention

51 E.g., American Ship Building Co. v. NLRB, 380 U.S. 300 (1965) (legality of offensive lock-out); Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964) (duty to bargain about contracting out of bargaining unit work); John Wiley & Sons v. Livingston, 376 U.S. 543 (1964) (liability of merger employer under predecessor's collective bargaining agreement); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945) (no-solicitation rule unlawful during nonworking time).
will be concentrated instead upon the administration and enforcement of existing substantive law. If the leadership of both unions and management are willing to accept, as an established fact, that the basic pattern of the governing law relating to collective bargaining is not likely to change in the foreseeable future—that neither side alone is strong enough to force revision in the basic structure—they might find it to their mutual advantage to combine with other elements in the national community in a good faith legislative effort to achieve fundamental revision in the administration and enforcement of this law. Such an observation may be only wishful thinking; nevertheless, the challenge is there—a challenge premised on the general acceptability of the substantive labor law as now written.²²

**D. The Procedural Jungle**

The procedural law under both statutes—the Railway Labor Act and the Taft-Hartley Act—is an overgrown jungle. Examination of the criticism frequently leveled at both Acts reveals that most complaints relate to the manner in which existing tribunals have interpreted certain statutory provisions and the way in which the administrative and enforcement machinery works—or fails to work.²³ We shall examine some of these complaints; however, first let us briefly tour this procedural jungle of conflicting and overlapping tribunals.

1. **Tribunals under the RLA**

   The tour begins with an examination of the tribunals and agencies charged with administration and enforcement of the Railway Labor Act:
   
   a. **National Mediation Board (NMB)**—This tribunal serves the following functions: (1) It handles representation cases under section 2, Ninth by determining appropriate bargaining units within the statutory phrase “craft or class,” conducting investigations (which may include holding hearings and elections) to determine the majority representative of each craft or class and certifying representatives for purposes of collective bargaining.²⁴ (2) Within the limited framework of its functions under section 2, Ninth, it settles certain types of “jurisdictional disputes,” at least those in which conflicting union claims of representation can be decided by defining the craft or class and certifying the exclusive representative of the employees.²⁵ (3) It provides mediation and related statutory

---
²² I do not mean to imply that efforts to achieve substantive improvement in the basic laws should not be pursued. Those efforts should and undoubtedly will continue to be made in order to adjust the law to changing needs and also to close loopholes revealed by usage and judicial interpretation. And efforts should certainly be made to improve the emergency disputes provisions of both the RLA and the LMRA. See Morris, Labor Law Revision: Some Preliminary Observations, 35 J. of Air L. & Com. 433 (1969) Revisions such as these, however, should not affect the basic legal structure of collective bargaining.
procedures to aid in the settlement of "major" disputes which require the service of a section 6 notice in order to change "rates of pay, rules or working conditions of employees, as a class as embodied in agreements."

(4) It appoints neutral arbitrators to sit on the various adjustment boards authorized to settle the "minor" disputes, which concern the application or interpretation of collective bargaining agreements. This jurisdiction also requires the NRAB to determine disputes between different unions which claim the same work under their respective collective bargaining agreements; these are garden-variety "jurisdictional disputes."

b. National Railroad Adjustment Board (NRAB)—This statutory Board is established pursuant to section 3 of the RLA and has jurisdiction over minor disputes on the railroads. As the Supreme Court held in Transportation-Communication Employees v. Union Pacific R.R., this jurisdiction also requires the NRAB to determine disputes between different unions which claim the same work under their respective collective bargaining agreements; these are garden-variety "jurisdictional disputes."

c. Special Boards of Adjustment—These boards are established by agreement, usually between a railroad and a single union, to hear and determine minor dispute cases which would otherwise be referable to the NRAB.

d. Public Law Boards—These boards were authorized by the 1966 amendments to the Act. They also have jurisdiction over minor disputes on a given railroad and may be established at the request of either the railroad or the representative of the employees to handle disputes which would otherwise be referable to the NRAB, or which have been pending before the NRAB for at least a year. Also, they may have jurisdiction over such other disputes as the parties may agree to submit.

e. Airline Adjustment Boards—These tribunals are generally organized as system boards of adjustment. Section 204 requires that they be established by air carriers and unions to hear and determine all disputes arising under collective bargaining agreements. It is likely that the authority of such boards to decide inter-union jurisdictional disputes would also be governed by the Transportation-Communication Employees case.

---


59 The Railway Labor Act establishes four divisions of the National Railroad Adjustment Board, dividing the jurisdiction of the boards as to type of employee. The first three divisions have ten members each (five from labor and five from the carriers); the fourth is a residual board with six members, having jurisdiction over carriers directly or indirectly by water and any type or class not included in the other three. Railway Labor Act § 3, 44 Stat. 578 (1926), as amended, 45 U.S.C. § 155 (1964).


f. Federal District Courts—These courts have the following jurisdiction under the RLA: (1) They directly enforce the substantive duties under the statute, principally by injunction, but may also, as illustrated by the Fifth Circuit's back-pay decision in Galveston Wharves, award monetary damages. Included within the jurisdiction of the federal courts are suits against unions for violation of the duty of fair representation. As the Supreme Court recently held in Glover v. St. Louis-San Francisco Ry. Co., a fair representation suit may be joined with an action against the carrier for violation of the collective agreement without prior exhaustion of contract or adjustment board remedies where the effort to use those remedies would be futile. Also included within this general jurisdiction is the authority of the district courts to enjoin strikes over matters concerning minor disputes for which an adjustment board would have primary jurisdiction. Assertion of this jurisdiction represents an accommodation between the RLA and the Norris-LaGuardia Act. (2) The district courts also have jurisdiction to enforce, with only limited judicial review, awards of the various adjustment boards previously enumerated. (3) The federal courts have diversity jurisdiction in damage suits brought by employees against carriers for wrongful discharge where reinstatement is not sought. In such actions, administrative and contractual remedies need not be exhausted except where required by applicable state law.

g. State Courts—State courts also have jurisdiction of the last type of action in which employees sue for damages for wrongful discharge.

64 Bhd. of R.R. Trainmen v. Chicago River & I. R.R., 353 U.S. 30 (1956); Flight Eng. Int'l Ass'n v. American Airlines, Inc., 301 F.2d 5 (5th Cir. 1962). In Bhd. of Locomotive Engineers v. Missouri-Kansas-Texas R.R. Co., 363 U.S. 528 (1960), the Supreme Court recognized the jurisdiction of a district court to condition its injunction against a strike concerning a minor dispute with a requirement that the carrier maintain the status quo pending NRAB determination of the dispute. See also Local Lodge 2144, Bhd. of Railway & Airline Clerks v. Railway Express Agency, Inc., -- F.2d -- (2d Cir. 1969), [70 L.R.R.M. 3295], holding that a union was entitled to a preliminary injunction maintaining the status quo pending adjustment board determination of the grievance because of a real threat of irreparable injury to the employees; no strike was involved in the case. But see Hilbert v. Penn. R.R. Co., 290 F.2d 881 (7th Cir.), cert. denied, 368 U.S. 900 (1961), and Switchmen's Union of North America v. Cent. of Ga. Ry., 341 F.2d 213 (5th Cir. 1965), cert. denied, 382 U.S. 841 (1966).
65 This assertion of jurisdiction under the RLA contrasts with the reluctance of the Supreme Court to achieve a similar accommodation under § 301 of Taft-Hartley. Sinclair Ref. Co. v. Atkinson, 370 U.S. 195 (1962).
69 E.g., Scott v. National Airlines, Inc., 142 So. 2d 313 (Fla. 1962); Crockett v. Union Terminal Co., 342 S.W.2d 129 (1960).
h. Civil Aeronautics Board (CAB)—Under section 401(k)(4) of the Federal Aviation Act of 1958, an air carrier is required to comply with the Railway Labor Act as a condition to holding a certificate of public convenience and necessity. The CAB thus has jurisdiction to enforce the Railway Labor Act by cancelling or withholding certification pending compliance with that Act. The Court of Appeals for the District of Columbia Circuit has agreed with the CAB that assertion of this jurisdiction is largely discretionary. The most notable exercise of this jurisdiction occurred during the pilots’ strike at Southern Airways, when the CAB, in disagreement with a federal district court which had also assumed jurisdiction of the same parties and subject matter, found Southern guilty of refusing to bargain about super-seniority that had been given to strike replacements. The CAB, in the manner of the NLRB, ordered the carrier to bargain and imposed various conditions to require compliance.

Each of these eight tribunals, or groups of tribunals, has original jurisdiction over various aspects of the administration and enforcement of rights and duties under the Railway Labor Act.

2. Tribunals under the LMRA.

We turn now to an examination of the tribunals and agencies responsible for administering and enforcing the law and policy of the Labor-Management Relations Act.

a. National Labor Relations Board—The NLRB exercises the following functions: (1) It handles representation cases under section 9 of the Act, including the holding of hearings, determining appropriate bargaining units, conducting elections and certifying bargaining representatives. (2) It decides unfair labor practice cases, a function which is essentially judicial. The term “unfair labor practice” is a statutory euphemism defining a violation of a substantive requirement of the Act. Remedial orders in unfair labor practice cases are not self-enforcing; therefore, to
require compliance, the Board must seek and obtain enforcement through a review proceeding in a United States court of appeals. In an unfair labor practice proceeding the Board may, but rarely does, petition a federal district court for temporary injunctive relief under section 10(j) pending final determination of the case by the Board. (3) Section 10(k) of the Act empowers and directs the Board to hear and determine "jurisdictional disputes" among competing unions whenever charges are filed under section 8(b)(4)(d) alleging a strike or withholding of service, or a threat to that effect, relating to disputed work assignments.

b. General Counsel—Since 1947 the position of General Counsel has been independent of the NLRB. The General Counsel’s office is responsible for the investigation of unfair labor practice charges, the issuance of unfair labor practice complaints and the prosecution of these complaint cases before the Board. There is no appeal from the refusal of the General Council to issue a complaint. In secondary boycott and organizational or recognitional picketing cases, when the officer or regional attorney to whom the case is assigned by the General Counsel has reasonable cause to believe that a complaint should issue, section 10(1) requires that he petition a United States district court for temporary injunctive relief pending NLRB action on the complaint. The Regional Directors, who operate under the General Counsel, also participate in processing and deciding representation cases.

c. Federal Mediation and Conciliation Service (FMCS)—The function of the FMCS is to assist parties in the settlement of labor disputes through conciliation and mediation. When requested by employers and unions, the FMCS also furnishes panels of neutral arbitrators from which arbitrators may be selected to hear and determine arbitration cases.

d. Voluntary Arbitration—The chief forum for the interpretation and application of collective bargaining agreements is private, voluntary arbitration. Unlike the adjustment board procedures of the Railway Labor

---

89 See RULES AND REGULATIONS OF THE NATIONAL LABOR RELATIONS BOARD, § 102.19.
93 "It is the policy of the United States that . . . the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes . . . ." Labor-Management Relations Act § 201(b), 61 Stat. 113, as amended, 29 U.S.C. § 171(b) (1964), amending 49 Stat. 412 (1935).
Act, arbitration of contract disputes under Taft-Hartley is not compulsory. However, the statute favors arbitration, and the courts indulge every reasonable presumption to find arbitration coverage when the parties have included an arbitration clause in their contract. Approximately 94 per cent of all collective bargaining contracts contain arbitration clauses.

e. Federal District Courts—(1) One of the most significant areas of labor law jurisdiction assigned to the federal courts is the enforcement of collective bargaining agreements pursuant to section 301 of LMRA. Following the Supreme Court's landmark decision in *Lincoln Mills,* section 301 became the platform for the establishment of a comprehensive system of arbitration law. Section 301 also provides a federal forum for damage suits for breach of collective bargaining agreements. However, it does not provide for injunctive relief against a strike in violation of a no-strike clause. (2) The federal district courts also exercise jurisdiction in fair representation cases against unions, and employers may be joined in such actions under section 301. (3) As previously noted, the federal district courts are given specific jurisdiction under section 10(j) and 10(l) to grant interim injunctive relief in certain types of unfair labor practice cases. Private parties, however, may not invoke the district court's jurisdiction under Taft-Hartley, except in rare instances against the NLRB itself, where the Board is exceeding its statutory authority and there is no factual issue to be determined by the Board. (4) The federal district courts are also empowered to issue limited injunctions in emergency disputes which imperil the national health or safety. (5) Section 303 of the Act grants the district courts jurisdiction to entertain private damage suits for secondary boycotts which violate section 8(b)(4) of the Act. (6) Section 302 of Taft-Hartley, which restricts payments by employers to employee representatives, is enforceable in the federal courts.

f. State Courts—State courts have concurrent jurisdiction with federal

---

61 *Id.*
69 *Bakery Sales Drivers, Local 33 v. Wagshal,* 333 U.S. 437 (1948). *See also Amazon Cotton Mill Co. v. Textile Wkrs.,* 167 F.2d 183 (4th Cir. 1948).
district courts in contract actions under section 301\textsuperscript{166} and in secondary boycott damage suits under section 303.\textsuperscript{166} Also, under various exceptions to the doctrine of federal preemption, state tribunals may coexist with the NLRA in the regulation of certain areas of conduct which touch interests that are "deeply rooted in local feeling,"\textsuperscript{1107} such as torts involving violence,\textsuperscript{108} or where the activity regulated is of "merely peripheral concern of the Labor-Management Relations Act,"\textsuperscript{3109} such as suits for reinstatement of union membership rights.\textsuperscript{110}

These are the six tribunals and agencies which share original jurisdiction over matters regulated by the Labor-Management Relations Act.

III. SPECIFIC PROBLEM AREAS

The multiplicity of tribunals and agencies which I have described—twelve varieties with assorted amounts of original jurisdiction over diverse aspects of labor relations—has produced, as one might expect, a sizable jurisprudence devoted exclusively to the subject of overlapping and conflicting jurisdiction.\textsuperscript{3111} Extensive judicial\textsuperscript{1112} and scholarly\textsuperscript{1113} efforts over the

\textsuperscript{166} Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962); Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).


last quarter of a century have failed to reconcile the jurisdictional functions of these tribunals. In fact, the changing role of collective bargaining as an institution seems to have accelerated the conflict. For example, an increasing number of legal disputes now occur in the context of established patterns of collective bargaining—disputes which typically involve, directly or indirectly, grievances relating to contract interpretation and/or fair representation. At present no single tribunal under either the RLA or the LMRA can effectively grant all of the relief required to settle many of these disputes. Writing new substantive laws will not solve the problem. However, procedural reform designed to coordinate enforcement of related laws could alleviate the worst aspects. Since our "horse-and-buggy" jurisprudence was not designed for the settlement of "jet age" labor disputes, there is an urgent need to develop more efficient methods of administration and to devise tribunals which will be better equipped, by structure and direction, to interpret and enforce the basic labor laws.

The various tribunals under the present statutes have too often proven their impotence in the performance of their jurisdictional tasks. The problems which they have developed will therefore be reviewed preliminary to an examination of proposed changes.

A. Problems Under The RLA

The scope of this paper does not permit a detailed recital of all of the recognized problems of administration and statutory interpretation that currently plague airline and railway labor relations. However, an attempt will be made to list the major trouble spots which may be traceable to the structural weakness inherent in the multiplicity of tribunals operating under the Railway Labor Act:

(1) The NMB has failed to establish realistic bargaining units, particularly in the airline industry, although it has ample discretion to do so under the broad statutory mandate contained in the phrase "craft or class." This discretion was fully reaffirmed by the Supreme Court in the ABNE case.

(2) There is an absence of sufficient NMB hearing procedures in representation cases; particularly, there is insufficient opportunity for adequate presentation of the carrier's position and evidence in individual cases involving craft or class determination.
The NMB lacks adequate administrative machinery for the conduct of elections and resolution of disputes relating to elections. Recent cases illustrate these inadequacies.

There is conflicting authority between the respective functions of the NMB and the various adjustment boards in the determination of inter-union jurisdictional disputes. The NMB has failed to provide a means for decertification of employee representatives. The NMB has also failed to provide an adequate "no" vote on the ballot it uses in representation elections.

There is a lack of uniformity in judicial enforcement and interpretation—the inevitable result of the scattering of decision-making responsibility among hundreds of federal district judges in courts of general jurisdiction. The absence at the trial court level of a concentration of judicial experience and specialization in the law of the Railway Labor Act impedes proper comprehension and efficient enforcement of a complex statute.

---


118 Compare Switchmen's Union of N. America v. National Mediation Bd., 320 U.S. 297 (1943), and Transportation-Communication Employees Union v. Union Pacific R.R., 385 U.S. 157 (1966). See Railroad Signalmen v. Southern Ry., 380 F.2d 19 (4th Cir. 1967). In Transportation-Communications Employee's Union v. Union Pacific R.R. Co., 385 U.S. 157, (1966), the Supreme Court said that "[t]here are two kinds of jurisdictional disputes. . . . The ordinary jurisdictional dispute arises when two or more unions claim the right to perform a job which existed at the time their collective bargaining contracts with the employer were made. . . . But the dispute before us now is not the ordinary jurisdictional dispute. . . . Here, though two jobs existed when the collective bargaining agreements were made . . . .

automation has now resulted in there being only one job, a job which is different from either of the former jobs and which was not expressly contracted to either of the unions. . . . The railroad, the employees, and the public . . . are entitled to have a fair, expeditious hearing to settle disputes of this nature. And the Adjustment Board has jurisdiction to do so," citing Railway Conductors v. Pitney, 326 U.S. 361 (1946), and Slocum v. Delaware, L & W.R. Co., 339 U.S. 239 (1950). In Firemen v. Louisville R.R. the Sixth Circuit said that "[t]he rule is plain: Jurisdictional disputes between labor organizations governed by the Railway Labor Act are within the exclusive jurisdiction of the National Mediation Board." To the District Court in the Southern District of New York the "exercise" by the Board [NRAB] of its exclusive jurisdiction to settle disputes like this in a single proceeding with all disputant unions present was also clear. See also the recent Fifth Circuit decision in Bhd. of Locomotive Firemen & Engineers v. Seaboard Coast Line R.R., 413 F.2d 19 (5th Cir. 1969), which further illustrated the complex problem. At issue was a tripartite dispute which followed the merger of the Seaboard Air Line Ry. and the Atlantic Coast Line R.R. into the Seaboard Coast Line R.R. It involved the effect to be given certain tripartite agreements executed by the Locomotive Engineers, the Locomotive Firemen and the former Atlantic Coast Line R.R. The Fifth Circuit found the problem to be jurisdictional between competing unions; consequently only the NMB would have jurisdiction to resolve the dispute. Dissenting vigorously, Judge Thornberg saw the problem as one requiring exercise of court jurisdiction to enforce the bargaining requirements of § 6 of the statute.


121 The Railway Labor Act was written for—and largely by—railroads and unions in an industry where labor organizations were already fully established (supra note 49). In fact, the language of the statute almost assumes the existence of unions on every property, e.g., § 2, First, 45 U.S.C. § 152. Thus, the success of the 1926 and 1934 Acts depended largely on voluntary compliance by the parties. In 1936, however, when Title II added coverage of the airlines, airline
(8) There is a need for an agency or officer, like the General Counsel of the NLRB, charged with prosecution of cases arising under the substantive provisions of the statute. It is believed that this defect in the administrative scheme has resulted in effective denial of employee rights, particularly in cases involving enforcement of a union's duty of fair representation.\footnote{The only machinery ordinarily available to redress RLA statutory violations in the nature of "unfair labor practices" is the federal district court. But see supra notes 72-76 and infra note 128. The judicial process is unwieldy, excessively time-consuming and expensive. For example, a period of six years was required to obtain reinstatement and back pay for locked out pilots in the AAXICO case (infra note 128); and the Galveston Wharves dispute (supra note 66) began five years ago and is apparently still bouncing between the district court and the court of appeals. Employees who have allegedly been discriminated against by unions must file and prosecute their own actions, and most are probably never filed. Of the few which reach the courts, on a clear day they can be seen forever. E.g., Brady v. Trans World Airlines, Inc., 401 F.2d 87 (3d Cir. 1968), cert. denied, 399 U.S. 1048 (1969); 35 J. AIR & COM. 254-55 (1966).}

(9) The absence of a clear determination as to the division of authority between the courts and the NMB over who will determine and remedy statutory violations relating to elections impairs the exercise of employee freedom of choice in representation cases.\footnote{The only machinery ordinarily available to redress RLA statutory violations in the nature of "unfair labor practices" is the federal district court. But see supra notes 72-76 and infra note 128. The judicial process is unwieldy, excessively time-consuming and expensive. For example, a period of six years was required to obtain reinstatement and back pay for locked out pilots in the AAXICO case (infra note 128); and the Galveston Wharves dispute (supra note 66) began five years ago and is apparently still bouncing between the district court and the court of appeals. Employees who have allegedly been discriminated against by unions must file and prosecute their own actions, and most are probably never filed. Of the few which reach the courts, on a clear day they can be seen forever. E.g., Brady v. Trans World Airlines, Inc., 401 F.2d 87 (3d Cir. 1968), cert. denied, 399 U.S. 1048 (1969); 35 J. AIR & COM. 254-55 (1966).}

(10) The decisions are greatly in conflict as to the proper distinction between major and minor disputes. The conflict as to the scope of adjustment board jurisdiction in the minor dispute cases frustrates the expeditious determination of many of these disputes. Confusing questions therefore arise: Is the adjustment board's jurisdiction exclusive or only primary?\footnote{To what extent may a court interpret a collective bargaining representative?... See Comment, Procedure and Judicial Review under Section 2, Ninth of the Railway Labor Act, 32 J. AIR & COM. 249, 254-51 (1966). Despite the long-standing mandate of the Supreme Court authorizing district court jurisdiction to enforce statutory duties under the RLA (Virginia Ry., Co. v. System Fed'n No. 40, 300 U.S. 515 (1937)), the Sixth Circuit recently held that a petitioning union seeking NMB certification could not seek judicial enforcement of a statutory provision guaranteeing the right of employees to organize and select a bargaining representative. But see supra notes 72-76 and infra note 66.)

The Supreme Court, as indicated by the considerable size of its annual docket of RLA cases, has tried to fill the role. Obviously, it can provide little guidance in this area for it must ration grants of certiorari according to other considerations.

To what extent may a court interpret a collective bargaining representative...
agreement for purposes of finding a violation of a statutory duty? In the absence of a single decisional authority other than the Supreme Court, the answers to these questions are slow in coming.

(11) The mingling, within the same agency, of the NMB's informal role in mediating disputes and its quasi-adjudicatory role of determining questions concerning employee representation hinders fulfillment of both roles.

(12) The cumbersome ritualism of inflexible statutory procedures contributes to delays in effective collective bargaining.

As a conclusion to this recital of problems, it can be observed that in RLA cases it is commonplace to find vast confusion concerning how the issues will be decided and which tribunal will ultimately have the authority to decide them. For example, in the ALPA-AAXICO dispute, which lasted six years, the case was tossed back and forth among a federal district court, a system board of adjustment, the NMB, the CAB and two circuit courts of appeals. It was like the game children play: "Button, button, who's got the button?" Only under the Railway Labor Act it is jurisdiction, not a button, that is elusive.

There are many such examples, but this survey is only preliminary and I also wish to describe some of the Taft-Hartley problems which are as serious as anything offered by the Railway Labor Act.

B. Problems Under The LMRA

Most procedural problems under the Taft-Hartley Act are of a different nature, though some are also traceable to conflicts among multiple tribunals. The main problem areas are the following:

(1) There is tendency for many of the key rulings of the NLRB to swing back and forth, reflecting changes in national political administrations. The uncertainty in the law engendered by this phenomenon

---


129 For a description of the Board's function in the two types of cases, see discussion in Thirty-Second Annual Report of the National Mediation Board, 1956, at 26-35. See Int'l Ass'n of Machinists v. National Mediation Bd., 312 U.S. 516 (1941), which required the NMB to discontinue mediation in an IAM-National Airlines dispute following 48 mediation sessions which involved 179 hours of talk, after which 97 issues remained unresolved.


128 AAXICO Airlines, Inc. v. Air Line Pilots Ass'n, 331 F.2d 433 (5th Cir. 1963), cert. denied, 379 U.S. 933 (1964); Air Line Pilots Ass'n v. Civil Aeronautics Bd., 360 F.2d 837 (D.C. Cir. 1966); AAXICO Airlines, Inc. v. Air Line Pilots Ass'n, 358 F.2d 744 (5th Cir. 1966); AAXICO Airlines, Inc. and Air Line Pilots Ass'n (Platt, System Bd. of Adjustment Award, 47 LA 289 (1966)).
makes voluntary acceptance of the Board's decisions harder to achieve. This is not a criticism of individual members of the Board, but rather of the system of five-year terms which has made such periodic decisional changes almost inevitable.

All of the criticisms of the Board on this score have a familiar ring. For example this statement:

'[T]he pattern of . . . decisions by the NLRB has given rise to a serious concern that policies laid down by Congress, in the Taft-Hartley and Landrum-Griffin Acts, are being distorted and frustrated, to say the very least. (Congressman Robert Griffin in 1962.)

One might also recall the following charge:

'[T]he new NLRB—manned suddenly by a majority made up of three new appointees—has proceeded to "reinterpret" the Act in such manner as to change its practical application substantially beyond anything seriously considered in recent Congresses.

This statement could have been a typical charge leveled against the NLRB by a spokesman for the National Association of Manufacturers during the early years of the Kennedy administration; yet, the quotation was from an article by Professor Willard Wirtz in 1954, during the Eisenhower administration.

Here is another comment:

'[T]he Taft-Hartley Act has been changed, and changed drastically. But the change has not been made by the Congress. It has been made by the Eisenhower appointees to the National Labor Relations Board. Sworn to uphold the law which Congress enacted, it would seem that they have searched it from stem to stern with the purpose of making it a more antilabor statute, and of reversing every possible rule of interpretation and application established in administration of the Act from 1947 through 1952. (Senator Wayne Morse, 1956).

We tend to forget. Perhaps union spokesmen and others favoring retention of the status quo have forgotten that the pendulum swings both ways.

(2) After 34 years, the National Labor Relations Act still requires


114 CONG. REC. 50 (1968) (restated by Congressman Griffin in a recent statement before the Senate). Numerous such charges were levied against the Board during the recent Ervin Committee hearings, supra note 129. E.g., Leonard S. Janofsky, representing the U.S. Chamber of Commerce, stated: "What alarms the business community is that the NLRB restructures the Federal labor law to coincide with the political and socioeconomic predilections respecting industrial relations of those individual members who happen to constitute a majority of the Board at any particular time." Id. at 356. Gerard D. Reilly, former NLRB member, noted that the Board as created by Congress is essentially a court, for unlike other independent agencies vested with quasi-legislative powers, Congress did not entrust the Board with policymaking authority." Id. at 432. He cited several instances to illustrate "how the present Board has disregarded congressional intent and cast aside guiding precedent, . . . a series of decisions which have virtually restructured the whole foundation of bargaining in certain industries." Id. at 433.


102 CONG. REC. 5454-5489 (1956) (speech of Senator Wayne Morse).
vigorous enforcement. Voluntary acceptance and compliance have not been achieved to the extent necessary for successful execution of the national labor policy. The recently issued Thompson Report in the House of Representatives on the effectiveness of National Labor Relations Act remedies found:

[a] regrettable unwillingness on the part of some to accept the basic tenets of the National Labor Relations Act. The national labor policy still meets determined challenge and resistance in some quarters. The caseload of meritorious "unlawful discharge" cases has doubled in the past eight years, suggesting a willful flouting of the national policy as enacted into law more than 30 years ago.13

(3) The Board's process is too slow for effective administration. The Thompson Report concluded that "[e]mployers who violate the law are encouraged to do so as the penalties come too late for effective enforcement, and in any event have little or no deterrent force." The situation is no better today than it was in 1960 when a blue-ribbon Senatorial Advisory Panel on Labor-Management Relations Law concluded that:

A major weakness in the labor-management relations law is the long delay in contested NLRB proceedings. . . . In labor-management relations justice delayed is often justice denied. A remedy granted more than two years after the event will bear little relation to the human situation which gave rise to the need for governmental intervention.13

(4) Except for section 10(1), which provides for mandatory injunctions against unions that engage in secondary boycotts and organizational or recognitional picketing, the NLRA provides no adequate means for obtaining quick and sure equitable relief to protect the rights which it guarantees. The Thompson Committee found this deficiency to be critical:

A growing body of evidence indicates that the freedom of choice guaranteed by Congress—to join a union or to refrain from so doing—has not worked well in practice. An increasing number of employees, approximately 15,000 a year, presently are being discharged because they join a union, or refuse to do so.

Not only do employers in increasing number flout and ignore the provisions of section 8(a)(3); there is further evidence that the administrative and judicial delay in processing these cases vitiates any effective redress—economic pressures force these discharged employees to forego their right to reinstatement in exchange for a partial "back-pay" award.

Some employers are willing to pay even more than the "back-pay" to rid their plants of union leaders; and the "chilling" effect of this callous tactic on the rank-and-file strikes at the very heart and purpose of the national labor policy to encourage the practice and procedure of collective bargaining.

134 Id. at 2.
136 Supra note 133 at 5.
(5) There is a serious conflict in jurisdiction between the NLRB and the arbitration process—just as there is a conflict between the NLRB and court jurisdiction under section 301. The Board has no jurisdiction as such to interpret or enforce collective bargaining agreements; that is the business of arbitrators and courts under section 301. Likewise, the courts have no jurisdiction to determine unfair labor practices; that is the Board's function. But the line which separates violations of collective agreements from unfair labor practices that involve the interpretation of such agreements is often difficult to find. And when it is found, the result may be the application of an inadequate remedy by a tribunal which may have jurisdiction in a technical sense but lacks the outlook and means in a practical sense to achieve a meaningful solution to the underlying dispute. It is true that the Board has authority to interpret collective bargaining contracts to the extent necessary for the determination of unfair labor practices; however, the interpretation of labor agreements is normally the function of arbitrators, subject only to limited judicial review under the familiar doctrine of the Steelworker Trilogy. When the Board invades this contractual relationship, it is often ill-equipped to prescribe


138 In 1947 Congress rejected a bill which would have given the NLRB unfair labor practice jurisdiction over breaches of collective bargaining agreements. S. 1126, 80th Cong., 1st Sess., §§ 8(a)(6) and 8(b)(5) (1947); 1 Lecis. Hist. of LMRA 109-11, 114. See NLRB v. C & C Plywood Corp., 385 U.S. 421, 427, n.11. In the adoption of § 301, the House Conferences asserted: "Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess., 42 (1947).

139 San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). See also Smith v. Evening News Ass'n, 371 U.S. 191 (1962), and Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 272 (1964), where the Supreme Court said that "[s]hould the Board disagree with the arbiter ... the Board's ruling would, of course, take precedence and if the employer's action had been in accord with that ruling, it would not be liable for damages under § 301." However, the Board will recognize an arbitrator's award when it finds that "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955). See also Adams Dairy Co., 147 N.L.R.B. 1410 (1964); Raley's, Inc., 143 N.L.R.B. 256 (1965); International Harvester Co., 138 N.L.R.B. 923 (1962) affirmed sub nom., Ramsey v. NLRB, 327 F.2d 784 (7th Cir.), cert. denied, 377 U.S. 1003 (1964).

140 NLRB v. Strong, d/b/a Strong Roofing Co., 393 U.S. 357 (1969); Acme Industrial Co., 387 U.S. 432 (1967); NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967); Mastro Plastics Corp. v. NLRB, 310 U.S. 270 (1940). The overlap of NLRA and § 301 jurisdiction was painfully apparent in the C & C Plywood case. The Board construed a provision in a collective bargaining agreement in which the employer had reserved the right to pay premium wage rates to reward particular employees for "some special fitness, skill, aptitude or the like." The Supreme Court affirmed the Board's construction that this clause did not authorize unilateral promulgation of an incentive rate for "glue spreader" crews; therefore, the employer was guilty of a refusal to bargain. The case may have paved the way for further NLRB encroachment into cases involving ordinary violations of collective bargaining contracts. The potential for conflict between Board determination and judicial action or arbitration (albeit there was no arbitration clause in the C & C Plywood contract) should be obvious.

an appropriate or complete remedy, and when it acts, it may be doing so at the expense of the arbitration process. 142

(6) This conflict with arbitration is particularly apparent in the burgeoning area of fair representation—a field of law which has become increasingly important now that collective bargaining has achieved greater stability, and union representation has become more institutionalized. Under the Taft-Hartley Act, neither a court nor the NLRB possesses sufficient processes, or has the requisite jurisdiction over parties, subject matter and remedies, to grant complete relief in many of these cases. 143 According to the Supreme Court's Vaca 144 decision, courts may be allowed to fashion more appropriate relief than the Board in cases involving both the employer and the union. However, the necessity of the employee bringing his own action through his own attorney seriously impairs the effectiveness of a purely judicial remedy, just as it does under the Railway Labor Act. 145 On the other hand, if the aggrieved employee chooses to file a charge with the Board, the General Counsel investigates the case and prosecutes it if it merits issuance of a complaint. But, unless the employer has conspired with the union or has acted in response to union pressure, there is no way for the Board to assume jurisdiction over the employer, 146 and, consequently, a complete remedy, which might require reinstatement of a discharged employee by the employer, may not be achieved. This defect is critical when an employee has been discharged for what the employer deems sufficient cause under the bargaining contract, and where the union, in breach of its duty of fair representation, fails to provide proper representation or arbitration. 147 There is an obvious need for a procedure which will wed the administrative and judicial processes; one which will permit a

142 "Arbitration is not a process which the Board is either equipped or qualified to follow. Those who are arbiters have special qualifications in a particular industry and come to know the common law of the shop . . . . What the 'common law' of the shop would show covering these . . . . benefits, what past practices might reflect on the amount of an award . . . . no one knows. These are matters for arbiters, chosen by the parties under the collective bargaining agreement, not for the Board, an alien to the system envisioned by Lincoln Mills." Strong v. NLRB, 393 U.S. 357, 364 (1969) (dissenting opinion, Douglas, J.). Board Member Brown, concurring in Adams Dairy Co., 147 N.L.R.B. 1410, 1423 (1964), declared: "While it is possible that a party may concurrently pursue both the arbitration and the unfair labor practice routes, I believe that it is inconsistent with the statutory policy favoring arbitration for the Board to resolve disputes which, while cast as unfair labor practices, essentially involve a dispute with respect to the interpretation or application of the collective-bargaining agreement."

143 Compare Vaca v. Sipes, 386 U.S. 171 (1967) and Int'l Union of Elec. Wkrs., Local 485 [Automotive Plating Corp.], 170 N.L.R.B. 121 (1968). While the Court route lacks the assistance of the office of General Counsel, the Board route lacks the necessary parties. In Automotive Plating the union was found guilty of breach of its duty of fair representation in violation of § 8(b)(1)(A) because of its refusal to process the grievance of a discharged employee. The employer, who was not a party to the action, maintained that the discharge was for cause under the collective bargaining agreement. Although the Board acknowledged that it was not foreclosed from construing the agreement, it wisely refrained from doing so, and instead remanded the case, retaining jurisdiction, and ordered the union "to request the Company to reconsider the matter . . . . and if necessary take the case to arbitration. . . ." [Emphasis added.] If the company wished to treat the discharge as final, the Board would obviously be powerless to require either arbitration or reinstatement.


145 Supra note 122 and accompanying text.


147 See Automotive Plating Corp., 170 N.L.R.B. 121 (1968); supra note 143 and accompanying text.
joinder of claims and parties\textsuperscript{148} in a combination unfair labor practice and section 301 action.

(7) The Board’s decisional process is unwieldy and inefficient. William Murphy, drawing on his recent experience as a professor in residence with the Board, observed that “the problem of delay is most acute at the Board level.”\textsuperscript{149} He had reference in particular to institutional delays caused, in large measure, by the duplication of staff work and the anonymity of the Board’s decisional process.\textsuperscript{150}

(8) The failure of the Board to make pre-trial discovery available to the parties complicates litigation and discourages settlements.\textsuperscript{151}

(9) The absence of any appeal from the refusal of the General Counsel to issue a complaint centers excessive authority in one man.\textsuperscript{152}

(10) The structure of the Act encourages inordinate resort to the appellate process. For example, in 1966, 64 percent of the Board decisions were appealed.\textsuperscript{153} The absence of self-enforcing orders requires the Board to obtain appellate review in many cases where an appeal might otherwise not be taken if the aggrieved party were required to take his appeal in the manner customary in ordinary civil court actions.

Thus, in the jargon of Madison Avenue, the NLRB has a “poor image.” The Board is not readily believed, it lacks the instant process necessary to make the bulk of its orders meaningful, and it has become a whipping boy for those who would prefer not to submit to the requirements of the statute. As a result of this poor image and of the jurisdictional problems inherent in the outmoded enforcement procedures of the statute, the labor policy of the Labor-Management Relations Act falls far short of fulfillment.

\section*{IV. A Working Hypothesis for Procedural Reform}

The foregoing problems are traceable primarily to procedural weaknesses in available enforcement machinery under both the Railway Labor Act and the Labor-Management Relations Act. Although the procedural difficulties under each statute are not the same, the underlying substantive law is

\textsuperscript{148} As under the liberal joinder provisions of Fed. R. Civ. P. 18, 19. See also the joinder provisions for the Court of Claims, U.S. Ct. Cl. Rules 25, 26, and 27. Under the Federal Rules of Civil Procedure and other modern codes of judicial practice, liberal joinder of claims and parties is encouraged—and in many instances required—so that a single action may dispose of all facets of a dispute among all parties concerned.


\textsuperscript{150} Id. at 130-132.

\textsuperscript{151} Experience with the liberal discovery practice under the Federal Rules of Civil Procedure demonstrates that settlement is more easily achieved when the element of surprise is removed from a lawsuit and each side has access to pertinent evidence. Even when settlement is not achieved, discovery reduces the issues in dispute and expedites the litigation process.

\textsuperscript{152} Under the National Labor Relations Act § 10(f), 49 Stat. 449 (1935), as amended, 61 Stat. 136, 29 U.S.C. § 160(f) (1964), only final orders of the NLRB are subject to judicial review. Refusal by the General Counsel to issue a complaint is not a final order within the meaning of § 10(f). Manhattan Constr. Co. v. NLRB, 198 F.2d 302 (10th Cir. 1952); Teamsters Local 886 v. NLRB, 179 F.2d 492 (10th Cir. 1950); Lincourt v. NLRB, 170 F.2d 306 (1st Cir. 1948).

sufficiently alike under both statutes to warrant development of a common procedure. Though I do not wish to oversimplify either the problems or their solutions, a good pragmatic basis for procedural reform does seem to exist. The one area where organized labor, organized management and so-called spokesmen for the public and for various segments of the public might find it advantageous to work together for legislative reform is in a program which leaves substantive law relatively unchanged, but concentrates on devising a simplified and more efficient means of enforcement and administration. Ideally such a means should be applicable to both statutes.154

As was indicated at the beginning of this paper, the program which I am suggesting should be considered only as a working hypothesis. Each component must be tested and weighed. If there is merit in the suggested approach, a great amount of study and revision will still be necessary. Some of the tentative conclusions supporting the hypothesis are based on experience and observation. Hard data, however, should be sought in statistical studies and detailed analyses of case histories. Whether such data will ultimately support the suggested plan, remove its underpinnings or point toward the development of a procedural structure along wholly different lines, remains to be seen.

A. General Structure

The complexities of the procedural problems under the existing laws stem more from the inadequacy of outmoded enforcement machinery than from complexity in the substantive law being administered. It would be folly to try to achieve meaningful procedural reform by patchwork. Therefore, the time has arrived for a bold, new approach—for establishment of a functional structure designed especially for the unique institutions which characterize labor relations in this country.

First, let us not be frightened by the tyranny of labels. I recommend establishment of a labor court. Though the label "labor court" means different things to different people, like Lewis Carroll's Humpty Dumpty, "[w]hen I use a word ... it means just what I choose it to mean—neither more nor less."155 And I do not choose for "labor court" to mean merely a legislative court substituted for the National Labor Relations Board;156 nor do I intend it to be an Americanized version of any of the several European labor courts which exist primarily to settle "rights" disputes.157 In the United States such disputes concern the application and interpretation of collective bargaining contracts and, in general, are handled effec-


155 L. CARROLL, THROUGH THE LOOKING GLASS 247 (Modern Library ed.).


tively by voluntary arbitration and statutory boards of adjustment. Therefore, "labor court," as the term will be used herein, will mean a constitutional court with jurisdiction limited to enforcement of the Labor-Management Relations Act and the Railway Labor Act. Furthermore, such a court would not exist in isolation; it would be part of a general revision in procedure, the result of which would be a planned coupling of the judicial and the administrative processes. Certain functions in law enforcement can best be handled by the judiciary; however, the administration of public laws, such as the ones involved herein, may also require use of administrative agencies. The plan which follows will therefore attempt to allocate functions within the constitutional framework respecting both the judicial and the legislative powers of the federal government.

The Supreme Court has recognized the right of Congress to establish a constitutional court of specialized and limited jurisdiction. In Glidden v. Zdonok, the Court gave effect to an express congressional declaration in the 1958 revision of the Judicial Code that the Court of Customs and Patent Appeals was "a court established under Article III. . . ." The Court stated that "Congress has never been compelled to vest the entire jurisdiction provided for in Article III upon inferior courts of its creation." Thus, the way is now open for the creation of a specialized court to do those things which a court can do more effectively than an administrative board. However, since successful administration of public laws such as these must also depend upon agency action, certain administrative machinery must be retained and modified. Specifically, a board can handle questions concerning representation better than a court. Moreover, an administrative general counsel, representing the public interest, should be made available to prepare and present complaint cases which otherwise would be inadequately handled by private litigation—if handled at all. With these goals in mind, the following proposals are cautiously suggested.

A constitutional court, having jurisdiction over the enforcement of substantive rights and duties contained in the Labor-Management Relations Act and the Railway Labor Act, should be created. The court might appropriately be called the United States Labor Court.

To supplement the court's judicial function, a new or revised adminis-

---

158 Supra 545 & 549. A caveat: Railroad adjustment board procedures in recent years have not been particularly effective. However, the newly organized Public Law (PL) Boards may provide improvement in the handling of "minor disputes" of railroad employees. The NMB "anticipates that Public Law (PL) Boards will eventually supplant the Special Board of Adjustment procedure, which has been utilized by many representatives of carriers and employees by agreement over the past 20 years, and also reduce the caseload of various divisions of the National Railroad Adjustment Board." 34TH ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD 44 (1968).

159 I.e., a court established under U.S. Const. art. III.


161 Id.

162 28 U.S.C. § 211 (1964). The same congressional declaration of intent was applicable to the Court of Claims. See note 171, infra.

163 370 U.S. at 561. In Brenner v. Mason, 383 U.S. 519 (1966), the Court reaffirmed the Glidden analysis of the nature and status of the Court of Customs and Patent Appeals, holding that a decision of the court "is that of an Article III court. It is 'judicial' in character. . . . It is final and binding in the usual sense." 383 U.S. at 526.
tractive structure should be established. This could be accomplished by a merger of the personnel and functions of three existing administrative agencies into two new agencies: (1) The representation functions under both the NLRA and the RLA would be combined for handling by a single board which could be called the National Labor Representation Board—a new NLRB. (2) The mediation functions of both the National Mediation Board and the Federal Mediation and Conciliation Service would be merged into a single mediation agency, which might be titled the National Mediation Service—the NMS. The two new agencies could absorb the personnel and membership of the existing agencies.

The office of General Counsel should be retained. Perhaps the position should be renamed General Labor Counsel—a more accurate identification of the function of the office. Under this proposal, the duties and responsibilities of the office would be expanded to include authority to issue complaints and to prosecute actions under the Railway Labor Act as well as under the National Labor Relations Act.

This is the plan in its broad outline. Let us now examine each component part.

B. The National Labor Representation Board

The new Board, which we shall continue to call the NLRB, should be equipped to operate the representation and election procedures under both statutes with a reasonable degree of uniformity. Although the statutory language of section 2, Ninth of the RLA and section 9 of the NLRA are different, both provide for wide agency discretion in the determination of "appropriate bargaining unit" or "craft or class." I know of no reason in law why the election procedures under both statutes could not be substantially identical if the new Board chose to make them so. Or the procedures could be different if the Board were to find appropriate grounds for making distinctions. The important factor is that the Board, established as an expert body, should be qualified to exercise an informed judgment in recognizing basic differences affecting the representation process among various industries, as well as any inherent differences existing in the legislation itself. The Board's rules, regulations, and orders would be expected to reflect those differences. The exercise of such judgment is a role familiar to the administrative process.

C. The General Labor Counsel

The two statutes under consideration were designed primarily to protect employees. For this reason, there should be a federal administrative officer

---

104 NLRB v. Hearst Publications, 322 U.S. 111 (1944). But see Taft-Hartley amendments, §§ 9(b) (1), 9(b) (2), 9(b) (3), and 9(c) (3).
106 See L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, 555-64 (1965).
available to prosecute violations under both statutes. To illustrate the point, if all employees aggrieved by discriminatory union action were required to hire private attorneys to prosecute their cases, relatively few of these cases would be processed adequately to conclusion. Yet that is exactly what is presently required under the Railway Labor Act. Under the National Labor Relations Act, however, the General Counsel is charged with representing the public interest and is available to prosecute such cases. The new General Labor Counsel should, therefore, have the same responsibility under both Acts.

Additional duties of this office would probably include processing and making initial decisions in representation cases, just as that function is now performed by the regional directors pursuant to authority delegated from the NLRB. The basic structure and function of the regional offices of the NLRB could therefore be preserved, though expanded in responsibility to include corresponding duties under the RLA. The regional directors could thus assume some of the representational functions now performed by employees of the National Mediation Board, such as conducting elections and investigating objections relating to elections. It is also proposed that the new General Labor Counsel would have the right to intervene in any action brought by a private party in the United States Labor Court.

D. The United States Labor Court

The jurisdiction of the United States Labor Court would extend to enforcement of rights and duties under the Railway Labor Act and the Labor-Management Relations Act. Jurisdiction under the former statute would be essentially the same as that now exercised by the United States district courts. Jurisdiction under the LMRA would include not only unfair labor practices under section 8 of the NLRA, but also sections 208, 209, and 210 (the provisions relating to injunctions in national emergency disputes), section 301 (the provisions for enforcement of

In Garner v. Teamsters Union, 346 U.S. 485 (1953), the Supreme Court emphasized the public rights aspect of the NLRA.

E.g., Rubber Wkrs. Local 12 v. NLRB, 368 F.2d 12 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967); Automotive Plating Corp., 170 N.L.R.B. 121 (1968).

The basic structure and function of the regional offices of the NLRB could therefore be preserved, though expanded in responsibility to include corresponding duties under the RLA. The regional directors could thus assume some of the representational functions now performed by employees of the National Mediation Board, such as conducting elections and investigating objections relating to elections. It is also proposed that the new General Labor Counsel would have the right to intervene in any action brought by a private party in the United States Labor Court.

D. The United States Labor Court

The jurisdiction of the United States Labor Court would extend to enforcement of rights and duties under the Railway Labor Act and the Labor-Management Relations Act. Jurisdiction under the former statute would be essentially the same as that now exercised by the United States district courts. Jurisdiction under the LMRA would include not only unfair labor practices under section 8 of the NLRA, but also sections 208, 209, and 210 (the provisions relating to injunctions in national emergency disputes), section 301 (the provisions for enforcement of

In Garner v. Teamsters Union, 346 U.S. 485 (1953), the Supreme Court emphasized the public rights aspect of the NLRA.

E.g., Rubber Wkrs. Local 12 v. NLRB, 368 F.2d 12 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967); Automotive Plating Corp., 170 N.L.R.B. 121 (1968).

The basic structure and function of the regional offices of the NLRB could therefore be preserved, though expanded in responsibility to include corresponding duties under the RLA. The regional directors could thus assume some of the representational functions now performed by employees of the National Mediation Board, such as conducting elections and investigating objections relating to elections. It is also proposed that the new General Labor Counsel would have the right to intervene in any action brought by a private party in the United States Labor Court.
labor agreements), section 302\textsuperscript{176} (the section relating to restrictions on payments to employee representatives), and section 303\textsuperscript{177} (the secondary boycott damage suit provisions).

Inasmuch as the Court would be organized under Article III of the Constitution, its judges would be appointed for life by the President with the advice and consent of the Senate. These appointments could pose a serious problem of political imbalance if they were all made at the same time, or, for that matter, if they were made by a single President. This problem might be lessened by the spreading of judicial appointments over at least two presidential terms. Such a piecemeal increase in the size of the Court would be matched by a piecemeal transfer of jurisdiction from the present National Labor Relations Board to the Court. The following suggested time-schedule of effective dates is intended, therefore, to achieve a measure of political balance among the initial appointees to the Court, and also to provide for an orderly transfer of jurisdiction from the NLRB during the period in which the Court is gaining in both size and experience.

A court of eleven judges is tentatively proposed. However, this entire number would not be achieved until six years after passage of the enabling legislation; only five of the judges would be appointed immediately. Two additional judges would be appointed at the end of the Court’s first three years of operation, and the last four judges would be appointed three years later. It is expected that Congress would authorize additional judges from time to time if the need should arise.

The full statutory jurisdiction of the Court would also be acquired over a six year period. I suggest that the Court’s jurisdiction for the initial three years be confined to the principal areas over which the United States district courts already have jurisdiction, \textit{i.e.}, over enforcement of the Railway Labor Act, over actions under section 301 of the LMRA, over the issuance of temporary injunctive relief under sections 10(j) and 10(1) of the NLRA and over enforcement of sections 302 and 303 of the LMRA. In addition, from the very beginning the Court should be able to exercise pendant jurisdiction\textsuperscript{178} over actions which ultimately are to be included in the Court’s regular jurisdiction. To avoid abuse of this practice by a party who might seek to extend the Court’s jurisdiction through joinder of an unfair labor practice charge with a frivolous or insignificant claim within the Court’s initial jurisdiction, the Court would be empowered to exercise discretion whether to assert jurisdiction over the unfair labor practice charge.\textsuperscript{179} It is intended that the NLRB would continue to be the principal forum for unfair labor practice cases during these first three years of the Court’s operation. Certain types of cases, however, would be especially appropriate for the exercise of pendant jurisdiction. For example, an unfair labor practice charge alleging violation of sections 8 (b) (1) (A), 8 (b) (2) and 8 (b) (3) of the NLRA, charging a union with a breach of

\textsuperscript{176} Id. at 29 U.S.C. § 186.
\textsuperscript{177} Id. at 29 U.S.C. § 187.
\textsuperscript{179} Id. Such discretionary power is already inherent in the doctrine of pendant jurisdiction.
its duty of fair representation in failing to process a discharge grievance, could and should be joined with a section 301 action against the employer, where the validity of the claim depends, in whole or in part, upon a finding that the employer has violated the collective agreement.

At the end of three years, the Court's second jurisdictional stage would be reached. Its statutory jurisdiction would then be expanded to cover the following sections of the National Labor Relations Act: Section 8(a)(1) (relating to interference by employers with protected employee rights); section 8(b)(1) (relating to union interference with protected employee rights); section 8(a)(2) (relating to employer domination and support of labor organizations); section 8(a)(3) (relating to discrimination in employment practiced by employers); section 8(b)(2) (relating to union induced employment discrimination); section 8(a)(4) (relating to protection of employees who file charges or testify under the Act); section 8(b)(5) (relating to excessive union initiation fees). These unfair labor practice sections concern rights of employees as individuals.

Three years later the Court would acquire its remaining jurisdiction. That acquisition would cover those provisions of the NLRA which relate generally to forms of unlawful activity which unions and employers might direct toward each other, rather than toward employees. These include unfair labor practices which are immediately concerned with the operation of collective bargaining and the use of economic weapons: Sections 8(a)(5) and 8(b)(3) (defining the duty to bargain collectively); section 8(b)(4) (relating to secondary activity and jurisdictional disputes); section 8(e) (proscribing "hot-cargo" agreements); section 8(b)(7) (relating to picketing for organization and recognition); and section 8(b)(6) (relating to "featherbedding"). However, none of the lines dividing the three jurisdictional stages should be drawn too sharply because the typical NLRB complaint case covers a wide range of unfair labor practices. It is recognized that during the transitional stage it may be difficult to determine whether a particular case should be filed with the lame duck NLRB or with the United States Labor Court. Guidelines would therefore have to be devised; these details, however, are beyond the score of a preliminary paper.

In many respects, the organization of the Court would resemble the United States Court of Claims. Commissioners, similar in function to those attached to the Court of Claims, would replace the present NLRB trial examiners as hearing officers in most of the contested cases. Incumbent NLRB trial examiners would undoubtedly be eligible to become the Court's first commissioners. Selection of the cases, or types of cases, to be heard by the commissioners should be left to the discretion of the Court. Moreover, the Court should decide the details of its own organizational structure. Though it may be assumed that the Court's headquarters would be in Washington, D.C., it should have authority to sit anywhere in the United States or its territories. Regular terms of the Court could be held in major metropolitan areas. The Court would be empowered to sit en banc,
in panels, or as a single judge. Single judges might act on pleas for temporary injunctive relief, or might be assigned to jury trials in those limited types of cases where a party would be entitled to a jury—for example, in secondary boycott actions for damages under section 303 of LMRA. In addition to the Court’s permanent judges, other federal judges would sit from time to time to aid in handling the docket.

It is anticipated that most cases would be heard initially by commissioners. The extent of the commissioners’ authority to hear evidence and make rulings or recommendations would probably be determined principally by the Court, although some legislative guidelines or limitations as to their authority might be appropriate. Further study on this question is necessary; it is suggested, however, that the guiding principle for establishment of the Court’s structure should be to allow the Court sufficient operational flexibility to achieve effective and efficient employment of both judges and commissioners. A certain amount of trial and error will probably be essential to the development of any effectual plan of operation.

A major element in the proposed plan is that actions in the United States Labor Court may be initiated by either the General Labor Counsel or by a private party. Invoking the procedure through the General Labor Counsel would be similar to that now prevailing under the NLRA, with one major exception: Whenever a charge is filed with the General Labor Counsel, it would be the duty of his office to conduct an investigation; his office would then either dismiss the charge or file a complaint with the Court; in the event of dismissal, the charging party could file and process his own case in Court—unlike the present procedure under the NLRA, where a charging party has no recourse after the General Counsel refuses to issue a complaint. Under the suggested plan, the General Labor Counsel would have the right to intervene in any action filed by a private party, including those actions not initiated by a charge filed with his office. Moreover, a party would have the right to file an action (complaint) in the Court without prior filing of a charge with the General Labor Counsel.

The Court would have essentially the same authority as any United States district court for issuance of appropriate legal process, orders and judgments. For example, dismissal of a complaint for failure to state a claim upon which relief can be granted would be available to the Court where appropriate. Likewise, summary judgments, temporary restraining orders and injunctions, to name only a few possible orders, would also be available. Only slight accommodation with the Norris-LaGuardia Act would be necessary for inclusion in the enabling legislation in order for

---

182 Compare: (1) Fair Labor Standards Act, 29 U.S.C. § 201 et. seq. (1964), enforcement through back wage suits brought by the Secretary of Labor, § 16(c), and by individual employees, § 16(b); (2) Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq., enforcement by individual civil suits, § 706(e) and (f), and also by suits filed by the Attorney General when he "has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance..." § 707(a). (For a similar allocation of enforcement rights, see also Title VII of the Civil Rights Act of 1968, 18 U.S.C. §§ 3612, 3613 (1969)).

the Court to issue injunctions, for such injunctive power already exists under the Railway Labor Act, and the Court would continue to have authority under sections 10(j) and 10(l) of the Taft-Hartley Act, assuming the minor procedural adjustments needed to reflect the basic re-structuring of the administrative-judicial relationship are made.

The plan contemplates no legislative changes in judicial authority to review adjustment board awards under the Railway Labor Act or arbitration procedures and awards under section 301 of Taft-Hartley. It is anticipated, however, that the Court's broad jurisdiction over both the collective bargaining process and the collective bargaining contract would stimulate the fashioning of flexible remedies, including some new remedies. For example, in an unfair labor practice proceeding under the NLRA, the Court would be able to require submission of an arbitral matter to an arbitrator, with the Court retaining jurisdiction for purposes of enforcing and/or reviewing the resulting arbitration award. The Court could also refer or remand a question concerning representation to the NLRB for its determination whenever appropriate, because the representation matter may require agency determination prior to a judicial decision on the merits of the complaint. The detailed mechanics of such referral and remand procedures need not be explored in the present paper. It suffices to note that the Court would have sufficient authority to fashion remedies that would more nearly reflect the Congressional intent in the two statutes than those to which the present tribunals are now limited.

Although most of the Court's jurisdiction would embrace cases that will have been initially submitted to a subordinate tribunal—to arbitration, to an adjustment board, or to the NLRB for determination of representation questions—the Court itself should possess original jurisdiction of these cases in a judicial sense. The Court's orders would thus be self-enforcing and resort to a court of appeals would not be necessary for enforcement purposes. However, the present role of the various courts of appeals would be maintained for appellate purposes. A party would be entitled to appeal a judgment of the United States Labor Court similar to the manner in which an appeal is now taken from a decision of a United States district court. No change is contemplated in appellate jurisdiction. The continued scattering of appellate review among the eleven United States courts of appeals is likely to produce a healthy cross-fertilization of judicial attitudes, which should counterbalance any tendency toward over-specialized expertise which might otherwise develop within the United States Labor Court. Final reconciliation of differences among the circuits would naturally be the responsibility of the Supreme Court through the exercise of its power of certiorari.

---


185 Contrast National Labor Relations Act § 10(e) with § 10(f) (29 U.S.C. §§ 160(e), (f), 158 (1964), amending 49 Stat. 452 (1935)).
E. The Mediation Service

A merger of the National Mediation Board and the Federal Mediation and Conciliation Service is suggested. This new National Mediation Service would confine itself to providing the mediation and conciliation functions authorized by the RLA and LMRA. It would also continue to provide assistance in the selection of neutrals to serve on adjustment and arbitration boards.

V. Testing the Hypothesis

The suggested plan must now be tested—at least on paper. Although an intensive study should be conducted in order to provide comprehensive data on the problem areas which have been touched on in this article, some preliminary conclusions, based on existing evidence, may be advanced. The overall conclusion is that the proposed allocation of functions between the new court and the modified administrative bodies would provide a fruitful means for achieving the objectives of the two basic collective bargaining statutes.

As previously noted, among the chief drawbacks of the Railway Labor Act are the archaic representation procedures employed by the National Mediation Board and the shackles which that Board and the statute itself have placed on collective bargaining. Separating representation and election procedures from the mediation process, and assigning both functions to agencies that are charged with similar responsibilities under the Labor-Management Relations Act, might release a viable potential for successful collective bargaining which was once thought to exist under the RLA. Also of importance, the new Labor Court, with assistance from a General Labor Counsel, would provide a needed forum for employee redress from union violations of the duty of fair representation.

The package of benefits which may be expected from application of the proposed procedures to the Labor-Management Relations Act will be of equal, if not greater significance. As presently constituted, the NLRB is unable to fulfill some of the major objectives of the statute. This is not the personal fault of either the Members of the Board or the General Counsel; nor can earlier Board personnel be blamed. After 34 years of operation under various political administrations, and with a normal turnover in Board personnel, it may reasonably be assumed that the principal fault lies in the procedural structure which Congress provided. There may have been a time when the administrative agency concept was suitable for the enforcement of unfair labor practice jurisdiction under the NLRA. That time might have been during the early days of the Wagner Act. This point has long been argued; but the issue is now moot for today the NLRB cannot adequately cope with the new generation of labor problems. To put it candidly, it is a mistake to expect an administrative agency to accomplish tasks which only a court can perform. The NLRB is not a court; it cannot issue temporary restraining orders, temporary injunctions or any orders, including final decisions on the merits, that are automatically en-
forceable. This lack of instant process—and process enforceable by its own contempt power—appears to be the principal cause of the low incidence of voluntary compliance with the Act. Now in its fourth decade, the NLRB must still handle, on a case-by-case basis, far too many matters involving fundamental rights of employees to engage in protected conduct. No other major civil statute in the federal law has achieved so little voluntary compliance after so long a period.

Because the NLRB is usually unable to react with the most appropriate procedures and remedies to fit particular situations, respondents and potential respondents in Board actions have little fear of what the Board might do to them. Thus, time is a weapon in disputes relating to the establishment of collective bargaining, and the slow pace of the Board’s process works against the very employees whom the Board is supposed to be protecting. When the Board finally does act, it may be too late to restore even a semblance of the status quo. Accordingly, the Board’s remedial process really frightens no one. To illustrate the point, if temporary injunctions were readily available in section 8(a)(3) and 8(b)(2) discharge cases, it is likely that relatively few such discharges would require final litigation on the merits. Of perhaps greater import, the number of such violations would probably decrease because the incentive for most of these discharges would be removed. Year after year large numbers of employees are discharged to “discourage membership” in labor organizations. However, if the government had the means to deal swiftly with such cases by obtaining prompt reinstatement where it could show reasonable cause to believe that a violation has occurred, the advantage attributable to the action would shift to the union. This does not now happen because the Board has no instant process, and prompt judicial action is unavailable. A dramatic example of how effective an injunction can be in a discharge case occurred a few years ago in a section 10(j) proceeding. It required six months of effort before the Board’s cumbersome machinery produced the 10(j) petition, but when it was finally filed, its effect was felt almost immediately. The facts of the case were simple. Four popular union adherents had been discharged at the beginning of a union organizing campaign, obviously setting back the campaign. Had there been no injunction, the union would probably have lost the election, for if reinstatement of the employees had to await the usual year or two of NLRB litigation, the apparent inability of the union and the government to protect the employees during the critical pre-election period would itself have interfered with the free exercise of section 7 rights. In McLuhan terms, the NLRB medium is the message. However, in the subject case the NLRB was saved from itself. Unlike thousands of similar cases, this one reached a federal judge just in time for the election. The judge was properly annoyed with the Board’s delay in filing the section 10(j) action—perhaps he did not realize that the unusual feature of the case was that

the action was filed at all. Yet, he found the evidence convincing and enjoined the company, with this lecture from the bench:

The conclusion that I reach here is that the company—and I don’t blame them for it—but apparently it is against the law to do so—the company was protecting itself against being unionized and they just thought—as I would probably if I didn’t know the law—that the best thing to do was to clip them at the bud. "Boys, get all these leaders out of here. Scare the rest of them."

And that is what happened in this case, and I have reasonable cause to believe that those four men, all four of them, were discharged because of union activities and for no other reason.

And I therefore am going to order that they be reinstated by the Company . . . .

Mr. ______, that is the order and I am giving it to you here. Mandatory injunction. You and all the other officers of your company . . . [Y]ou offer these four men . . . either the job they had at the time of discharge or similar position. 188

Here was the judicial mystique at work. The judge represented the full authority of the judicial power of the United States. His personal presence and his personal order accomplished what an anonymous order of the NLRB can rarely accomplish alone. The union won the election and the four section 8(a)(3) cases were quickly settled with back pay and continued employment.

Injunctions are not enough. A labor court must be an expert court, and it must carry on a tradition of interpreting a broad statute in accordance with national policy. The unspecialized United States district courts, as their record of interpreting the Railway Labor Act has demonstrated, cannot do this. Specialization and uniformity cannot be achieved by hundreds of different judges acting independently of one another. The Labor Court could supply expertise and uniformity.

The proposed Labor Court could also provide for discovery under rules comparable to the Federal Rules of Civil Procedure. This should eliminate the need for formal hearings in many cases, and voluntary settlements would also be encouraged. This has been common practice in the federal courts since the adoption of the Federal Rules of Civil Procedure in 1938. Alexander Holtzoff’s early comment on the Federal Rules remains accurate:

The elimination of the “sporting theory” of justice, the simplification of procedure, and the prompt disposition of controversies on the merits are the great objectives of the new federal civil practice. One of the principal means for the attainment of these purposes is discovery, by which a disclosure may be obtained in respect of all pertinent information in the possession of any party to a litigation . . . . 189

187 During that same year, the NLRB sought 10(j) injunctions in only 2 cases involving 8(a)(3) violations. THIRTIETH ANNUAL REPORT OF THE NLRB 214 (1965).

188 Clifford W. Potter, Regional Director v. United Foods, Inc., Civil Action No. 64-B-104 (S.D. Texas, Brownsville Div. 1965).

Because discovery may disclose substantially all of the material evidence in advance of trial, and participating attorneys can thus intelligently evaluate the merits of the case, parties are more likely to enter into pre-trial settlements. But even when settlement is unattainable, the discovery process may lead to a summary judgment or at least to a shorter trial. In contrast, the NLRB is truly a "horse and buggy" agency in the tedious way in which it handles cases. With administrative determination separated from judicial enforcement, and with appellate review a prerequisite for enforcement, there is little wonder that some parties use the Board's own process as a buffer against organizational activity.

On the other hand, the Board acts more quickly against unions when they are involved in section 8(b)(4) and 8(b)(7) violations, but only because section 10(l) makes mandatory the filing of petitions for injunctions in such cases. Expedited action may thus be obtained, but perhaps at the expense of other values. The district courts, under section 10(l), must routinely grant injunctions when "the officer or regional attorney . . . has reasonable cause to believe such charge is true and that a complaint should issue." In most cases there is probably no injustice in this inflexible procedure, but the statutory imposition of such a rigid requirement on a non-specialized court prevents early disposition of the underlying dispute and may unjustly pre-determine a strike by the sheer power of the injunction, regardless of the ultimate disposition of the case. A specialized court could consolidate the hearing on a temporary injunction with a hearing on the merits, or make whatever order was appropriate under the circumstances.

Another important area where the suggested Labor Court would improve on the NLRB's performance is in the matter of certainty and predictability in the decision-making process. Policy shifts from one Board to the next, and inconsistencies in interpreting and applying the statute from one administration to another, benefit no one in the long run. These decisional deviations give violators and opponents of the Act a scapegoat in the Board. On the other hand, pronouncements by a court, especially a federal court, ordinarily carry that authority which an impersonal federal agency is incapable of conveying. The image of a tribunal matters greatly in successful law enforcement.

Defenders of the NLRB status quo often point with pride to the Board's capacity to exercise specialized and expert judgment. Such a quality, however, need not be a monopoly of an administrative agency; a specialized court might succeed in bettering the Board's record on this score. Moreover, the great innovator in labor relations has been the Supreme Court, not the NLRB. But the revised NLRB would have an opportunity to continue to exercise inventiveness in processing representation cases and election procedures. Flexibility in rule-making for representation matters may be more desirable than for unfair labor practices, where stare decisis is both a virtue and a necessity. Furthermore, the Board's expertise as an

---

\[\text{Supra p. 562.}\]
innovator in unfair labor practice cases may be based as much on myth as on fact, for many of the Board's most famous innovations have fallen by the judicial wayside. To name a few of the major casualties: the Mountain Pacific doctrine, the Brown-Olds remedy, the Washington Coca-Cola doctrine, the American National Insurance case, the Insurance Agents case, the American Ship Building case, and the Babcock and Wilcox case. Furthermore, it was the Supreme Court, not the NLRB, that developed the doctrine of fair representation; the Board did not adopt it until twenty years later. Also, in Town and Country and Fibreboard, the Board followed a doctrine which the Supreme Court had already established in Telegraphers v. Chicago & N.W.R. Co. Thus, the conclusion may be drawn that a court is as likely to develop new and acceptable approaches as is an administrative board. And it may be more likely to be successful on judicial review.

Another advantage which might be expected from the proposed Labor Court is that different types of actions, such as unfair labor practices and contract violations, may be joined in the same proceeding. This would not have been of great importance 30 years ago, but today, with so much organized industry and so many disputes arising out of existing collective bargaining relations, the Board is unable and unsuited to determine with finality many of these disputes. Since the emphasis in collective bargaining in this country should continue to be based on voluntary action, a Labor Court with jurisdiction over contract enforcement as well as unfair labor practices, could make judicial determinations and fashion remedies which would utilize arbitration and other voluntary means. As noted previously, in the area of fair representation there is a particular need for joinder of actions and flexibility of remedies. Similar advantages could be made applicable to many actions under the Railway Labor Act.

The proposed plan could also help to improve the mediation system. The voluntary nature of mediation and the absence of sanctions may be its real strength. The federal mediator has nothing to sell but his good offices, which consist primarily of his personal ability to persuade, to listen, and to suggest. But whatever the qualities he brings to the bargaining table, it is generally agreed that his services are a valuable aid to the collective bargaining process. Although mediation procedures and conditions under which mediation is invoked differ markedly under the two statutes, the personalized nature of the job of mediating is similar under each. A merger of the mediation functions of the FMCS and the NMB should

---

provide an opportunity for both groups of mediators to share valuable experiences and techniques. Also, one mediation agency should be more economical to operate than two, and a single agency should provide for a more centralized and uniform direction to the service. Perhaps most important, however, there would be a separation of mediation from the adjudicatory functions of the NMB. If mediators can confine their efforts to mediation, which the NMB as an agency cannot do under the present RLA, their roles as neutrals may yield greater success in assisting parties in reaching bargaining agreements.

It would unduly prolong this paper to detail the anticipated effect of the proposed plan on each of the problem areas previously outlined; but it is suggested that the reader himself make these comparisons, for the plan purports to offer a means to eliminate or at least to mitigate most of these problems. Probable effects on the items noted earlier are summarized briefly in the following paragraphs.

Under the Railway Labor Act it is expected that the plan would: (1) Help achieve more realistic bargaining units, especially in the airline industry; (2) improve representation procedures and provide an opportunity for presentation of carrier views; (3) provide adequate machinery to settle representation disputes; (4) avoid most of the jurisdictional conflicts which exist among tribunals enforcing the Act; (5) probably provide a means for decertification of employee representatives; (6) probably provide a "no" vote in representation elections; (7) achieve uniform judicial enforcement and interpretation of the Act; (8) provide an officer who would assist in enforcing rights under the Act, especially rights of individual employees; (9) provide more freedom of choice to employees in the exercise of their rights of representation; (10) make the major-minor distinction more meaningful and help prevent such a distinction from interfering with the expeditious settlement of labor disputes; (11) separate mediation from adjudication; (12) reduce some of the delays in collective bargaining.

Under the Labor-Management Relations Act it is expected that the plan would: (1) Virtually eliminate the pendulum-like shifts in decisional law which have characterized NLRB action in preceding years; (2) increase voluntary acceptance of the requirements of the Act; (3) speed up the enforcement process; (4) provide for instant judicial process when and where needed; (5) eliminate or substantially reduce the conflict between unfair labor practice jurisdiction and the arbitration process; (6) provide for joinder of actions, particularly in fair representation cases; (7) provide for a more efficient decisional process; (8) provide for pretrial discovery; (9) eliminate the absolute power of the General Counsel to dismiss a charge without review; and (10) reduce the incidence of appellate review.

The plan is not expected to be a panacea. However, I believe that it may offer a fair and functional means to improve the enforcement and administration of the two major collective bargaining statutes.
VI. Conclusion

This article is a plea for statesmanship in the development of new labor legislation. With minority groups creating new forms of concerted activity for the purpose of asserting their claims for equal treatment within the industrial establishment, with collective bargaining reaching an institutional plateau, and with modern industry devising new technologies and new types of business entities, a streamlined judicial and administrative procedure needs to be established to cope with such new problems and to adequately handle the old ones.

We live in an age of industrial interdependence. The distinction between industries covered by the Railway Labor Act and those covered by the Labor-Management Relations Act have become increasingly artificial and irrelevant. For example, containerized cargo moves back and forth between coverage of both Acts, because warehousing, longshore, shipping and motor carrier operations are covered by the LMRA, whereas railroads and airlines are covered by the RLA. To cite another example, employees of independent aircraft maintenance companies may be covered by the LMRA even though they service aircraft whose crews and related personnel are covered by the RLA. By any standard, it is difficult to justify two separate statutes. However, substantive unification, providing for a single statute covering airlines, railroads and other industries, seems unattainable at the present time. Although the plan which I have outlined seeks to unify procedures only, in time, unified procedures could lead to unified substantive law—whether by administrative practice, judicial interpretation, new legislation or by a combination of all these means. Inasmuch as procedural unification may be an attainable goal, the suggested plan could provide a substantial first step toward achieving unification of all federal law relating to collective bargaining.

I have attempted to identify the principal problem areas and to propose a working hypothesis that might provide a reasonable means to reduce or eliminate some of the major difficulties in the administration and enforcement of the collective bargaining statutes. The conclusions, however, are tentative. Hopefully, collective bargaining has sufficiently come of age so that labor and management, working with other interested groups, can now join in a common effort to improve the operation of the collective bargaining system. It is my thesis that this improvement can be accomplished without fundamentally changing the substantive law. But even if the plan which I have proposed proves to be unacceptable, a constructive effort should nevertheless be made to devise another approach to fill the need—for the need is great.