Judicial and Regulatory Decisions

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THE right of an airline owned by a foreign government to claim sovereign immunity from suit was raised in Adatto v. United States of Venezuela. Linea Aeropostal Venezolana accepted Christmas merchandise from Louis Adatto, an American citizen, for rush delivery to Caracas, Venezuela. Adatto alleged that the goods were delayed until after Christmas, resulting in the loss of the entire sale price of the merchandise. Linea Aeropostal Venezolana, or L. A. V., is a "corporation" having no privately owned stock or shares of any type, and whose officers are all ministers of the Venezuelan government. Adatto brought two suits. One, directly against L. A. V., went to trial on the merits, and the defendant did not even claim to be entitled to sovereign immunity. In the other suit, which was against the United States of Venezuela, the defendant did not appear, but claimed sovereign immunity through a brief filed as amicus curiae. The district court dismissed the latter suit for lack of jurisdiction, because of sovereign immunity, and the Second Circuit affirmed. 2

Rules governing sovereign immunity of government owned business enterprises in general have become fairly well clarified. The precise effect of these rules when applied to government owned airlines has not yet been discussed by the courts, but it appears that cases involving government owned airlines should be treated like the other cases. In general, a government or a governmental agency is entitled to immunity, while a separate corporation owned in part or entirely by the government is not, as the following discussion will show.

The doctrine of sovereign immunity deprives the courts of jurisdiction over a suit brought directly against a foreign government or involving property owned directly by a foreign government. A suit in which the foreign sovereign is not named as defendant may nevertheless be barred if the foreign state is a necessary party, as where the foreign state is one of the claimants to the funds involved in the suit, or where a state owns

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1 181 F. 2d 501 (2d Cir. 1950).
2 The Second Circuit relied on Puente v. Spanish National State, 116 F. 2d 43 (2d Cir. 1940), cert. denied 314 U. S. 627 (1941), in its memorandum opinion affirming the district court.
3 The Exchange, 7 Cranch 116 (U.S. 1812); Ex Parte Republic of Peru, 318 U. S. 578 (1943); Berizzi Brothers Company v. S. S. Pesaro, 271 U. S. 562 (1926).
6 The Exchange, 7 Cranch 116 (U.S. 1812); Berizzi Brothers Company v. S.S. Pesaro, 271 U. S. 562 (1926).
first mortgage bonds and a foreclosure suit is brought by second mortgagees. 8

The subject matter of the suit does not seem to be controlling, because the courts apply the same rules in a wide variety of cases. Sovereign immunity exists whether the suit is in rem 9 or in personam. 10 The principles apply equally in a suit against a state owned railroad, 11 a state liquor monopoly, 12 or the ownership of mortgage bonds. 13 Government owned ships 15 and tobacco warehouses 16 cannot be sued successfully. It is not relevant whether the organization seeking immunity is carrying on an activity usually thought of as governmental; it is enough that the foreign government saw fit to engage in that activity. 17 Thus it is clear that the court was correct in holding that the government of Venezuela cannot be subject to suit for acts done by a commercial airline owned by it.

The rules of sovereign immunity making a corporation subject to suit and a government exempt seem to be applied equally in contract and tort suits. 18 The plaintiff's brief in Adatto v. United States of Venezuela quotes some language of Mr. Justice Brandeis in Lynch v. United States, which, taken out of its context, appears to be to the contrary. "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." 19 The next page of the same opinion makes it clear that Justice Brandeis was not talking about sovereign immunity. "Contracts between individuals or corporations are impaired within the meaning of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened. A different rule prevails in respect to contracts of sovereigns." In the Lynch case, plaintiffs sued the United States on war risk insurance contracts with the government, and the defense was that Congress had repudiated the contracts, by repealing legislation. The opinion

8 Cunningham v. Macon and Brunswick Railroad Company, 109 U.S. 446 (1883).
9 The Exchange, 7 Cranch 116 (U.S. 1812); Berizzi Brothers Company v. S.S. Pesaro, 271 U.S. 562 (1926); The Carlo Poma, 259 Fed. 369 (2d Cir. 1919).
14 Cunningham v. Macon and Brunswick Railroad Co., 109 U.S. 446 (1883).
15 The Exchange, 7 Cranch 116 (U.S. 1812); Ex Parte Republic of Peru, 318 U.S. 578 (1943); Berizzi Brothers Company v. S.S. Pesaro, 271 U.S. 562 (1926).
16 But cf. The Beacon Park, 66 F. Supp. 211 (W. D. Wash., 1946) (ship possessed by a corporation, not the government, held not entitled to immunity).
17 Oliver American Trading Company, Inc. v. Government of the United States of Mexico et al., 5 F. 2d 659 (2d Cir. 1924); Ballaine v. Alaska Northern Railway Company, 259 Fed. 183 (9th Cir. 1919); F. W. Stone Engineering Co. v. Petroleos Mexicanos de Mexico, D. F., 352 Pa. 14, 42 A. 2d 57 (1945).
18 E.g., Murray v. Wilson Distilling Co., 213 U.S. 151 (1909) (contract); Fields v. Fredonita & Thanica A.D., 263 App. Div. 155, 31 N. Y. S. 2d 739 (1941) (contract); The Maipo, 263 Fed. 657 (S. D. N. Y. 1918) (tort). The sole case holding that there is a difference in result, depending on whether the suit is contract or tort, is The Charkeih, L. R. 4 A and E 59 (1873), overruled by The Parliament Belge, 5 P. D. 197 (1880).
makes it clear that, while Congress' attempt to make the plaintiff's contracts with the government void was not successful, Congress could have taken away the plaintiff's right to sue on those contracts, because sovereign immunity protects the government from suits on its contracts unless it waives that immunity.20

Our courts have no power to try a foreign sovereign, because of rules of international law. The Exchange 21 explains that international customs and understandings show that by permitting a sovereign to enter our country or to send his property into our territory, we impliedly grant that sovereign and its property immunity from our laws. The courts observe that to fail to recognize that immunity could cause serious foreign policy repercussions, as it would be a violation of faith, could embarrass our Executive Department in its foreign relations, and could make it harder for our government to claim immunity for its enterprises.22 Furthermore, a wronged claimant may have a remedy through diplomacy, even though our courts cannot hear his case.23

Government Corporation Poses New Problems

In the case of a corporation owned by or connected with a foreign sovereign, new issues arise. A corporation is not entitled to sovereign immunity, even though a foreign government owns a part 24 or all 25 of its stock. On the other hand, sovereign immunity may protect a corporation that is so closely connected with a government as to be an agency of that government.26 Sovereign immunity is generally held not to exist where a separate corporate entity is set up, so that the property is not owned by the government in its own name and the corporation is free to contract in its own name.27 Examples of immune enterprises may be found in cases involving government owned railroads; the courts look to see whether the railroad has outstanding stock, whether government appropriations pay operating exp-

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20 "The contracts between a Nation and an individual are only binding on the conscience of the sovereign and have no pretensions to compulsive force. They confer no right of action independent of the sovereign will." Ibid., quoting Hamilton, THE FEDERALIST, No. 81.
21 7 Cranch 116 (U.S. 1812).
22 The Exchange, 7 Cranch 116 (U.S. 1812); Republic of Mexico v. Hoffman, 324 U.S. 30 (1945); The Maipo, 252 Fed. 627 (S. D. N. Y. 1918); Note, 40 COLUMBIA L. REV. 453 (1940). It has even been suggested that a failure to grant sovereign immunity could be a cause of war. The Maipo, supra, quoted with approval in The Pesoaro, 13 F. 2d 468 (S. D. N. Y. 1926), aff'd Bertazi Brothers Company v. S.S. Pesoaro, 271 U.S. 562 (1929).
23 Banque de France v. Equitable Trust Company of New York, 33 F. 2d 202 (S. D. N. Y. 1929); Hannes v. Kingdom of Roumania Monopolies Institute, 6 N. Y. S. 2d 960 (Sup. Ct. N. Y. County 1938); 6 Moore, DIGEST OF INTERNATIONAL LAW §970 (1906).
24 Sloan Shipyards Corporations et al. v. United States Shipping Board Emergency Fleet Corporation and the United States, 258 U.S. 549 (1922); Molina v. Comision Reguladora del Mercado de Henequen, 91 N. J. L. 392, 105 A. 397 (1918); accord, Coale v. Societe Co-op Suisse des Charbons Basle et al., 21 F. 2d 180 (S. D. N. Y. 1921) (corporation whose stock was owned by private individuals, but which had some of its directors appointed by Swiss Government held not entitled to sovereign immunity).
26 Oliver American Trading Company, Inc. v. Government of the United States of Mexico et al., 5 F. 2d 659 (2d Cir. 1924); Ballaine v. Alaska Northern Railway Company, 259 Fed. 183 (9th Cir. 1919) (this case involved a U.S. corporation, but the tests to be applied seem to be the same as those for a corporation owned by a foreign government).
27 See footnote 22, above.
penses, and whether the income is a part of the national revenues. It appears, then, that L.A.V. has no sovereign immunity, so Adatto’s suit against it correctly went to trial on the merits.

Cases close to the borderline between a corporation whose stock is owned by a government, which is not entitled to immunity, and an agency of the government, entitled to immunity, are sometimes hard to distinguish. When the United States bought all the stock in an Alaskan railway and operated the line to develop an area, the railroad was held to be merely an agency of the government, and hence was entitled to immunity. On the other hand, when Haiti bought all the shares of a bank, and added to the activities of the bank the duty of being a fiscal agent for the government, the court held that the bank had no sovereign immunity.

While the distinction between a government corporation and a government has been criticized, an examination of the policy reasons considered by the courts will show that this distinction is sensible. When a corporation is formed, and operates in its own name rather than in the name of its government, this indicates that the enterprise is intended to be separated from the government. The state is not a necessary party when its corporation is sued, any more than any stockholder is a necessary party when any corporation is sued. The law of the foreign state which owns the corporation may, if examined, be seen to deny immunity to that corporation.

Diplomatic Assistance for Tort Claims

Our State Department draws a distinction between contract and tort claims, in deciding whether to lend its aid to an American citizen trying to collect money from a foreign government through diplomatic channels. The State Department will not lend its aid in contract claims, as it reasons that one who contracts with a foreign government assumes the risk that the government will deal fairly with him, but the department will lend its aid to the victim of a tort. Representing a claim through diplomacy appears to be of value only where the courts can give the claimant no aid, so the relevancy of the tort or contract nature of the claim here is not inconsistent with the irrelevancy of the nature of the claim when deciding questions of sovereign immunity from the courts’ jurisdiction.

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28 Mason v. Intercolonial Railway of Canada, 197 Mass. 349, 83 N. E. 876 (1908); accord, Oliver American Trading Company, Inc. v. Government of the United States of Mexico et al., 5 F. 2d 659 (2d Cir. 1924); Bradford v. Director General of the Railroads of Mexico, 278 S. W. 251 (Tex. Civ. App. 1925). These railroad cases were decided on the issue of their connection with their governments, not on any question relating to the location of the railroads in or out of the United States, so their reasoning should be applicable to cases involving airlines.

29 Ballaine v. Alaska Northern Railway Company, 259 Fed. 183 (9th Cir. 1919).


33 United States v. Deutsches Kalisyndikat Gesellschaft et al., supra note 32.

34 2 Hyde, International Law, Chiefly as Interpreted and Applied by the United States 890 (2d Rev. Ed. 1945).
The procedure for presenting a claim of sovereign immunity in United States Courts, and the role that the State Department plays in court decisions, are decisive in many cases. *Ex Parte Muir* 35 stated the rule for the federal courts, holding that the claim may be presented by an appearance by the foreign sovereign or its accredited representative, or by a suggestion of our State Department, presented through the Attorney General. The federal cases since the *Muir* opinion follow it in holding the Secretary of State's "suggestion" to be binding, 36 but a suggestion by an ambassador to be not binding, even though forwarded by the Secretary of State. 37 A suggestion by an ambassador may be properly considered by the court, but it is not binding, as is the State Department's action. 38 An appearance by a corporation claiming sovereign immunity does not satisfy the requirement of an appearance by a foreign sovereign or its ambassador. 39 Where it is quite clear that sovereign immunity exists, as where the subject of the litigation is in the direct possession of the foreign government, the court can hold that it has no jurisdiction even without a recommendation from the Secretary of State or an appearance by the foreign sovereign, according to the rule of *Puente v. Spanish National State*, 40 because the court does not have to render a judgment that it knows will be void.

Some state courts are not as strict as the federal courts in their holdings on how a claim of immunity should be presented. The testimony of a railway agent was held to be sufficient to show that the railroad was entitled to sovereign immunity, 41 and a brief filed by an attorney as amicus curiae may establish such a claim. 42 While the courts of New York can seek the aid of the State Department, 43 the Department's recommendation is not binding on them, 44 and they will consider a claim of immunity no matter how it is presented. 45 Perhaps the strongest argument that could be made in the plaintiff's favor in *Adatto v. United States of Venezuela* is that the procedure followed, filing an amicus curiae brief, was inadequate to present the claim of sovereign immunity. The *Puente* case, on which the second circuit relied in sustaining the dismissal of Adatto's suit, sanctioned a departure from the *Muir* rule only where the defendant's right to immunity was clear. Plaintiff's attorney in his brief emphasizes the argument that the peculiar nature of the business involved, operating a commercial airline, makes this

35 254 U.S. 522 (1921); Note, 26 Ill. L. Rev. 215 (1932).
37 The Secundus, 15 F. 2d 713 (E. D. N. Y., 1926).
40 Sullivan v. State of Sao Paulo, 122 F. 2d 355 (2d Cir. 1941).
a situation where traditional rules of sovereign immunity should not be applied. Because the precise question presented had not been passed on by the courts previously, plaintiff might argue that this is a place for the declared policy that courts should not expand sovereign immunity, a subject profoundly affecting our foreign relations, without the aid of the State Department. It is believed, however, that a suit brought against a foreign sovereign in its own name is never successful, whatever the activity that sovereign was engaged in, so the fact that air transportation was involved should raise no serious questions requiring a departure from the Puente procedure.

The C.A.B. has stated that the Adatto case raises no new problems of sovereign immunity. Nothing in our statutes, regulations, permits or treaties seems to contradict this. The permit issued to L.A.V. was typical; it contained a provision requiring the carrier to accept the Civil Aeronautics Act and the regulations under that act. The Civil Aeronautics Act provides that permits may be issued to foreign airlines willing to conform to the Act but the Act itself does not cover the problem of jurisdiction in a civil suit, although it does provide for jurisdiction for violations of the Act. Our treaties and conventions do not cover this problem. As we saw above, the subject matter of the suit is not relevant to the question of sovereign immunity.

Plaintiffs in Adatto's place are in no worse a position than anyone else who claims to have been wronged by a foreign sovereign. Foreign airlines such as L.A.V. have not tried to claim immunity when sued in their own names, even where, as in the case of L.A.V., an argument that there is no separate corporation seems possible. It is submitted that, because failing to enforce the traditional international laws on sovereign immunity could result in serious foreign policy repercussions, it is imperative for our courts to continue to grant sovereign immunity according to precedent.

47 The C.A.B.'s position was stated in a letter to Senator Johnson on June 20, 1950.
48 C.A.B. Permit No. 2281 (1946).
50 Civil Aeronautics Act §§903, 1007, 52 Stat. 1017 (1938), 49 U.S.C. §§623, 647 (1951). The definitions in this act would make L.A.V. a civil aircraft, for the purposes of this act.
§1(14). “Civil aircraft” means any aircraft other than a public aircraft.
§1(30). “Public aircraft” means an aircraft used exclusively in the service of any government or any political subdivision thereof, including the government of any State, Territory, or Possession of the United States, or the District of Columbia, but not including any government-owned aircraft engaged in carrying persons or property for commercial purposes. 52 Stat. 997 (1938), 49 U.S.C. §401 (1951).
51 The Warsaw Convention of 1929, dealing with civil liability of foreign aircraft, was ratified by the United States in 1934. 49 Stat. (pt. 2) 3000 (1934), U.S. Treaty Series No. 867. The United States expressly excluded Article 2(1) of the convention, the article making aircraft owned by states subject to the terms of the convention.
AIRLINE LABOR POLICY, THE STEPCHILD OF THE RAILWAY LABOR ACT

IN 1936 Congress enacted Title II of the Railway Labor Act.1 Thereby it extended to the airlines a labor law designed by and for the railroad industry.2

A number of factors influenced the Congressional decision. In 1936 close regulation of almost every facet of air transportation, from personnel qualifications to route allocation, was already well-established practice.3 This provided ready evidence of the public interest in airline health and undoubtedly helped overcome any Congressional reluctance to take over air labor relations. In addition, probably a strong consideration in favor of Title II was the expectation, never fulfilled, that air controls would soon be centralized in the Interstate Commerce Commission, the same agency which

2 Inclusion of the airlines under the coverage of the Railway Labor Act had been proposed and rejected several times before. Representative La Guardia introduced the first bill to extend the Act on April 1, 1932, but it failed to receive the backing of the railroad unions. Another bill was proposed shortly thereafter which did receive the necessary railroad support. It was introduced in the House by Mr. La Guardia and in the Senate by Senator Bingham. The Senate bill was reported favorably but was never brought to a vote. The House bill was opposed by several influential groups and died in committee. See PuFFER, AIR TRANSPORTATION 559 (1941); FEDERAL COORDINATOR OF TRANSPORTATION, HOURS, WAGES AND WORKING CONDITIONS IN SCHEDULED AIR TRANSPORTATION 101 (1936).
3 Air transportation began as a creature of the federal government. The Post Office Department inaugurated the first regular air-mail service in 1918 and continued to operate domestic air-mail routes until 1925. In the latter year Congress made provision for turning the air-mail service over to private carriers; and in 1926 it passed the Air Commerce Act, providing for safety regulation and aids to air navigation. The privately owned air transportation industry may be said to date from 1926. It was in this year also that the first scheduled passenger service became available. PuFFER, AIR TRANSPORTATION 2-4 (1941).

Government control today is pretty well localized in the Civil Aeronautics Board just as railway controls are centered in the Interstate Commerce Commission. This agency was established in 1940, 54 STAT. 1235, under a reorganization plan which modified the "bible" of the airline industry, the Civil Aeronautics Act, 52 STAT. 977 (1938); 49 U.S.C. §401 (1940). Under this Act the CAB now controls practically every aspect of the airlines except labor relations, see Ballard, Federal Regulation of Aviation, 60 HAB. L. REV. 1235 (1947), and many of its functions have at least indirect effects on labor conditions.

One commentator has singled out the following ways in which the CAB influences airline labor relations:

1. It prescribes the minimum qualifications which air employees in skilled occupations must possess for certification.
2. It determines the personnel complements that must be employed in connection with flight operations.
3. It determines what types of aircraft may be flown and the operating rules for each.
4. It allocates routes and approves reorganizations, thus affecting many jobs.
5. It controls the "ability to pay" since it controls air mail rates.

He expresses the opinion that these functions exercise a profound effect on labor conditions and that greater cognizance should be taken of the fact. KAHN, INDUSTRIAL RELATION IN THE AIRLINES 404-6 (unpublished thesis in Harvard University Library, 1950) (Dr. Kahn's thesis, subtitled "The interaction of unions, management and government in a regulated and subsidized industry," is the only significant survey of airline labor relations and was of considerable help in the preparation of this Comment. It will be cited hereafter as KAHN).

Most aspects of present-day regulation were manifest by 1936. The supervisory function now vested in the CAB was largely split up between the Department of Commerce and the Interstate Commerce Commission. See JOHNSON, GOVERNMENT REGULATION OF TRANSPORTATION 620-7 (1938).
already governed the railroads.\textsuperscript{4} In the interest of uniformity it seemed desirable to bring rail and air transportation under a single labor agency as well.

One of the most compelling influences, however, was the crying need for air labor legislation of some form. Several serious squabbles had already disturbed the infant air industry.\textsuperscript{5} To be sure, the Wagner Act,\textsuperscript{6} then in the process of formulation,\textsuperscript{7} would also have protected airline employees and fostered unionization. But federal control of industrial relations outside the rail industry was still practically an experiment.\textsuperscript{8} And the Railway Labor Act, then recently amended,\textsuperscript{9} was regarded as the last word in sound labor legislation.\textsuperscript{10} Proponents of Title II asserted that an industry so charged:

\textsuperscript{4} This expectation was frequently manifested at the hearings on the bill to enact Title II. See e.g., testimony of Mr. Edward G. Hamilton, legislative representative of the Air Line Pilots Association, Hearings before Subcommittee of the Committee on Interstate Commerce on S. 2496, 74th Cong., 1st Sess. 5 (1935).

\textsuperscript{5} The cry for unified transportation controls apparently is not dead yet, despite establishment of the CAB, Cf. S. 305 introduced into the last session of Congress on January 11, 1951, and referred to the Senate Committee on Interstate and Foreign Commerce.

\textsuperscript{6} Most early controversy involved the aristocrats of the air labor force, the pilots. Depression-induced wage reductions had driven them to try to bargain collectively. Their efforts toward organization were the genesis of the Air Line Pilots Association, which grew up practically overnight in 1931 and has ever since been probably the most effective single force in airline labor relations.

\textsuperscript{7} Management did not accept passively employee efforts to organize. In at least one case, employer intransigence was enough to lead to the bankruptcy and dissolution of an airline. By early 1932 considerable sentiment had been manifested for inclusion of the airlines under the Railway Labor Act, the only form of federal labor control then in existence.

\textsuperscript{8} Further impetus toward unstable labor relations was the introduction of the new and faster DC-3 aircraft. At that time most carriers endeavored to change from a mileage to an hourly basis of pilot compensation in order to avoid the increased labor costs that would result from higher speeds. The pilots objected and claimed they should have a share in the benefits of technological improvement. By mutual agreement the dispute was submitted to the National Labor Board, a newly-established product of the National Industrial Recovery Act. The outcome of the controversy, the now-famous Decision 83, established a compromise system of pilot compensation which included base pay, hours worked and miles flown. Decision 83, with some variations, still controls pilot pay.

\textsuperscript{9} On the general history of early air labor strife, see PUFFER, AIR TRANSPORTATION 554-70 (1941); FEDERAL COORDINATOR OF TRANSPORTATION, HOURS, WAGES AND WORKING CONDITIONS IN SCHEDULED AIR TRANSPORTATION 98-114 (1936).

\textsuperscript{10} See, e.g., testimony of Madam Perkins, then Secretary of Labor, that "... the Railway Labor Act embodies the fullest and most complete development of mediation, conciliation, voluntary agreement, and arbitration that is to be found in any law governing labor relations ... [and the] administration of the Railway Labor Act is an outstanding example of effective administration of a labor law." Hearings before Committee on Commerce and Committee on Education and Labor on S. 3078, 75th Cong., 3d Sess. 968-9 (1938). Some recent commentators
with public responsibility as air transportation needed the background of labor experience and the more detailed regulation of the Railway Labor Act. Only its orderly routine of conference, mediation, arbitration and fact-finding, they said, could assure stable industrial relations. Practically no one voiced a contrary view. Title II was approved in April 1936.

In the fifteen years since 1936 the airlines have grown up. Whether their expansion is gauged by passenger-miles flown or revenue dollars, they have expanded to at least ten times their 1936 size. There has been a con-

have seconded these observations. Kaltenborn, Governmental Adjustment of Labor Disputes 72 (1943) ("The law is in general well-conceived and effectively administered").

For a dissent from this view, see Northrup, The Railway Labor Act and Railway Labor Disputes in Wartime, 36 Am. Econ. Rev. 324 (1946). Dr. Northrup is practically the sole recent commentator on the Railway Labor Act. The most comprehensive discussion is contained in his recent book, as yet unpublished, The "Model Labor Law"—An Analysis of the Railway Labor Act and Its Administration. See also his articles: The Appropriate Bargaining Unit Question Under the Railway Labor Act, 60 Q. J. Econ. 250 (1946); Emergency Disputes Under the Railway Labor Act, 1948, Proc. Ind. Rel. Research Ass'n 78; Unfair Labor Practice Prevention Under the Railway Labor Act, 3 Ind. and Lab. Rel. Rev. 323 (1950). Both Dr. Northrup and his writings were of considerable assistance in the preparation of this article.

11 Mr. O. S. Beyer, director of the Section of Labor Relations under the Federal Coordinator of Transportation, asserted: "The [Wagner] act as proposed, while it seeks to encourage duly chosen representatives of employers and employees to bargain collectively, does not provide for the orderly process of notice, conference, mediation, arbitration, fact-finding, and conciliation available in the event of a labor dispute in those industries subject to the Railway Labor Act. In an industry such as air transportation, so largely charged with responsibility to the public, and in which safety is such a large element, it is of special importance that every legal safeguard . . . should be adopted . . ." Hearings before Subcommittee of the Committee on Interstate Commerce on S. 2496, 74th Cong., 1st Sess. 17 (1935). See also statement of Mr. Hamilton, Id. at 5; Federal Coordinator of Transportation, Hours, Wages and Working Conditions in Scheduled Air Transportation 124 (1936).

Certainly another consideration in favor of Title II, whether vocalized or not, must have been the fact that the Wagner Act was of dubious constitutionality. Fifty-eight Liberty League lawyers pronounced it unconstitutional almost at its inception. And the constitutional question was not finally settled in favor of the Act until NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). See Stern, The Commerce Clause and the National Economy, 1933-1946, 59 Harv. L. Rev. 645, 674-85 (1946).

Representatives of airline management were conspicuous by their absence. At one point in the hearings the chairman asked, "Is there somebody here that is interested on the other side of this question?" No one answered. Hearings before Subcommittee of the Committee on Interstate Commerce on S. 2496, 74th Cong., 1st Sess. 23 (1935). One well-informed source (who asks to remain unnamed) has speculated that the airlines were so confident that the bill, like its predecessors, see note 2 supra, would not pass, that they did not bother to send a representative to the hearings.

The point that the airlines had not been heard on the bill was briefly raised on the floor of the House. But objections were brushed aside and the bill was passed. 80 Cong. Rec. 5089-40 (1936).

13 Id. at 5411.

14 Domestic air carriers flew 438,989 passenger miles in 1936, 6,227,932 in 1948. International carriers flew 41,829 as against 1,961,794. Civil Aeronautics Administration, Statistical Handbook of Civil Aviation 67, 85 (1949).

Domestic carriers' total revenues were $43 million in 1938 and $434 million in 1948. The comparable international figures are $15 million and $249 million. Id. at 74, 89. The last few years have been even bigger for both domestic and international airlines. And the future will probably bring continued expansion. See Forbes Magazine of Business, Third Annual Report on American Industry 74 (1951); Wall Street Journal, March 22, 1951, p. 1, col. 1.

Despite this almost phenomenal growth, the airlines still play only a relatively small part in the total transportation picture. In 1949 they accounted for only 1.5% of total intercity passenger traffic and .05% of intercity freight traffic. 64 ICC Ann. Rep. 22 (1950).
comitant growth in the number of personnel employed.\textsuperscript{15}

Such prodigious development has not, it is true, been accompanied by much change in the essential nature of the industry's labor force. This remains comparatively small, widely dispersed, and extremely specialized. Today sixteen major companies share the bulk of the nation's flying business.\textsuperscript{16} Each of these serves a number of cities. While a large part of an airline's personnel may be located at its home base, some employees are maintained at every station.\textsuperscript{17} And air transport workers are further distributed among various categories of flight and ground jobs.\textsuperscript{18} All this segmentation takes place in a work force which even today numbers less than eighty-five thousand, a mere six per cent of the total employees covered by the Railway Labor Act.\textsuperscript{19}

Fifteen years have, however, wrought a profound change in the character of air unionization. In 1936 collective bargaining was a new practice for both carriers and unions; not a single air collective bargaining agreement had yet been signed.\textsuperscript{20} And only one union, the Air Line Pilots Association, was very active in airline labor affairs.\textsuperscript{21} This was a considerable contrast to the situation on the railroads where unions were then, as they

\textsuperscript{15} In 1936 domestic airlines employed 7,079 workers and international airlines 2,916. The comparable figures in 1948 were 60,416 and 23,726 respectively. CIVIL AERONAUTICS ADMINISTRATION, STATISTICAL HANDBOOK OF CIVIL AVIATION 63, 83 (1949).

\textsuperscript{16} American, Braniff, Capital, Chicago & Southern, Colonial, Continental, Delta, Eastern, Mid-Continent, National, Northeast, Northwest, Pan American (including Panagra and American Overseas), Trans World, United, and Western.

\textsuperscript{17} Five airlines account for about three-fourths of the total traffic—American, Pan American, United, Trans World and Eastern. These companies own about two-thirds of the total number of planes and a much greater per cent of the more modern and largest aircraft. It is the managements of these lines that have played a major part in shaping air industrial relations. KAHN 35.

\textsuperscript{18} American Airlines employees, for example, are scattered among seventy-three separate stations. For a detailed breakdown of the personnel distribution on two major airlines, see KAHN, tables XVIII and XIX, following pp. 203 and 204 respectively.

\textsuperscript{19} For the major divisions established by the National Mediation Board for collective bargaining purposes, see notes 23 and 68 infra.

\textsuperscript{20} The latest available figures are for 1948. In that year air employees of both domestic and international carriers totaled slightly more than 84,000. See note 15 supra. In the same year the employees of the nation's railroads totaled 1,345,000. THE WORLD ALMANAC 649 (Hansen ed. 1951).

\textsuperscript{21} Not until fiscal 1937 were any air collective bargaining agreements executed and filed with the National Mediation Board as required by RAILWAY LABOR ACT, §5 Third (e). Four were filed that year; in fiscal 1938 the number on file increased to 16. These early agreements involved mechanics and radio operators. The pilots, despite their strong organization, did not enter into any written contracts during the first few years under Title II. 4 NMB ANN. REP. 7, 30 (1938).

\textsuperscript{22} Labor organization among groups other than the pilots did not emerge in any significant degree until after 1938. The ALPA was formed under the leadership of a former pilot, David L. Behncke, in 1931. By 1932 it included more than 75% of the scheduled airline pilots in the United States. Mr. Behncke headed the union until very recently and exercised what many have asserted to be an almost dictatorial control over its policies. For a comprehensive analysis of recent developments in ALPA internal affairs, see AVIATION WEEK, August 6, August 13, August 20 and August 27, 1951.

Because of its small size and centralization of control the ALPA evidently decided to concentrate its early efforts in Washington. Its lobbying activities were largely responsible for Decision 83, Title II and the Civil Aeronautics Act of 1938. It was not until after 1938 that the ALPA turned seriously to collective bargaining to extend the gains it had won in Washington. See KAHN 324; Northrup, Collective Bargaining by Air Line Pilots, 61 Q. J. Econ. 533 (1947).
are today, powerful national organizations. Now the major airlines are almost completely organized. Moreover, the unions active in air transportation are no longer weak aggregations struggling for recognition. At least three of them are strong national unions with over a quarter of a million members. And the Air Line Pilots Association wields an influence which belies the paucity of its membership.

At the same time our national labor philosophy has changed. Early laws followed the Wagner Act pattern of restraining employer activity and encouraging unions. But, if the Taft-Hartley Act is any evidence, national labor policy today tends to regard the parties as equals and to put

22 The railroad union movement began in the 1850's. Organization had reached a significant stage by the time of the notorious Pullman strike in 1894. Many of today's major railroad unions were well-established before that date. By 1929 the unions had reached such a high degree of centralization and political maturity that they formed the Railway Labor Executives' Association to coordinate rail union activities in matters of mutual interest. See Middleton, Railways and Organized Labor (1941); Monroe, Railroad Men and Wages (1947).

23 As of June 30, 1950, the following was the state of organization in some of the major airlines:

<table>
<thead>
<tr>
<th>CRAFT or CLASS</th>
<th>American</th>
<th>Eastern</th>
<th>Pan-Am.</th>
<th>TWA</th>
<th>United</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pilots</td>
<td>ALPA</td>
<td>ALPA</td>
<td>ALPA</td>
<td>ALPA</td>
<td>ALPA</td>
</tr>
<tr>
<td>Flight Engineers</td>
<td>ACFEA</td>
<td>ALFEA</td>
<td>FEIA</td>
<td>FEIA</td>
<td>ALCEA-ARA</td>
</tr>
<tr>
<td>Radio Operators</td>
<td>ALCEA-ARA</td>
<td>ALCEA-ARA</td>
<td>TWU (1)</td>
<td>ALCEA-ARA</td>
<td>ALCEA-ARA</td>
</tr>
<tr>
<td>Flight Pilots</td>
<td>FEIA</td>
<td>ALCEA-ARA</td>
<td>TWU</td>
<td>TWU</td>
<td>ALCEA-ARA</td>
</tr>
<tr>
<td>Mechanics</td>
<td>TWU</td>
<td>IAM (2)</td>
<td>TWU</td>
<td>IAM</td>
<td>IAM</td>
</tr>
<tr>
<td>Flight Dispatchers</td>
<td>ALDA</td>
<td>ALDA</td>
<td>TWU</td>
<td>TWU</td>
<td></td>
</tr>
<tr>
<td>Clerical Personnel</td>
<td>TWU (4)</td>
<td>ALDA</td>
<td>ALDA</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Flight Service Personnel</td>
<td>ALSSA (7)</td>
<td>ALSSA</td>
<td>ALSSA</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Guards</td>
<td>IAM</td>
<td>IAM</td>
<td>TWU</td>
<td>IAM</td>
<td>IAM</td>
</tr>
</tbody>
</table>

ACFEA—Air Carrier Flight Engineers Association.
ALCEA-ARA—Air Line Communication Employees Association, A.R.A., C.I.O.
ALDA—Air Line Dispatchers’ Association, A. F. of L.
ALPA—Air Line Pilots Association, A. F. of L.
ALSSA—Air Line Stewards and Stewardesses Association.
BRC—Brotherhood of Railway and Steamship Clerks.
FEIA—Flight Engineers International Association.
IAM—International Association of Machinists.
TWA—Transport Workers Union of America, C.I.O.

(1) Includes flight radio officers.
(2) Includes stockroom personnel and cargo handlers.
(3) Includes fire inspectors, commissary clerks, stockroom personnel and cargo handlers.
(4) Stockroom personnel only.
(5) Includes telephone operators.
(6) Includes truck drivers, stockroom personnel and cargo handlers.
(7) Stewards only.

For complete data on all major air carriers, see 16 NMB ANN. REP. 74-5 (1950).

24 The United Auto Workers, C.I.O., has almost a million members, the International Association of Machinists has almost 600,000, and the Brotherhood of Railway Clerks about 350,000. 4 BUREAU OF NATIONAL AFFAIRS, LABOR POLICY AND PRACTICE §263 (1950). The Transport Workers Union, which is becoming increasingly active in airline affairs, has about 95,000 members. Peterson, Handbook of Labor Unions 391 (1944).

25 The ALPA has only about 6100 members. 4 BUREAU OF NATIONAL AFFAIRS, LABOR POLICY AND PRACTICE §263 (1950). Yet the union, "a very strategically situated group,... has used its advantage to the utmost. In the face of an extraordinary large surplus of trained pilots which the war created, it has continued to boost the salaries of its members. Moreover, it has been unusually adroit in the political field. Despite its limited numbers (and votes), it has won the battle of Congress to a degree which has been exceeded by few organizations. Taking full advantage of the 'romantic allure' of the industry and jobs, pilots, lobbying in their smart uniforms, have impressed the legislators time and again." Northrup, Collective Bargaining by Air Line Pilots, 61 Q. J. ECON. 533, 574 (1947).

26 The Wagner Act, citing specifically the inequality of bargaining power of unorganized employees, declares it to be national policy to encourage collective bargaining and to protect the freedom of employees to designate representatives of their own choosing without interference by employers. 49 STAT. 449 (1935), 29 U.S.C. §151 (1946). A similar public policy had been declared in the Norris-LaGuardia Act three years earlier. 47 STAT. 70 (1932), 29 U.S.C. §102 (1946).

"And it seems apparent, in retrospect, that in passing the [Wagner Act],
similar restraints on both. Against this changed background, and with fifteen years of perspective, it is now possible to evaluate the Railway Labor Act as it applies to the air transport industry and to determine whether Congress’ original purpose is being adequately fulfilled.

The Nature of the Railway Labor Act

The Railway Labor Act was a product of our union-fostering labor past and the climax of almost fifty years of national railroad labor legislation. Both trade unions and labor strife appeared early on the railroads. And the resulting problems were reflected in Congressional debate well before the turn of the century, since this was clearly one business to which the “commerce power” extended. The present Act, culminating almost half a century of federal experiments in the railroad labor field, was passed in Congress was doing its best to provide the A. F. of L. with the means to promote the unlimited expansion of its member unions, free from the interference of employers.” GREGORY, LABOR AND THE LAW 226 (1946).

27 61 STAT. 136 (1947), 29 U.S.C. c. 7 (Supp. 1950). This will be cited hereafter as TAFT-HARTLEY ACT.

28 “The Taft-Hartley amendments represent an abandonment of the policy of affirmatively encouraging the spread of union organization and collective bargaining... The Government, instead of aiding one side, now stands in the center. The change of policy appears to be based on the belief that labor unions have become so strong that legislative action was required to redress the balance of power in the collective bargaining process.” COX, Some Aspects of the Labor Management Relations Act, 1947, 61 HARV. L. REV. 1, 44 (1947).


“We cannot overlook the fact that many of the states have been taking action to restrict union power and practices. In the legislative sessions of 1947 all but 18 states enacted one or more laws restricting union security, banning the closed shop, prohibiting secondary strikes and boycotts, regulating picketing and requiring unions to file financial statements... The Federal law must, therefore, be seen in its context of a rising popular demand for legislative reformation of union activities.” McKelvey, The Wagner Act and the Taft-Hartley Act, lecture at Elmira College, Dec. 8, 1947.

29 See note 22 supra.

30 As early as 1882 Congress began the consideration of methods and devices for the settlement of railway labor disputes. On June 15, 1882, Senator Morgan of Alabama offered a resolution calling for the appointment of a committee to investigate and propose a solution for railway labor troubles. [13 CONG. REC. 4924 (1882).] FISHER, USE OF FEDERAL POWER IN SETTLEMENT OF RAILWAY LABOR DISPUTES 8-9 (1922).


32 Federal railroad labor legislation began with the Act of 1888, providing for voluntary arbitration and government fact-finding. The provisions were used only once, and then unsuccessfully. The Erdman Act of 1898 placed primary reliance on mediation and conciliation by temporary boards, with voluntary arbitration as a second line of defense. The Newlands Act of 1913 established a full-time Board of Mediation and Conciliation and somewhat improved previous arbitration provisions. But the Newlands machinery failed to produce agreement as to whether railroad employees should have an eight hour day. The problem was settled only when Congress passed the Adamson Act in 1916 and upheld labor’s view.

During World War I the government took over the railroads. Under the federal Director General of Railroads the employees’ right to organize without management interference was established. And bipartite boards of adjustment were set up to handle grievance disputes.

The railroads were returned to private ownership in 1920; and the Transportation Act of that year prescribed new techniques for settling railroad labor disputes. The Act’s provisions were partly a reversion to the principles of the Act of 1888, with mediation discarded and reliance placed on investigation and recommendations by a tripartite, nine-man Railroad Labor Board. But mediation was made the basic method of federal intervention when Congress passed the Railway Labor Act in 1926. FISHER, USE OF FEDERAL POWER IN SETTLEMENT OF RAILWAY LABOR DISPUTES (1922); WOLF, THE RAILROAD LABOR BOARD (1927).
1926. It was largely the result of joint efforts by rail carriers and unions, both of whom were dissatisfied with existing dispute-settlement procedures.

Under New Deal aegis, the Act received a thorough overhauling in 1934, when some of the Wagner Act spirit of nurturing national unions was injected into it. Thus, as it stands today, the Act's avowed goal of avoiding interruptions to commerce is supposedly effectuated both by guaranteeing freedom of organization to carriers and their employees and by providing a mechanism for the prompt and orderly settlement of disputes.

The Railway Labor Act's first line of defense against labor discord is the imposition of certain general duties to insure fair collective bargaining. Carriers and their employees are directed to make and maintain written agreements or application of agreements covering rates of pay, rules, or working conditions.

The general purposes of the Act as it now stands are set out as: "(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) To forbid any limitation upon freedom of association among employees or any denial, as a condition, of employment or otherwise, of the right of employees to join a labor organization; (3) To provide for the complete independence of carriers and employees in the matter of self-organization; (4) To provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) To provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."
agreements concerning rates of pay, rules and working conditions. Their representatives are to confer regarding all disputes and to strive to achieve expeditious settlements. Carriers must deal with the freely designated representatives of their employees. And any deliberate interference with employees' freedom to organize, such as "yellow dog" contracts or the active fostering of company unions, subjects the offending carrier and its responsible officers to severe punishment.

But, because conferences between management and union will not always produce agreement, the Act seeks to maintain labor peace by establishing a comprehensive dispute-settling framework. Two basic types of disputes are differentiated: "matters of interest," which concern the establishment of rates of pay, rules or working conditions, and "matters of right," which grow out of the interpretation or application of existing contracts. The Act undertakes to treat each differently.

To help settle disputes over matters of interest, the Act establishes a three-man administrative agency—the National Mediation Board. If the parties to a dispute are unable to agree, they may invoke the aid of this agency. Or the Board may proffer its services if it feels a labor emergency exists. Once involved, the Board endeavors to help the disputants to agree. If unsuccessful in mediating the dispute, the Board is required to

37 The act merely prescribes that carriers and employees "exert every reasonable effort to make and maintain agreements . . ." RAILWAY LABOR ACT §2 First. But, since the Act also requires that every carrier file with the Mediation Board copies of all agreements in effect with its employees, Id. at §5 Third (e), the Board has interpreted the requirement to mean written agreements. NATIONAL MEDIATION BOARD, FIFTEEN YEARS UNDER THE RAILWAY LABOR ACT, AMENDED, AND THE NATIONAL MEDIATION BOARD 10 (1950).

38 RAILWAY LABOR ACT §2 Second, Sixth.

39 Id. at §2 Third, Fourth, Ninth.

An injunction may be obtained by employees to enforce their right to designate representatives without management coercion. Virginian Ry. v. System Federation No. 40,300 U.S.15 (1937).

40 The Railway Labor Act originally prohibited requiring a promise from any prospective employee to join or not to join any labor organization. This has been modified by a recent amendment which allows the union shop. See note 86 infra. It also proscribes any carrier's use of funds to maintain any labor organization or to pay any labor representative. But carriers are specifically authorized to allow employees to confer during working hours without loss of time; and they may furnish free transportation to employees who are travelling on union business. Carriers must post notices to advise employees of their rights to organize and bargain collectively without employer interference. The willful violation of any of these provisions subjects the carrier, its officer or agent to a fine of from $1,000 to $20,000, imprisonment up to six months or both. Each day of willful violation is specifically made a separate offense. RAILWAY LABOR ACT §2 Fourth, Fifth, Eighth, Tenth.

41 See Hearings Before Committee on Interstate Commerce on S. 3266, 73rd Cong., 2d Sess. 33-4 (1934).

42 Whereas labor legislation as originally applied to the railroads . . . made no attempt to differentiate between the various types of labor controversies but treated them as if they were all of a kind, the amended Railway Labor Act clearly distinguishes different kinds of disputes, recognizes the differences in the principles which underlie them, and provides different methods and establishes separate agencies for handling the various kinds. These principles, methods, and agencies, evolved through years of experimentation, provide a model labor-relations policy . . ." NATIONAL MEDIATION BOARD, FIFTEEN YEARS UNDER THE RAILWAY LABOR ACT, AMENDED, AND THE NATIONAL MEDIATION BOARD 1 (1950).

43 RAILWAY LABOR ACT §4.

The members of the board are appointed for three-year terms, one member's tenure expiring each year. No more than two of the members may be of the same political party. Ibid.

44 Id. at §6 First.

45 Ibid.

Each of the Board's three members and any of its staff may act in a mediating capacity. In addition to its office personnel the Board has a staff of media-
urge the parties voluntarily to submit their dispute to a binding arbitration. If arbitration is refused and the dispute threatens substantially to interrupt interstate commerce, the Board must notify the President. He, at his discretion, may establish an “emergency board” to investigate the dispute and make recommendations for settlement. While the recommendations are not binding, it was thought that the prestige of the President and the force of public opinion would virtually compel their acceptance. During the whole of this procedure, and for thirty days after the emergency board’s report, the parties may not change the conditions out of which the dispute arose.

Disputes over matters of right, generally of lesser significance, are given more summary disposition. Title II specifically requires the establishment of “boards of adjustment” to umpire grievance or contract-interpretation disputes which subordinate management and union officials cannot settle. Pursuant to this directive most lines have established system-wide

tors, selected through the Civil Service, who spend most of their time in the field. Only a small proportion of the mediation conferences are held in Washington. NATIONAL MEDIATION BOARD, FIFTEEN YEARS UNDER THE RAILWAY LABOR ACT, AMENDED, AND THE NATIONAL MEDIATION BOARD 7, 9 (1950).

The provisions for the appointment of an arbitration board and the conduct of the arbitration are contained in §7, 8 and 9 of the Act. The parties to an arbitration each name one arbitrator (or two, if they have agreed on a board of six). The remaining arbitrator (or arbitrators) is chosen by those named by the parties or, if they cannot reach agreement, by the Mediation Board. RAILWAY LABOR ACT §5 Third (a).

The President has discretion as to the creation of the board, its size and composition and the compensation of its members. A new board must be created for each emergency. The board must make its report to the President within thirty days after its creation. Ibid.


System-wide and regional boards were regarded as a sort of interim measure. The Act envisages eventual establishment of a National Air Transport Adjustment Board, with two carrier and two union members. This Board, which would hear all disputes from all carriers and all classes of employees, is to be set up whenever the National Mediation Board deems it necessary. Id. at §205. However, there seems to be general satisfaction with the present local boards; and establishment of a national board seems most unlikely. See statement of Francis A. O’Neill, Jr., chairman of the National Mediation Board, Hearings Before Subcommittee on Appropriations on Appropriations for 1951, 81st Cong., 2d Sess. 988 (1950).

On the other hand, the Act makes a National Railroad Adjustment Board mandatory. RAILWAY LABOR ACT §3. This was one of the major innovations of the 1934 amendments. It is the only aspect of the Act’s operation that has been subject to intensive analysis and comment. See, e.g., Jones, Inquiry Relating to the National Railroad Adjustment Board (1940); Spencer, The National Railroad Adjustment Board (1938); Garrison, The National Railroad Adjustment Board: A Unique Administrative Agency, 46 YALE L.J. 567 (1987).
adjustment boards for each craft or class. These generally consist of four members, two designated by management and two by the union. An increasing number of the boards provide for the naming of a fifth neutral member in case of deadlock. The adjustment boards have exclusive primary jurisdiction over all matters of right that come within their purview. Their decisions are enforceable in the courts. And in an enforcement suit their findings are given the weight of prima facie evidence.

51 Consensus of replies received by the author from major airlines in answer to questionnaire.

For a detailed description of the pre-adjustment board grievance procedure on one major airline, see KAHN, Chart X, following p. 396.

52 Members are generally designated by their sponsors for a period of one year. As a rule, company officers and union officials are named. Theoretically at least, the members of the board are given a free hand to decide cases on their merits rather than on the basis of individual loyalties to management or union. Id. at 396.

53 "Where the parties are unable to agree upon a neutral to serve as referee the National Mediation Board is frequently called upon to name such neutrals. Such referees serve without cost to the Government and although the Board is not required to make such appointments under the law, it does so in the interest of promoting stable labor relations on the airlines." 16 NMB ANN. REP. 89 (1950).

54 Until recently it was believed that an employee with a grievance could either complain to his adjustment board or sue in a court on the terms of the contract. And the election of a forum, once made, was binding. Cf. Moore v. Illinois Central R.R. 312 U.S. 630 (1940).

But two recent Supreme Court decisions have pointed out that the administrative remedy is exclusive and must be exhausted before application to the courts. Both cases held it improper for a state court to render a declaratory judgment in a dispute which had not been carried through to the National Railroad Adjustment Board. Slocum v. Delaware L. & W. RR., 339 U.S. 239 (1950); Order of Railway Conductors v. Southern Ry., 339 U.S. 255 (1950). For the implications of these decisions, with particular reference to the railroad industry, see Comment, Railroad Labor Disputes and the National Railroad Adjustment Board, 18 U. of Chi. L. Rev. 303 (1951).

55 RAILWAY LABOR ACT §§ 8 First (p.), (9).

The scope of judicial review of adjustment board rulings has troubled the courts on numerous occasions. The Act provides that decisions shall be "final and binding . . . except insofar as they shall contain a money award." The person for whose benefit an order is made may bring an enforcement suit if necessary. But the losing party has no way to secure review of the board's ruling except to refuse to obey the order and hope his adversary will bring the case to court. By doing this he undertakes the danger of being subjected to two years accrued damages if the beneficiary of the award waits the full statutory period before filing suit for enforcement. Ibid. And the beneficiary, almost always the union since practically all grievance complaints are initiated by employees, may refuse to sue at all and use strike threats to enforce the award. Nevertheless, the carrier may not go to court for a declaratory judgment. Washington Terminal Co. v. Boswell, 124 F. 2d 255 (D. C. Cir. 1941), cert. denied 315 U.S. 795 (1942), noted at 51 YALE L. J. 666 (1942).

Even in a worse position is the employee to whom the adjustment board denies relief. Since he has no award to enforce, he cannot get into court. See, e.g., Berryman v. Pullman Co., 48 F. Supp. 542 (Mo. 1942). And under the Slocum case, see note 54 supra, he had no choice but to submit his grievance to the adjustment board. This situation has led to assertions that adjustment board procedure should be made more formal to insure such a plaintiff a fair hearing. Comment, Railroad Labor Disputes and the National Railroad Adjustment Board, 18 U. of Chi. L. Rev. 303 (1951).

However, where courts have felt that adjustment board procedures did deny an employee a fair hearing, they have sometimes permitted judicial review of an adverse ruling. See, e.g., Elgin, J. & E. RR. v. Burley, 325 U.S. 711 (1945); Edwards v. Capital Airlines, 176 F. 2d 755 (D.C. Cir. 1949), cert. denied, 338 U.S. 863 (1949). The latter case involved the ruling of an airline system board of adjustment. While stating that "the award of the Board is entitled to presumptive weight of validity, and he who would upset it must bear a considerable burden," id. at 760, the court concluded that, under the circumstances, the aggrieved employees were entitled to have a court examine the award. Dictum in
But not all disputes fall neatly into either the “matters of interest” or “matters of right” category. Most conspicuous are disagreements over who is entitled to act as the employees’ bargaining representative.\(^5\)\(^7\) Such questions entail decision as to what is the appropriate bargaining unit\(^5\)\(^8\) and who is the choice of a majority of its members. Not knowing what else to do with it, the Railway Labor Act gives the function of making these decisions to the National Mediation Board.\(^5\)\(^9\)

The Impact of Title II

Whether application of the Railway Labor Act did, or does, contribute much to stability and harmony in airline industrial relations may well be questioned.\(^6\)\(^0\) Certainly, unionization of the airlines and the acceptance of collective bargaining have been achieved during the fifteen years of the Act’s tutelage. But these might have been similarly accomplished under the Wagner Act; the state of air labor organization in 1936 was far more similar to that of major industries generally than to the comparatively unique set-up in the rail industry.\(^6\)\(^1\) Other forms of transportation developed their labor relations without such specialized treatment.\(^6\)\(^2\)

the Edwards case indicates that the courts may be more willing to review system board rulings than they are to scrutinize awards of the somewhat more formal National Railroad Adjustment Board. Id. at 760-1.

\(^{56}\) RAILWAY LABOR ACT §3 First (p.). At least one court has felt that, because adjustment board personnel are so familiar with the operations of the carrier, the boards’ findings should be “...probative, not merely presumptive in value, having effect fairly comparable to that of expert testimony.” Washington Terminal Co. v. Boswell, 124 F. 2d 235, 241 (D.C. Cir. 1941).

\(^{57}\) Other disputes which come up under the Act and which are not strictly either matters of interest or of right include inability to agree on a third arbitrator, see note 46 supra, on a fifth, neutral adjustment board member, see note 53 supra, and on the interpretation of a mediation agreement, see note 45 supra.

\(^{58}\) The Act prescribes that the bargaining unit be a “craft of class.” RAILWAY LABOR ACT §2 Fourth. But it was necessary that some arbiter be provided to decide the extent of “craft or class” in actual situations. The importance of that decision and the power over the character of the labor picture which is inherent in it are discussed in Northrup, The Appropriate Bargaining Unit Question Under the Railway Labor Act, 60 Q. J. Econ. 250 (1946).

\(^{59}\) RAILWAY LABOR ACT §2 Ninth. The function was given to the Board despite strenuous objection, including that of Samuel E. Winslow, Chairman of the United States Board of Mediation, the counterpart of the National Mediation Board under the 1926 Act. See Hearings Before Committee on Interstate Commerce on S. 3266, 73rd Cong., 2d Sess. 134-5 (1934).

\(^{60}\) The matter is, to say the least, a controversial one. David L. Behncke, former president of the Air Line Pilots Association, recently asserted that “[t]he Railway Labor Act has fit the airline industry in the same natural glove-like fashion as it has the railroads.” Hearings Before Subcommittee on Railway Labor Act Amendments of Committee on Labor and Public Welfare on S. 3463, 81st Cong. 2d Sess. 456 (1950). Robert Ramspeck, the executive vice president of the Air Transport Association of America, had said several months before that “experience...has convinced us that this act, which was tailored to meet [sic.] the problems of the railroads and their unions, just does not fit the airline industry...” Hearings before Subcommittee on Railway Labor Act Amendments of Committee on Labor and Public Welfare on S. 3295, 81st Cong., 2d Sess. 215 (1950).

\(^{61}\) Unions had been firmly entrenched on the railroads for many years. See note 22 supra. Even as early as 1910 almost a third of railway workers were union members. DAUGHERTY, LABOR PROBLEMS IN AMERICAN INDUSTRY 408 (5th ed. 1941). But the modern union movement, as exemplified by the steel, auto and textile industries, was mostly a product of the New-Deal thirties. Like the airlines, these industries have grown from a practically unorganized state in the early thirties to their present high percentages of union membership. See MILLIS & MONTGOMERY, ORGANIZED LABOR 192-201 (1945); LABOR PROBLEMS IN AMERICA 258-64 (Stein & Davis ed. 1940).
The Unionization of Airline Employees

Imposition of the Railway Labor Act largely predetermined the nature of airline unionization. The Act directs that the employee bargaining unit be a “craft or class.”68 The connotations of that phrase, built up in a railroad context, virtually guaranteed a union structure in the airlines closely parallel to that of the rail industry.64 Further assurance of this result was the fact that responsibility for applying the phrase to specific situations is vested in the National Mediation Board—the scion of a long line of railroad labor agencies.65 The Board's thinking was, and is, necessarily railroad-oriented.66

Natural growth and Mediation Board policies have pretty well crystallized bargaining units in the air industry. The Board's rulings have established a narrow interpretation of "craft or class."67 Today nine major

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62 For brief surveys of the history and extent of union development in the maritime trucking, street railway and bus industries, see Taft, Brief Review, in How Collective Bargaining Works 934-40, 948-52 (Twentieth Century Fund ed. 1945).
63 RAILWAY LABOR ACT §2 Fourth.
64 "The Railway Labor Act does not define the terms 'craft or class' in which the majority is given the right to determine representation. Whether the terms are used synonymously or whether a class comprises several crafts or vice versa is not explained. In making rules to govern elections and designating the employees who may participate in such elections, the Board [NMB] in most cases has been confronted with disputes as to whether the employees involved constitute one class or craft, or whether they are several distinct crafts for each of which separate representatives are to be chosen by separate majorities." NATIONAL MEDIATION BOARD, FIFTEEN YEARS UNDER THE RAILWAY LABOR ACT, AMENDED, AND THE NATIONAL MEDIATION BOARD 16 (1950).
65 "Over the years most of the main craft or class issues have been resolved. Thus there is a rather extensive body of precedents for settlement of such issues without the necessity of public hearings." Ibid.
66 The problem of "craft or class" may be exemplified by the decision regarding the group to which airline stores personnel belong. These employees provide parts, materials and tools for the mechanics. But they were not included within the mechanics bargaining unit. Because it was standard railroad practice, the determination was made that they belonged in the general clerical craft or class. Hearings before Subcommittee of Committee on Labor and Public Welfare on S. 3295, 81st Cong., 2d Sess. 219 (1950).
67 "[T]he Board also divided the janitors working for the airlines into two classes—the ones which work in the shops being in the mechanics class and the ones working in the offices being in the clerks class. While this followed the railroad precedent, it created something of a problem for the airlines, since many of the airlines—Capital Airlines, for example—have their company offices in the same hangars where their major mechanical work is done. Splitting a natural occupational group in this way is bound to cause jurisdictional disputes and unrest." Id. at 220
68 RAILWAY LABOR ACT §2 Ninth.
69 The present National Mediation Board replaced the Board of Mediation which had been set up under the 1926 Act. 44 STAT. 579 (1926). This, in turn, had replaced the old Railroad Labor Board, established under Title III of the Transportation Act of 1920. 41 Stat. 470 (1920). And this board took the place of the Board of Mediation and Conciliation which the Newlands Act set up in 1913. 38 STAT. 108 (1913).
70 Such an orientation could be expected since the Board had years of experience in railroad affairs before it ever faced an airline representation dispute. And, even today, airline cases make up only a small percentage of the Board's work. Of the 2288 representation cases handled by the Board since its inception, only 128 have concerned the airlines. 16 NMB ANN. REP. 38, 41 (1950). And, since the 1934 amendments authorized the transfer to the National Mediation Board of the old Board of Mediation's staff, RAILWAY LABOR ACT §4, Fifth, most of the present Board employees probably have roots deep in the railroad past.
71 There seems to be no overpowering reason why "class" could not have been interpreted liberally to permit a single industrial bargaining unit or two broad unions, one for flight crews and one for ground personnel. Many airline
"crafts or classes" are recognized. The Board refuses to allow the bargaining unit to be less than system-wide nor smaller than "well recognized crafts or classes." The suitability to the air transport industry of the present system of craft bargaining units is dubious. In the first place, the existing setup tends to lead to jurisdictional problems. In addition, the freedom of air employees to choose the bargaining unit they themselves prefer is considerably restricted. A greater degree of employee choice seems more likely to produce satisfied workers than the rather narrow stratification imposed under the Railway Labor Act.

Even after the bargaining unit is fixed, influence of the Mediation Board over who will act as employee representative continues. The Railway Labor Act provides that the bargaining representative shall be determined by the majority of a craft or class. Even after the bargaining unit is fixed, influence of the Mediation Board over who will act as employee representative continues. The Railway Labor Act provides that the bargaining representative shall be determined by the majority of a craft or class.

People would have preferred this. Northrup, The Appropriate Bargaining Unit Question Under the Railway Labor Act, 60 Q. J. ECON. 260, 266 (1946). But the Board evidently felt bound by its railroad decisions which interpreted "class" as tantamount to "craft." Pilots; flight engineers; radio and telegraph operators; flight navigators; mechanics; flight dispatchers; clerical personnel; flight service personnel; and guards. A few numerically insignificant groups are also treated separately. E. g., truck drivers, flight kitchen personnel, meteorologists. 16 NMB ANN. REP. 74-5 (1950).

An interesting comparison may be drawn between Railway Labor Act and Taft-Hartley Act handling of guards and supervisors in determining the appropriate bargaining unit. Though no statutory provision prescribes that it do so, the National Mediation Board does treat guards as a separate unit. However, it does not require that they be represented by a different union from other employees. Nor is any distinction made under the Railway Labor Act between the treatment of supervisors and their subordinates. The Act covers both "employees" and "subordinate officials." RAILWAY LABOR ACT §1 Fifth. See 16 NMB ANN. REP. 22-3 (1950).

In contrast, guards are excluded from regular unions under the Taft-Hartley Act. TAFT-HARTLEY ACT §§7, 9(b). (Employees may choose craft unit, plant unit, employer unit, or no union at all.) For a clear and comprehensive discussion of how the National Labor Relations Board, the Taft-Hartley Act arbiter of bargaining unit disputes, has dealt with craft unit problems to provide a maximum of free choice without a multiplicity of separate units, see Rathbun, The Taft-Hartley Act and Craft Unit Bargaining, 59 YALE L. J. 1023 (1950).

To bolster its reluctance to permit any innovations in the field of "craft or class" designation, the Board calls out a parade-of-horribles argument. "To permit such divisions would give rise to more divisions and subdivisions. Once the bars are down, there is no logical stopping place and such a course would ultimately defeat real collective bargaining as contemplated by the law. On the other hand, stabilization of well recognized crafts or classes as they have been generally established on carriers under the act by the employees and managements after long years of negotiations will tend to stabilize collective bargaining relationships." Ibid. Cf. note 64 supra.

Cf. TAFT-HARTLEY ACT §§7, 9(b). (Employees may choose craft unit, plant unit, employer unit, or no union at all.) For a clear and comprehensive discussion of how the National Labor Relations Board, the Taft-Hartley Act arbiter of bargaining unit disputes, has dealt with craft unit problems to provide a maximum of free choice without a multiplicity of separate units, see Rathbun, The Taft-Hartley Act and Craft Unit Bargaining, 59 YALE L. J. 1023 (1950).

The Board is authorized to take a secret ballot of employees or to use any other appropriate method. Ibid. While a check of authorizations given by the
election in which each employee is asked to vote for his choice among the several listed organizations. But Mediation Board ballots list only the unions involved. Consequently, an employee desiring not to be represented by any union must either write in "no union" or refuse to vote.

Other aspects of representation proceedings under the Railway Labor Act are equally unsuited to a young and growing industry whose labor picture is so dynamic. No means is provided whereby employees may petition to decertify a bargaining agent with which they are dissatisfied. Thus, once a union is entrenched as bargaining agent, the only way it may be dislodged is by certification of another union to take its place. And the Mediation Board will not hold a certification election more often than every two years. Moreover, while an employer clearly has an interest in

individual employees is sometimes used, Board policy, generally speaking, is against this technique. "The presence of authorizations and counter authorizations is no reliable indication of the true desires of employees for representation. It is only when the employee is given an opportunity to vote by secret ballot that his true desires are expressed . . . ." 16 NMB ANN. REP. 19-20 (1950).

Considerable question has arisen in the past as to how strong a vote a union must receive in order to attain certification. In the early days the Board required that a majority of those employees eligible to vote must vote for the union. But, pursuant to the decision in System Federation No. 40 v. Virginian Ry., 11 F.Supp. 621 (E.D.Va. 1935), aff'd, 84 F.2d 641 (4th Cir. 1936) and 300 U.S. 515 (1937), the Board changed its policy to require only that the union receive a majority of votes cast in an election in which a majority of eligible voters participate. This ruling was repeatedly challenged by those who asserted that any majority vote should be adequate. However, the Board's policy was bolstered by a 1947 opinion of the Attorney General. 40 Ops. ATT'Y GEN. 541 (1947). This stated that, while the Board has the power to certify a representative which receives a majority vote even though less than a majority of eligible voters participate in the election, its practice of requiring majority participation is within its discretion. NATIONAL MEDIATION BOARD, FIFTEEN YEARS UNDER THE RAILWAY LABOR ACT, AMENDED, AND THE NATIONAL MEDIATION BOARD 14-15 (1950). A recent appeal by an airline union resulted in a court decision to the same effect. Radio Officers' Union v. National Mediation Board, 181 F. 2d 801 (D.C. Cir. 1950).

It is noteworthy that, if there is lack of cooperation among the workers opposed to unionization, a small but active union minority can install a union as bargaining agent for the entire unit. Assume 26 percent of the workers are pro-union and 74 percent prefer no union. If 49 percent of the workers, all anti-union, stay away from the polls but all other workers vote, there will be majority participation. And the 26 percent of union supporters will outvote the participating 25 percent of union opponents.

In dealing with this question as far as railroad employees are concerned, the issue as to whether a particular bargaining unit wants to be represented by a union at all is not usually important, since rail employees have been organized for many years. However, since air transportation is a young industry, with employee organization a relatively new thing, this issue is an important one." 16 NMB ANN. REP. 1-2 (1950). During the late 1940's there were a particularly large number of representation disputes in the airlines. E. g., 42 in fiscal 1947, 46 in fiscal 1948. 13 NMB ANN. REP. 19 (1947); 14 NMB ANN. REP. 23 (1948). Activity has declined to some extent in the past year or two. E. g., 22 in fiscal 1950, 16 NMB ANN. REP. 42 (1950).

There is apparently no way in which employees can return to a union-free status.

"This policy derives from the law which imposes upon both carriers and employees the duty to exert every reasonable effort to make and maintain agreements. Obviously, this basic purpose of the law cannot be realized if the
having representation disputes among his employees quickly settled, he is not regarded as an “interested party” nor allowed to request a certification election. These policies inhibit the free choice so necessary in an industry where ideas are still changing as new developments take place.

Probably none of these failings in representation procedure would be quite so serious if the proceedings were subject to judicial review. But it is now well established that the Mediation Board’s certification is the final word; its decisions are not appealable.

And the National Mediation Board itself is not happy with its representation responsibilities. Even on its face the Railway Labor Act appears somewhat to destroy the “model” dichotomy between matters of interest and matters of right by giving to the Board, a dispute-settling agency, the controversial function of settling representation quarrels. In practice, the Board has frequently observed that active involvement in such matters creates ill-will and detracts from its effect as a conciliator. It has therefore adopted the unfortunate but easy expedient of reapplying past rulings, which, more often than not, were made for the railroads.

The present structure of air unionization, a partial product of both Railway Labor Act provisions and National Mediation Board policies, seems representation issue is raised too frequently. In addition, representation elections and the organizing campaigns which necessarily precede them cause unsettled labor conditions and, in many cases, disturb employees substantially in the discharge of their duties.” 16 NMB ANN. REP. 21 (1950).

If the Board conducts a hearing on the subject of the bargaining unit, it may allow the carrier to attend and testify. But this is purely discretionary. The carrier has no right to be present. See NATIONAL MEDIATION BOARD, FIFTEEN YEARS UNDER THE RAILWAY LABOR ACT, AMENDED, AND THE NATIONAL MEDIATION BOARD 28 (1950).

The Taft-Hartley solution seems fairer. It allows thirty percent of the employees to present a request for decertification of a representative, allows elections every year, and gives employers the right to petition for a certification election. TAFT-HARTLEY ACT §9 (c). Moreover, the ballots used by the National Labor Relations Board, the Taft-Hartley administrative agency, contain a specific place where employees may vote for “no union.” See, e.g., Interlake Iron Corp., 4 N.L.R.B. 55, 60 (1937).

“Here . . . the intent seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law.” Switchmen’s Union v. National Mediation Board, 320 U.S. 297, 305 (1943).

Certifications by the National Labor Relations Board are also non-reviewable. The employer who is subjected to judicial scrutiny is if the employer refuses to deal with the designated representative and thereby embroils himself in an unfair labor practice proceeding which comes before the courts on appeal. See Atlanta Metallic Casket Co. v. United Paperworkers, 87 F.Supp. 718 (N.D.Ga. 1949). Presumably, review of a National Mediation Board representation decision might likewise be had if a court of equity were asked to enforce a certificate of the Board. Switchmen’s Union v. National Mediation Board, 320 U.S. 297, 307 (1943).

For a discussion of some of the inequities which result from the general non-reviewability of Board decisions, see Northrup & Dunne, Administrative Discretion, Judicial Review and Discriminatory Bargaining Units, 4 LAW. GUILD REV. 2 (1944).

See note 42 supra.

“The time consumed by the Board in disposing of these disputes, coupled with the ill-will engendered by them, as well as their bad effect on the morale of the service, has prompted the Board upon several occasions to urge that the parties involved in such disputes exert every effort to adjust them at home and among themselves instead of bringing them to the Board. Frankly, the Board does not consider that the purposes of the Railway Labor Act are best served by permitting these disputes to acquire sufficient magnitude to make it necessary to refer them to the Board for adjudication.” NATIONAL MEDIATION BOARD, FIFTEEN YEARS UNDER THE RAILWAY LABOR ACT, AMENDED, AND THE NATIONAL MEDIATION BOARD 20 (1950).

See, e.g., note 64 supra.
destined to solidify under the new union shop amendment. Until last year the Railway Labor Act prohibited all forms of union security. But in January, 1951, Congress passed an amendment which allows both the union shop and voluntary "check-off" of union dues. This amendment, coupled with the absence of decertification proceedings, makes it unlikely that present unions can be unseated.

Unfair Labor Practices

The dominant position of the present unions is further assured by the Railway Labor Act's lack of any effective proscription of union unfair labor practices. While it does impose very real restrictions on employer activity, the Act is practically silent concerning the obligations of unions. It provides only in general terms that employees must bargain collectively,

86 "Union security" is the generic term used to describe such labor contract provisions as required union membership (the "closed shop" or "union shop") and the automatic deduction from wages of union dues (the "check-off"). The Railway Labor Act, as amended in 1934, prohibited employers from deducting any dues or other contributions from wages and prescribed any sort of employee agreements to join or not to join any labor organization. RAILWAY LABOR ACT §2 Fourth, Fifth. While these prohibitions were designed primarily to eradicate company unions, they were worded in terms of "any labor organization" because of the prevailing opinion that any method of tying up men's jobs with union membership inhibited freedom of choice. See statement of Joseph B. Eastman, Federal Coordinator of Transportation, Hearings before Committee on Interstate Commerce on S.3266, 73rd Cong., 2d Sess. 157 (1934).


88 In this regard the Railway Labor Act and the Taft-Hartley Act are quite similar. Both prohibit the employer from: interfering with employees' freedom to join or organize a union; interfering with or contributing financial or other support to any labor organization; and influencing or coercing membership or non-membership in a labor organization in any way except that provided by authorized union shop clauses. Both also require that the employer bargain collectively with the duly authorized representatives of his employees. And under both acts any deduction from employee wages must be authorized in writing. Compare RAILWAY LABOR ACT §2 as modified by Pub. L. No. 914, 81st Cong., 2d Sess. (Jan. 10, 1951) with TAFT-HARTLEY ACT §§8(a), 302(c) (4).

89 In contrast, the Taft-Hartley Act provides a comprehensive list of union unfair labor practices. TAFT-HARTLEY ACT §8 (b).

Under that act labor organizations are forbidden:

1. To restrain or coerce employees in their free exercise of the right to join or refrain from joining a union. Id. at §8 (b) (1) (A).

2. To restrain or coerce an employer in the free choice of a representative for collective bargaining or the adjustment of grievances. Id. at §8(b) (1) (B).

3. To cause or attempt to cause an employer to discriminate against an employee in regard to any condition of employment in order to encourage or discourage membership in a labor organization. Id. at §8(b) (2).

4. To cause or attempt to cause an employer to discriminate against an employee whose union membership has been denied or terminated on grounds other than his failure to pay required initiation fees and dues. Ibid.

5. To refuse to bargain collectively with an employer whose employees it represents. Id. at §8(b) (3).

6. To engage in or induce engagement in any secondary boycott, jurisdictional dispute, or strike to induce an employer or self-employed person to join any employer or labor organization. Id. at §8(b) (4).

7. To strike to force recognition of a union as employees' representative when another union has been properly certified or to force assignment of work to particular employees. Ibid.

8. To require of employees covered by a union shop agreement initiation fees which the NLRB finds excessive or discriminatory. Id. at §8(b) (5).

9. To cause or attempt to cause employers to pay "in the nature of an extraction" for services not performed or not to be performed. Id. at §8(b) (6).
follow established dispute procedure, and not interfere with the employer's choice of bargaining agent. The sanctions provided in the Railway Labor Act are applicable only to employers. Moreover, the sanctions provided in the Railway Labor Act are applicable only to employers. The Act's only remedy against an offending employer is a criminal penalty—and a rather severe one at that. This will be imposed only after a full-fledged trial and a finding that the violation was "willful." As a matter of fact, the procedure is so cumbersome and entails such severe penalties that it has practically never been invoked. Where employees or their representatives have tried to induce carrier compliance with the Act's collective bargaining provisions they have been forced to seek an injunction. The Railway Labor Act provisions, like those of the Wagner Act, were probably appropriate in the days of struggling young unions, the present state of air unionization justifies the imposition of a code of emp-
ployee unfair labor practices. Successful collective bargaining requires holding adversaries of equal power to the same rough standard of labor ethics.

The Prevention of Disputes

The heart of the Railway Labor Act is its elaborate program for the settlement of disputes over matters of interest. How well it facilitates expeditious disposal of these disputes is probably some indication of the Act's value to the air industry.

Once the initial conferences between the parties have broken down, the Railway Labor Act's first line of offense is the ability of the National Mediation Board to conciliate. Since 1936 the Board has intervened in 273 airline disputes. The vast majority of these have led to apparently successful conclusions—mediation agreements, agreements to arbitrate, or withdrawals of one sort or another. Analyzed statistically, mediation in unfair labor practices. But only two such elections have been voided during the Act's administration. One of these was a recent case involving, Chicago & Southern Air Lines. See Northrup, Unfair Labor Practice Prevention Under the Railway Labor Act, 3 IND. & LAB. REL. REV. 323, 333 (1950).

The Taft-Hartley employee unfair labor practices constitute one system that might well be applied to the airlines. Of course, it is possible that their application would lead to new difficulties. It is well-accepted that the Taft-Hartley union unfair labor practice proscriptions have not proved a panacea for all labor ills and have even, in some instances, raised new problems. See, e.g., MILLIS & BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 441-81 (1950).


The demand for "equalization" of legislative provisions was one of the driving forces which led Congress to substitute the Taft-Hartley Act for the Wagner Act. MILLIS & BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 272 (1950).

Like all previous railroad labor legislation, the Railway Labor Act "was passed to secure the prompt and orderly settlement of disputes between carriers and their employees." Atlantic Coast Line R.R. v. Pope, 119 F.2d 39 (1941).

RAILWAY LABOR ACT §§.

"The mediatory services of the Board are only in order and forthcoming where direct negotiations between the parties, diligently and conscientiously conducted, have exhausted all possibility of effecting agreement between them. . . . From the time, however, that the Board takes jurisdiction, the negotiations proceed under its auspices and with the help of its representative." NATIONAL MEDIATION BOARD, FIFTEEN YEARS UNDER THE RAILWAY LABOR ACT, AMENDED, AND THE NATIONAL MEDIATION BOARD 10 (1950).

"Experience under the act since its passage in 1926 has proven that agreements in mediation are the most satisfactory method of settling disputes of this nature [situations which threaten to interrupt interstate commerce]. An agreement reached in mediation is not made under any compulsion, and results from a voluntary meeting of the minds, which in turn implies that both sides have receded from their original positions at the start of the controversy. A successful mediator is often able to suggest compromises which may preserve the basic positions of the parties, and still result in an agreement being reached. A feeling of good will between the parties usually comes out of a voluntary agreement, and has a salutary effect on future negotiations." Id. at 37-8.

NMB ANN. REP. 55 (1950). The increased labor activity in the airlines in the post-war period is reflected in the fact that 233 of these cases have been handled in the past five years. Ibid; 15 NMB ANN. REP. 37 (1949); 14 NMB ANN. REP. 36 (1948); 13 NMB ANN. REP. 32 (1947); 12 NMB ANN. REP. 33 (1946).

Of the 155 airline disputes which the Board mediated between 1937 and 1948, 75 resulted in mediation agreements, 24 in agreements to arbitrate, and 32 in withdrawals. For a detailed breakdown of the cases by "craft or class," see KAHN A22-34. Even discounting the withdrawals, many of which may have left the quarrels unresolved, the figures show almost 65% success.
air labor disputes seems to have done a good job.\textsuperscript{102} And the conciliation background of the Board and its mediators has probably had a salutary effect on air labor relations. When the Railway Labor Act was first imposed, collective bargaining was new in the air transport industry.\textsuperscript{103} The presence of experienced mediators no doubt facilitated understanding of the bargaining process and aided many settlements.\textsuperscript{104}

However, the Board's effect on air mediation seems not altogether wholesome. Now that management and unions are more sophisticated, the value of having experienced mediators on hand may well have diminished. And the fact that parties to a dispute know they have a third person to call on for assistance leads them to rely on outside help instead of putting forth their own best efforts to agree.\textsuperscript{105} Moreover, the fact that most mediators have a big background of railroad experience\textsuperscript{106} may lead to future troubles in the air industry. Railroads are plagued with the problem of paying for work not done while airlines, so far, are not.\textsuperscript{107} But the presence of mediators schooled in the railroad tradition makes it difficult for air carriers to resist employees' feather-bedding demands.\textsuperscript{108} To force airlines to adopt this practice would put a strong inhibition on technological improvement\textsuperscript{109} and a severe financial burden on an industry that already loses money.\textsuperscript{110}

\textsuperscript{102} However, there is no way of telling how many disputes which were brought to an apparently successful conclusion by the Board later reappeared in a different guise.
\textsuperscript{103} Cf. note 20 supra.
\textsuperscript{104} "On the railroads where collective bargaining has been in effect for many years and where the representation and agreement relationships have been more or less crystallized, the 'knowhow' and the application of the provisions of the Railway Labor Act are quite well understood and established.... The airline industry now presents a somewhat different picture. This industry has experienced rapid expansion in the recent past and many problems have arisen as to the establishment of employer-employee relationships as provided for in the Railway Labor Act. The Board has endeavored to counsel with the parties involved in disputes as to the procedural operations of the Railway Labor Act and the duties of the parties thereunder, and excellent progress has been made in this direction." National Mediation Board, Fifteen Years Under the Railway Labor Act, Amended, and the National Mediation Board 12 (1950).
\textsuperscript{105} The Board has on several occasions noted with censure the fact that it has been called in to mediate disputes which have not been thoroughly negotiated between the parties. See, e.g., Id. at 11-12; 16 NMB Ann. Rep. 34 (1950).
\textsuperscript{106} Cf. note 66 supra.
\textsuperscript{107} See Monroe, Railroad Men and Wages 5-6 (1947); Hearings before Subcommittee of Committee on Labor and Public Welfare on S.3295, 81st Cong., 2d Sess. 224 (1950).
\textsuperscript{108} "The airlines are concerned for fear their wage and rule agreements will gradually develop on the same pattern as the railroads. While the airlines can avoid this, of course, by holding fast and refusing to agree to any such conditions, they are faced in mediation by suggestions from Mediation Board mediators that the particular rule in controversy has long been established on the railroads. That has happened before and it will happen again. It is hard for airline negotiators to hold out against the pressure of the pattern of railroad settlements and practices fostered by the Railway Labor Act." Ibid.
A noteworthy example of the lamentable tendency to impose railroad logic on the airlines is the recent Civil Aeronautics Board ruling approving the acquisition of American Overseas Airlines by Pan American. In its orders approving the route transfer, 1 A. CCH Aviation Law Rep. \(\text{\$11,247, 21,272, 21,273} (1950)\), the Board ordered that employees be compensated for any losses suffered (by termination of employment, reduction in salary, etc.) during a two-year period as a result of the acquisition. The ruling follows the well-established railroad practice. But this is no justification for applying it to an expanding, as opposed to a contracting, industry. See 64 Harv. L. Rev. 664 (1951).
\textsuperscript{109} The airline pilots are currently engaged in a campaign to have a mileage limit put on their work month. At the same time they seek increased hourly rates to assure the same take-home pay for flying fewer hours at increased speeds. In this way they hope to combat the technological unemployment which will
Arbitration, the next step prescribed if mediation fails, has been significantly more successful in the airlines than in the railroads if statistics tell the whole story. Out of the total of 140 rail and air arbitration settlements which have been reached under National Mediation Board supervision, almost one-third have involved airlines. AND in approximately two-thirds of the airline cases in which the Board has proffered arbitration, both carrier and union have accepted.

One explanation for the acceptance of arbitration in air disputes—at least by management—is the fact that carriers prefer to be “compelled” to grant a pay raise. Any requests for rate increases must be justified before the Civil Aeronautics Board. Carriers evidently feel they will present a more convincing case if a wage raise is the result of an arbitration order and not a voluntary settlement. The fact that practically all air arbitration cases have involved the issue of wages is strong evidence of this.

The emergency board is the culmination of the Railway Labor Act's dispute-settling mechanism; its success should be some measure of the Act's efficacy. The boards have been remarkably unsuccessful. There have between seven airline emergency boards appointed since enactment of Title II. None of the board's recommendations has ever served as the basis of result from the use of new and faster planes. One of their arguments is that railroad engineers have a similar mileage limit. Aviation Week, Sept. 11, 1950, p. 46.

Since reduced operating costs are the primary incentive to mechanical improvements, such agreements would act as a strong deterrent to the introduction of new planes. Thus the consuming public would be denied more efficient transportation at lower cost. Cf. PATTERSON, SOCIAL ASPECTS OF INDUSTRY 294 (3d ed. 1943).

While most airlines today show income statements in the black, net earnings result only because the Government pays substantial subsidies. Inasmuch as these subsidies have been combined with compensation for carrying the air mail in one lump sum payment, they cannot be measured. A recent Civil Aeronautics Board ruling will have the effect of separating air mail pay from subsidies after October 1, 1951. Wall Street Journal, October 2, 1951, p. 5, col. 1.

The lack of financial stability of the airlines is well-established. Congress recently conducted a full-scale investigation “to learn why, in a period of unprecedented prosperity, the air-line industry is in such poor financial condition.” See Berge, Subsidies and Competition in Air Transport Policy, 18 J. AIR LAW & COMM. 1 (1951).

It is noteworthy that approximately one-half of airline operating expenses consist of labor costs. KAHN 401.

While the most difficult disputes persist to the emergency board stage. But the emergency board provision was enacted with this fact clearly in mind. The boards were designed to settle those quarrels which were too tough for the Act's other techniques. See statement of Donald R. Richberg, counsel for the organized railway employees, Hearings before Committee on Interstate and Foreign Commerce on H.R. 7180, 69th Cong., 1st sess. 18 (1926).

Carriers must file all rates with the Board. Any interested party may then complain to that body that the rates are unjust, unreasonable or discriminatory. If the Board feels the complaint warrants further action, it will hold hearings and issue an order. The Board may also begin an investigation on its own initiative. See PUFFER, AIR TRANSPORTATION 380-8 (1941).
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settlement of an air labor dispute. One board, by acting in unorthodox fashion as a mediator, was able to effect an agreement between the parties. Another is still pending. In the rest of the cases, the boards' recommendations were not accepted and the disputes were eventually resolved on some other basis.

International Association of Machinists and Northwest Airlines which grew out of disagreements over the terms of their first collective bargaining agreement. The board was appointed after the employees had gone on strike during conciliation efforts by a mediator from the National Mediation Board. The emergency board rejected many of the union demands.

(3) No. 62 was appointed May 15, 1948, to investigate a dispute between both the Air Line Pilots Association and the International Association of Machinists and National Airlines. The pilots' quarrel arose over one National pilot's discharge. The IAM dispute stemmed from the inability of carrier and union to agree on the terms of a contract covering the clerical employees. The emergency board was not appointed until three months after the pilots went on strike. Its appointment was precipitated by an ALPA threat to shut down all airlines flying at all airfields served by National. The board commented on the intransigence of the carrier and recommended the reinstatement of strikers and further efforts to agree. The case is discussed in a Note, 16 J. AIR L. & COMM. 113 (1949) and KAHN 399-60.

(4) No. 67 was appointed January 24, 1949, to investigate another dispute between the International Association of Machinists and Northwest Airlines. This concerned rates of pay. By acting as a mediator the board was able to bring the parties to an accord.

(5) No. 90 was appointed July 12, 1950, to investigate a dispute between the Brotherhood of Railway Clerks and Braniff Airways over the terms of various working rules. The Brotherhood sought to base the rules on similar agreements in the railroad industry. The carrier asserted that they should be patterned after the provisions in the agreements it had with other labor organizations. The board saw merit in the position of both parties and made a number of specific recommendations.

(6) No. 94 met early in 1951 to investigate a dispute between the Air Line Pilots Association and American Airlines. Worried over the prospect of 500-mile-per-hour jet transports in the not-too-distant future, the union is seeking again to force a revision of the standards of Decision 83. It wants to step up hourly pay and step down the flight mileage permitted. The result would be to maintain pilot employment and take-home pay despite equipment improvement and shorter working hours. The outcome of the controversy will undoubtedly have industry-wide repercussions. See notes, 109 supra and 118 infra.

(7) The latest emergency board was appointed last December to investigate a dispute between the Transport Workers Union and Pan American World Airways. Wages are the primary issue.

117 Emergency Board No. 67. See note 116 supra.
118 This the TWU-Pan American board, note 116 supra. No report had been issued at the time this article went to press.
119 Board No. 36 was followed by a pilots' strike on one airline and protracted negotiations and arbitration. The pilots ended up with considerably more than the emergency board thought they should have.

The recommendation of the second air emergency board (No. 38) were also rejected by the union; and subsequent negotiations resulted in its attaining somewhat more than the board had proposed.

In the National dispute the recommendations of the board (No. 62) did help to settle disagreements with the IAM. But the carrier rejected the settlement proposed with the pilots' union. A final accord was reached some four months later independently of both the National Mediation Board and the emergency board.

The detailed suggestions of the recent Braniff emergency board (No. 90) were regarded by the company as ambiguous and incomplete. Subsequent negotiations between the carrier and the union resulted in a working agreement which averted a threatened strike and provided for future informal conferences to work out the details of the rules.

Board No. 94, in the American-ALPA controversy, submitted its report on May 25, 1951. The dispute has still not been settled. While American was the airline nominally involved in the dispute, the controversy is in fact an industry-wide one. The fundamental principle in contention is whether or not "mileage increase determination" (the ALPA term—the airlines call it "mileage limitation") should be imposed. The Board recommended that nothing be done at
Several reasons may be advanced for the boards' lack of success in air disputes. Probably most important is the fact that the emergency board is predicated on the theory that public opinion will force acceptance of its recommendations.\textsuperscript{119} But public opinion rarely gets very aroused over airline labor quarrels. Moreover, during the last decade emergency boards have completely failed in all but a few major railroad disputes.\textsuperscript{120} The loss of prestige which the boards have thus suffered in the railroad industry has very likely lessened their effectiveness in air conflicts. And the tendency of rail carriers and unions to resort to emergency boards in order to avoid a binding arbitration has almost made a mockery of a procedure theoretically reserved for only the most serious disagreements.\textsuperscript{121}

The over-all utility of a formalized dispute procedure such as the Railway Labor Act provides is doubtful.\textsuperscript{122} Most deleterious to stable industrial relations is the habit, developed by both management and labor, of going through established routines instead of making an honest and direct effort to agree.\textsuperscript{123} This proclivity is increased by the carriers' desire to grant a

\textsuperscript{119} See note 48 supra.

\textsuperscript{120} For an analysis of some of these recent railroad cases see Northrup, The Railway Labor Act and Railway Labor Disputes in Wartime, 36 AM. ECON. REV. 324 (1946).

\textsuperscript{121} The Mediation Board has commented with disapproval on this practice. See 16 NMB ANN. REP. 34-5 (1950).

\textsuperscript{122} Unfortunately, the Taft-Hartley Act offers no solution in this area either; its emergency dispute procedure was largely modeled on that of the Railway Labor Act. Under its provisions the President may appoint a board of inquiry to investigate any threatened or actual strike which he feels imperils the national health or safety. And he may direct the Attorney General to get an injunction against the strike for a limited period. \textit{TAFT-HARTLEY ACT} §§206-10. Thus, as in the Railway Labor Act emergency board provisions, reliance is placed on fact-finding and "cooling-off" periods. Most commentators have asserted that these "cooling-off" periods more often serve as "heating up" periods. See, e.g., MILLER, AMERICAN LABOR AND THE GOVERNMENT 416 (1948); 1 FED. MED. & CONCIL. SERV., ANN. REP. 56 (1949).

\textsuperscript{123} Senator Morse of Oregon commented on this practice in a question addressed to Mr. D. B. Robertson, president of the Brotherhood of Locomotive Firemen and Enginemen. "Do you agree with me that if the parties can determine in advance, from a procedure that is set up for the settlement of a labor dispute by the Government, whether it is to their advantage to follow Government intervention, that the party that finds it to his advantage to follow Government intervention is likely to sit back and let the case run its course in the Government intervention rather than try to settle the case himself in good faith.
wage increase only under compulsion. An incidental result is that many
disputes are aggravated when breaches in prescribed formalities occur.124
Were the parties to expend their efforts in straightforward collective bar-
gaining, satisfactory settlements would more likely result.125

In its effect on resolving disagreements over matters of right, the
Railway Labor Act has little more to commend it than it has in the area
of discord over questions of interest. At least one major airline labor
dispute grew out of the inability of an adjustment board to settle a griev-
ance complaint.126 And without a deadlock-breaking mechanism, the boards
give a delusive appearance of finality to the grievance procedure. While
the members are nominally given a free hand in decision-making, their
fundamental allegiance tends to assert itself in any major dispute. Though
the boards are the terminus of contract-interpretation disputes, their four
bipartite members thus tend to split on major issues, thereby settling
nothing.127

Only a conclusive grievance-adjudication process can prevent little quar-
rels from growing into big ones. The merit of conclusive arbitration of
such questions is evidenced by its widespread adoption by industry gen-

An Evaluation of Title II

While the number of actual work stoppages in air transportation has
not been alarming, this is probably true in spite of the Railway Labor Act,
not because of it.129 A few of the Act’s provisions have unquestionably

collective bargaining with his adversary?" Mr. Robertson agreed. Hearings
before Subcommittee on Railway Labor Act Amendments of Committee on Labor

124 The National Airlines strike, for example, was complicated by a disagree-
ment as to whether the IAM had waited the required thirty days after failure of
mediation before calling its strike. The conflict was based on two different inter-
pretations of the statutory words describing the proper procedure. RAILWAY

125 See, e.g., statement of William Green, president of the American Feder-
ation of Labor, that “[b]y the enactment of more laws and more procedural regu-
lation governing the adjustment of the disputes the area of disputes tends to
become exaggerated and dramatized and the difficulty in reaching an agreement
enhanced. The so-called ‘fact finding’ procedure and its many varieties and
forms hinder rather than help the promotion of industrial peace.” Hearings
before Subcommittee of Committee on Labor on General Labor Conditions, 79th
Cong., 2d Sess. 92 (1946).

126 The dispute between National and the ALPA grew out of an adjustment
board deadlock as to the propriety of a pilot discharge. See Note, 16 J. of Am
L. & Comm. 113 (1949).

127 See KAHN 396-7.


129 One of the main objections to the use of a board of impartial arbitrators
is that they often make unworkable proposals. The fact that the regular
members of the adjustment boards are persons thoroughly familiar with the
practical operations of the airline makes it more likely that sensible solutions
to problems will result. Thus the system board, with provision for a neutral in
case of deadlock, is an instrument capable of realistic as well as decisive action.
Cf. Taylor, The Voluntary Arbitration of Labor Disputes, 49 Mich. L. REV. 787,
797 (1951).

130 While certainly the number of actual work stoppages is one indication
of how well an act serves its purpose, it is by no means the sole criterion. The
mere absence of strikes or lockouts does not prove that everyone is happy. And
the fact that there were few strikes in the past does not guarantee that the same
condition will prevail in the future.
helped settle air labor disputes. By providing some sort of framework around which collective bargaining in the airlines could grow, the Act served a useful purpose. Its enunciated aims stated an attractive ideal toward which labor and management could strive. The conciliation experience of the National Mediation Board probably facilitated acceptance of collective bargaining. And a very real number of disputes have been settled under the Act's provisions for arbitrating questions of interest.

But, in most respects, the Act's contribution to wholesome industrial relations has been either negligible or negative. Several of its features inhibit speedy and effective settlement of airline disputes. The Mediation Board is bothered by numerous auxiliary functions. Its mediators are steeped in railroad traditions. And, while the value of any formalized dispute procedure is an open question, one of the Act's most publicized innovations, the emergency board, has been a notorious flop.

The recent turbulent labor history of the railroads has helped destroy what little prestige the Act's formalisms may once have had. It can hardly be expected that a procedure which has failed in the industry for which it was tailor-made can be very effective in other industries.

But the inability of the Railway Labor Act to settle disputes is not its most serious defect. Based on an outmoded labor philosophy, the Act imposes excessive restrictions on individual workers and an unequal bargaining position on management. Unions today are powerful national organizations—very often more than a match for their employer-adversaries. But the Railway Labor Act is the product of an era of management-dominated company organizations, when government policy was to nurture national unions in order to equalize bargaining power. In a day of relatively equal adversaries some system of proscribing unfair practices of both unions and management is more realistic and fair.

And individual freedom of expression of both employer and employee deserves better protection than the Railway Labor Act affords. The employer's right of free speech should be preserved. The right of employees not to join any union or to act to decertify an unsatisfactory bargaining agent should be recognized. And employees should be given wide discretion in their choice of the appropriate bargaining unit. The Railway Labor Act is deficient in all these aspects. Moreover, its provisions for determining employee representatives are carried out by an agency which regards that function as bothersome and therefore tries to minimize it.

What few desirable features the Railway Labor Act does provide might easily be had without, at the same time, incurring the Act's disadvantages. Arbitration of questions of interest, which has been moderately successful in air disputes, has been used in a number of other industries outside Railway Labor Act jurisdiction. In some of these it is even the standard procedure. And arbitration of grievances, a very desirable practice, is not peculiar to the Railway Labor Act. The vast majority of collective bargaining agreements contain such a provision. Finally, several agencies

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132 Cf. Taft-Hartley Act §8(c).
133 The Taft-Hartley Act specifically recognizes this right. It is subject, of course, to the provisions of any valid union shop agreement. Id. at §7.
134 Cf. Id. at §9 (c) (1) (A).
135 Cf. note 71 supra.
136 This is true, for example, in the full-fashioned hosiery and printing industries. Cf. Kennedy, Effective Labor Arbitration: The Impartial Chairmanship of the Full-Fashioned Hosiery Industry (1948); 5 L.A. 16 (1946).
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provide expert mediators who are not handicapped by auxiliary duties or a background of experience in a unique industry.\footnote{\textsuperscript{137}}

**Conclusion**

Clearly, many of the Railway Labor Act features which are detrimental to healthy collective bargaining in the airlines are equally inappropriate for the railroads. And the desirability of any specialized labor legislation is dubious. But individual legislative treatment of the railroads is so established a precedent that realism compels its acceptance. Even in the fields of social security and corporate reorganization, the rail industry has received the special attention of Congress.\footnote{\textsuperscript{138}} Moreover, the major railroad unions, a dominant political influence, are strongly in favor of their specialized treatment.\footnote{\textsuperscript{139}}

The airlines, however, suffer far more than the railroads under the inequities of the Railway Labor Act. For they are compelled to operate under a special law designed for a completely different industry. The statute in its present form was largely drafted by the national rail unions. Its administration is characterized by an orientation toward the peculiar problems of the railroad industry. And this is only to be expected, since airline employees constitute barely six per cent of the workers under the Act's jurisdiction. In a set-up historically and numerically so dominated by railroad interests, airline labor policy is in the position of "a very small tail being wagged by a very large dog."\footnote{\textsuperscript{140}}

Perhaps the solution to air labor problems is the formulation of a special labor law for the airlines incorporating the best features of all existing legislation and geared to the peculiar characteristics of the industry.\footnote{\textsuperscript{141}} But such a proposal is patently unrealistic. The airlines are neither so different nor so important as to merit special labor treatment. It seems doubtful whether any industry is.

Perhaps inclusion of the airlines under the Taft-Hartley Act is the best alternative. For the policies and provisions of that act better ensure both individual freedom and equal bargaining power.\footnote{\textsuperscript{142}} And, most important, it was not designed and is not administered under the influence of a particular industry.

\footnote{\textsuperscript{137} E.g., the Federal Mediation and Conciliation Service set up under the Taft-Hartley Act. \textit{TAFT-HARTLEY ACT} §202.}
\footnote{\textsuperscript{139} The rail unions themselves have probably been the most active proponent of specialized railroad legislation. For a brief account of some of their activities and accomplishments, see Northrup; \textit{Industrial Relations on the Railroads}, in \textit{LABOR IN POSTWAR AMERICA} 449, 454-7 (Warne ed. 1949); Wolf, \textit{Railroads}, in \textit{How COLLECTIVE BARGAINING WORKS} 318, 364-73 (Twentieth Century Fund ed. 1945).}
\footnote{\textsuperscript{140} Statement of Robert Ramspeck, executive vice president, Air Transport Association of America, \textit{Hearings before Subcommittee of Committee on Labor and Public Welfare} on S.3295, 81st Cong., 2d Sess. 218 (1950).}
\footnote{\textsuperscript{141} Any change of the labor law governing the airlines would necessitate minor amendment to the Civil Aeronautics Act. 52 STAT. 977 (1938), 49 U.S.C. §401 (1946). Section 401(1)(4) of this Act requires air carrier compliance with the Railway Labor Act as a condition of holding certificates of public convenience and necessity.}
\footnote{\textsuperscript{142} See, e.g., notes 71, 80 and 88 supra.
But, while the Taft-Hartley Act looks good on paper, it has raised scores of new problems in interpretation and application. Indiscriminate prescription of the Act therefore seems inadvisable. Its imposition on the airline industry might, while removing Railway Labor Act inequities, introduce a myriad of unforeseen difficulties.

To determine what the best solution may be, immediate legislative examination of the problem seems imperative. The airlines should not suffer under an outmoded labor act whose operation is dominated by a rival industry. Nothing but inertia justifies the continued application of the Railway Labor Act to air transportation.

JAMES B. FRANKEL

DIGEST OF RECENT CASES

RAILWAY LABOR ACT — NATIONAL MEDIATION BOARD JURISDICTION


The Air Line Dispatchers' Association, a labor organization filed with the National Mediation Board under the Railway Labor Act an application for an investigation of an alleged representation dispute among the flight dispatchers of Pan-American-Grace Airways, Inc. The airline company operates and the dispatchers are employed solely outside the continental limits of the United States. The Board ruled that it had no jurisdiction and dismissed the application. The association then sought review of the Board's action in the district court. The court dismissed, ruling that the Board's decision was not subject to judicial review.

The circuit court held that judicial review of the Board's action was permitted under the Administrative Procedure Act where no Federal statute expressly precludes such review. However, the circuit court held that the Board's action in dismissing the complaint was correct because the scope of the Railway Labor Act, in its application to air transport, could not be extended beyond the limits of railway coverage which is limited to common carriers engaged in interstate and foreign transportation but only insofar as such transportation takes place within the United States.

CONTRACTS — CAB JURISDICTION

Lichten v. Eastern Airlines, 189 F. 2d 939 (2nd Cir. 1951)

Where an air carrier's tariff contained a provision exempting it from liability for any loss or damage to baggage regardless of negligence, it was held that this provision was valid, unless expressly disapproved of by the CAB; that the plaintiff was unable to recover the value of jewelry lost while she was a passenger on one of the air carrier's planes; and that the only remedy would be before the CAB which has exclusive primary jurisdiction over all matters regarding air carriers' tariffs.

PRIVATE AIRPORT — NUISANCE

Anderson Et. Al. v. Sauza Et. Al., Cal. 232 P. (2d)- 274, June 1, 1951

The lower court had found that the operation of a private airport was a nuisance to adjacent property owners by reason of the noise and low flights

143 See, e.g., MILLIS & BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY (1950). In the course of an analysis of the history and operation of the Taft-Hartley Act the authors bring out numerous instances in which the Act has led to knotty problems.

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of the airplanes and had decreed a permanent injunction completely forbid-
dig the operation of the airport. The Appellate Court reversed, holding that
an airport is not a nuisance per se and it had not been shown that the im-
position of appropriate rules and limitations would still not make it possible
for the airport to be operated in a normal and useful manner.

ANTl-I-TRUST — CAB — COMPETITIVE PRACTICES
S.S.W. v. Air Transport Association, July 12 — F. 2nd. — (D.C. Cir. 1951)
An irregular air carrier brought suit under anti-trust laws against cer-
tain regularly certified air-carriers charging that the regular air carriers
monopolized air commerce and suppressed competition. The district court
had dismissed the action on the ground that the CAB had exclusive juris-
diction over competitive practices and therefore over alleged violations.
The circuit court held that although the CAB does have primary jurisdiction
to determine violations of competitive practices, the Board has no authority
to award damages. Therefore the case should not have been dismissed for
lack of court jurisdiction but should be held pending the Board's determi-
nation of the lawfulness of the practices of the regular air carriers under
the terms of the Civil Aeronautics Act. The District Court can then deter-
mine the damages for violation of anti-trust laws.

FEDERAL TORT CLAIMS ACT — JET TRESPASS
Where property was damaged and personal injuries were incurred as a
result of the crash of an Air Force jet fighter plane, damages could not be
collected on a claim based on or general allegation of negligence. Under
the Federal Tort Claim Act, however, action may be permitted for a "wrong-
ful act" and includes a wrong by trespass. The court held that the flight and
crash of the plane did constitute trespass, and furthermore, that the taking
off of a jet plane over a residential area in the present stage of jet aviation
development is an extra hazardous activity.

INTERVENORS — JUDICIAL REVIEW
Western Air Lines Inc. v. Civil Aeronautics Board —
F. 2nd. — (9th Cir. 1951)
A party to a proceeding before the CAB is also entitled to be a party
to and to intervene in a judicial review of the Board's proceedings. How-
ever, there is no rule of procedure that necessarily entitles persons who are
permitted to intervene in Board meetings to be recognized as a party to a
judicial review of such proceedings. In addition, intervenors are not entit-
elled to petition for judicial review.

MANUFACTURERS' LIABILITY — OPERATORS' LIABILITY
The Douglas Aircraft Company and United Airlines were held equally
liable for the death of a passenger in an airplane crash. The fact that
hazardous carbon dioxide concentration in the cockpit, which caused the
pilots to lose control of the plane resulted from negligence by the manu-
facturer, was held not to lessen the duty the air carrier owed to its passen-
gers to use the greatest care in operation of its planes. However, Douglas
was also held liable on the ground that its instructions to the pilots as to
emergency procedures were inadequate and the tests made with respect to
changes in the airplane design were improper.

TAXATION — GASOLINE SALES TAX
Chicago and Southern Air Lines Inc. v. Evans, Tenn. 240 S.W. 2d 249 (1951)
The state legislature passed an act exempting aviation gasoline from
taxation with the intent of relieving aviation gasoline dealers of the burden
of paying seven cents privilege tax to maintain state highways. However, a later act subjecting aviation gasoline to the two per cent sales tax was valid. The court ruled that the first act could be properly amended by implication of another act and that it was not the legislative intent to exempt aviation gasoline from all future taxation.

ANTI-TRUST — CIVIL AERONAUTICS ACT

Slick Airways Inc. v. American Airlines, Inc. —

An air carrier alleging violations of anti-trust laws by certain air freight carriers and seeking treble damages and injunctive relief is entitled to immediate relief in the courts. A conspiracy to drive a competitor out of business is not the type of agreement encompassed within the Civil Aeronautics Act and is not subject to the primary jurisdiction of the CAB for approval or disapproval or for consideration of immunity from anti-trust laws. It is not necessary for the air carrier first to prove before the Board a conspiracy to restrain trade before seeking treble damage relief in the courts. The Civil Aeronautics Act provides no remedy in damages for wrongs equivalent to violations of anti-trust laws and it was not the intent of the Civil Aeronautics Act to leave a party completely without remedy in damages.

CONTRACT AIR CARRIER—LIABILITY FOR BREACH OF CONTRACT

Phalanx Air Freight, Inc. v. National Skyway Freight Corporation
— Cal. — 232 P 2d 510, (June 15, 1951)

Defendant, authorized to operate only as a contract carrier entered into a contract by which plaintiff, a regular air carrier, would arrange with individual shippers for a shipment by air of less than plane-load lots and after combining such individual shipments into plane-load lots forwarded them by defendant's planes. In an action for breach of this contract the court held that a provision for termination after notice for a fixed period does not render the contract illusory. The court also found that the contract which contains a provision for monthly re-negotiation of rate and volume quantities does not become unenforceable on failure to re-negotiate since only one contract was entered into by the parties, not a series of month to month contracts.

AIR TRANSPORTATION CONTRACT—INTERRUPTION OF JOURNEY

Hohensee v. Colonial Airlines, Inc.
— Pa. Ct. of Common Pleas, (October 2, 1950)

The journey of an air carrier passenger was interrupted when a connecting carrier refused to permit him to board a plane since his seat had been erroneously sold to another person. The passenger brought suit to recover business loss resulting from the delay. The court found that the transportation contracts made with the initial carrier and the connecting carrier were separate; therefore, the action could not be brought on the basis of negligent performance of a through transportation contract. The action must be brought against the connecting carrier for non-performance of a contract.

DEATH OF PILOT IN AIRPLANE COLLISION — COVERAGE OF AVIATION LIABILITY POLICY

Petro Et Al v. Ohio Casualty Insurance Co.
95 F. Supp 69 (S.D. Cal. January 3, 1951)

Damages may be collected for the death of a pilot who was killed in an airplane collision caused by the negligence of the other pilot where the
plane of the negligent pilot was covered by an aviation liability policy. The court found that the negligent pilot was a private certified pilot within the meaning of the terms of the liability policy, although the plane was furnished to him pursuant to a contract with the Veteran's Administration.

**PILOT'S DEATH OVER THE HIGH SEAS — JURISDICTION OF ADMIRALTY COURT**


The Death on the High Seas Act, which confers right of action for wrongful death occurring on the high seas at any point beyond a marine league from the shore of any state, is applicable to the death of an airplane pilot, who was killed when his plane went down in Massachusetts Bay. Although the wrongful act, the alleged negligent inspection of the plane which resulted in the accident occurred on land, the court found that the wrongful act was consummated over the high seas and, therefore, the action comes under the jurisdiction of the admiralty court.

**WRONGFUL DEATH ACTIONS — STATE STATUTE EXCLUDING FOREIGN WRONGFUL DEATH ACTIONS**

First National Bank of Chicago v. United Airlines, Inc. 190 F. 2d 493 (7th Cir. July 5, 1951)

A wrongful death action, which was brought in Illinois courts to recover damages for the death of a passenger on an air carrier which crashed in Utah, was dismissed for lack of jurisdiction. On appeal, the court found that the Illinois statute, which excludes all foreign death actions capable of being prosecuted to judgment in the courts of the state where death occurred, is valid legislation.

**PILOT'S CONTRACT OF EMPLOYMENT — ADJUSTMENT IN PAY FOR FLYING HEAVIER AIRCRAFT — RETROACTIVE PAY DISPUTE**

Western Airlines, Inc. v. Hollenbeck — Colo. — 235 P. 2d 792 (August 6, 1951)

A dispute over the amount of retroactive pay due an air carrier pilot for flying aircraft heavier than those in use by the carrier at the time of his employment was settled in favor of the pilot. The court found that a contract negotiated by Airline Pilot's Association takes precedent over an earlier recommendation by a presidential Emergency Board as to rates of pay. Furthermore, a bulletin posted by the carrier relating to retroactive pay and signed by the pilots does not have the effect of revoking or superseding the pilots' contract of employment; and acceptance by the pilot of a check for retroactive pay according to rates recommended by the Emergency Board does not mean that the pilot is accepting it in full payment of his rights and claims.

**AIRPLANE CRASH AT COUNTY AIRPORT — NEGLIGENCE — LIABILITY OF COUNTY**

Miller Et Al v. County of Contra Costa — Cal. — 235 P 2d 76 (August 27, 1951)

A county is liable for damages for injuries sustained by a pilot and for damages to a plane resulting from an accident at the county airport where the accident was caused by an obstruction on the runway which had not been called to the attention of the pilot. The court also found that the negligence of the owner of the plane in failing to warn the pilot of the obstruction was not a proximate cause of the accident since knowledge of the obstruction would not have caused the pilot to act differently in an emergency situation.