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**AN INTRODUCTION TO THE
RAILWAY LABOR ACT**

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As the title indicates, this booklet is intended as an introduction to the major issues, cases and doctrines under the Railway Labor Act, rather than a definitive treatise addressing all issues and all cases. As such, we hope that it will serve as a useful primer for those new to study or practice under the Act, or as a quick reference guide for the more experienced practitioner of law or labor relations under the Act. While the reach of the RLA is limited to two industries, its impact on rail and air carriers, their employees, and the people they serve, is monumental. We hope that this booklet contributes to a better understanding of the Act and enhances its positive impact on each of these constituencies.

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ABOUT THE FIRM

Paul, Hastings, Janofsky & Walker LLP is an international law firm with more than 900 attorneys in 13 strategically located offices: New York, N.Y.; Stamford, Connecticut; Washington, DC; Atlanta, Georgia; Tokyo, Japan; Hong Kong, Shanghai, and Beijing, China; Paris, France; Los Angeles, San Francisco, San Diego and Orange County, California.

Our practice covers a broad range of substantive legal areas and includes the representation of more than 200 of the Fortune 500 companies as well as smaller emerging business enterprises. In addition to aviation, our attorneys provide expertise in the following major practice areas: corporate law, employment law, litigation, real estate and tax.

Our Employment Law Department is one of the largest and best-known in the nation, with 200 attorneys. This Department includes our Railway Labor Act practice, which is centered in our Washington, DC office. The lead attorney in this practice, Jack Gallagher, has practiced exclusively under the RLA for almost 30 years and is a regular faculty member for the American Law Institute's course on Airline and Railroad Labor Law. Other noted RLA practitioners in the DC office include Neal Mollen, Jon Geier, Ken Willner, and Meg Spurlin.

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I. INTRODUCTION

The Railway Labor Act (“RLA” or the “Act”), enacted in 1926, was the first of the modern American labor laws. By the 1920s, the railroad industry employed over 2 million workers and, after years of struggle, railroad labor unions had become well-established.¹ The Transportation Act of 1920 had created a weak framework for railroad collective bargaining, but had left many critical issues unaddressed. As a result, a special committee of rail labor and management jointly drafted a proposal for a new statute to create a legal framework for their relationship. The proposal was then passed by Congress without substantial change. Thus, the legislative history of the RLA is unique in that it consists of the draftsmen reporting to Congress about the issues and the intended solutions rather than reports of solutions devised in the legislative process.²

Policy of Avoiding Interruptions To Commerce. While the Railway Labor Act provides for the organization of employees for free collective bargaining, the Act includes a strong policy statement, and a variety of provisions, designed to avoid or delay any interruption to commerce such as would be occasioned by a strike.

The freedom to engage in self-help, the freedom of labor to interrupt the employer’s operations or freedom on the part of the employer to stop or alter operations, is limited because of the third party interest involved in RLA labor disputes, the interest

¹ The establishment of this beachhead for the labor movement was not without tremendous difficulty and management resistance. Much of labor’s progress was made when the Federal government took control of the railroads during World War I.

² The Act was extended to air carriers in 1936. 45 U.S.C. § 181.

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of the travelling public or the shipping public. From a public policy standpoint, strikes, especially frequent or prolonged strikes, are to be avoided because they impact the rights and interests of travellers or shippers and the public interest in the free flow of commerce, especially as to essential commodities.

The Railway Labor Act delays or avoids strikes in two principal ways. First, the Act prolongs the process of collective bargaining. The Act requires that an agency of the federal government, the National Mediation Board (“NMB”), release the parties for self-help 30 days before a strike can occur; the timing of such a release is in the sole discretion of the Board.³

The second feature of the Railway Labor Act which is designed to avoid strikes is a requirement for mandatory arbitration of disputes about the interpretation or application of an existing labor agreement.⁴ Under the Railway Labor Act the parties have no choice; airlines are required by law to include an arbitration clause in their agreement and railroads are subject to a federal arbitration board, the National Railroad Adjustment Board or privately established arbitration boards. The parties cannot use self-help in an arbitrable dispute, cannot strike, and cannot take action inconsistent with an arbitration decision.

³ In contrast, under the subsequently enacted National Labor Relations Act, the parties can bargain to impasse at their contract expiration date. At that point the NLRA allows the parties to engage in controlled economic warfare.

⁴ Under the National Labor Relations Act, it is permissible, and now almost universal custom, for the parties to a labor agreement to insert an arbitration clause to resolve disputes about the meaning of the agreement. Such a clause, however, is optional; it is not required by law. See *Nolde Brothers, Inc. v. Local No. 358, Bakery Workers Union*, 430 U.S. 243, 250-51 (1977).

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Enforcement. The RLA creates a federal agency, the National Mediation Board (“NMB”), to mediate collective bargaining and to certify employee choice of union representatives. The NMB, however, has no law enforcement functions. Alleged violations of the RLA are litigated by the parties in the federal courts.

Comparability with National Labor Relations Act. Courts frequently resort to caselaw under the National Labor Relations Act (“NLRA”) for analogy in determining RLA issues. “[F]ederal common labor law developed under the NLRA may be helpful in deciding cases under the RLA.” Trans World Airlines v. IFFA, 489 U.S. 426, 432 (1989). In Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 383 (1969), the Supreme Court stated:

To the extent that there exists today any relevant corpus of “national labor policy,” it is in the law developed during the more than 30 years of administering our most comprehensive national labor scheme, the National Labor Relations Act. This Act represents the only existing congressional expression as to the permissible bounds of economic combat. It has, moreover, presented problems of federal-state relations analogous to those at bar.

On the other hand, the Supreme Court cautioned that the NLRA

cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes.

Id. (footnote omitted). See also Chicago & N.W. Ry. v. UTU, 402 U.S. 570, 579 n.11 (1971) (“all parallels between the NLRA and the [RLA] should be drawn with the utmost care and with full awareness of the differences between the statutory schemes”); Brotherhood of R.R. Trainmen v. Chicago River & I. R.R., 353 U.S. 30, 31-32 n.2 (1957)

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(“The relationship of labor and management in the railroad industry has developed on a pattern different from other industries. The fundamental premises and principles of the [RLA] are not the same as those which form the basis of the [NLRA].”).

II. SCOPE OF COVERAGE UNDER RLA

While it is usually clear whether an employer is a rail carrier or an air carrier, and whether an individual is an “employee” of such a carrier, there have been a significant number of issues relating to jurisdiction under the Railway Labor Act.⁵

A. Carrier.

The RLA defines the term “carrier” as

any express company, sleeping-car company, carrier by railroad, subject to subtitle IV of title 49, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage and handling of property transported by railroad

45 U.S.C. § 151, First. Thus, the RLA applies not only to railroads and airlines but also to any company that is directly or indirectly owned or controlled by, or under common control with, a railroad or airline and that performs a service in connection with transportation.

Subsidiaries and Affiliates. The NMB applies a two-part test to determine whether an entity that is not an airline or railroad is covered by the RLA: (1) whether

⁵ The NMB’s decisions regarding its own jurisdiction, unlike its determinations in representation disputes, discussed in section III-A below, are subject to judicial review. See ILA v. NMB, 870 F.2d 733 (D.C. Cir. 1989).

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there is common ownership or control between the entity in question and an RLA carrier and (2) whether the work performed by the entity's employees is traditionally performed by the employees of an airline or railroad. Both components must be satisfied for the NMB to conclude that the entity is covered by the RLA. The NMB presumes that "control" is established by ownership; therefore, all airline or railroad subsidiaries presumptively satisfy the first prong of the test.⁶ If there is not ownership, an entity such as a ground services contractor or other affiliate can still be "controlled" by a carrier that exercises *de facto* control over manner in which the entity does business. Significant factors include (1) whether the entity's employees are supervised by railroad or airline employees in how they perform their jobs, (2) whether the carrier's managers make effective recommendations regarding hiring, firing or discipline of the entity's employees, (3) ownership of equipment, (4) training of the entity's employees, and (5) holding out the entity's employees as employees of the carrier.⁷

As for the second part of the test – work traditionally performed by a carrier – the following activities have been found to come under the RLA: (1) air taxi services and charter operations that are not negligible or sporadic, (2) maintenance, servicing and refueling of aircraft, (3) screening and security; (4) in-flight food catering; (5) sky cap services; (6) ground services (including directing, parking, starting and towing aircraft, transporting cargo or baggage, and cleaning aircraft). The NMB and

⁶ A truly separate subsidiary which does not do the majority of its work for a carrier and does not hire a majority of its employees from the carrier potentially could achieve a different result. North Carolina Ports Auth., 9 N.M.B. 398 (1982) (when state authority/owner separated railroad facilities from docks department, docks ceased being subject to RLA); remanded, *ILA v. NMB*, 870 F. 2d 733 (D.C. Cir. 1989), 26 NMB 305 (1999) (dismissed as moot).

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courts have reached inconsistent decisions whether information service is work traditionally performed by employees of air carriers. In one case, the NLRB concluded such work was not traditional airline work and thus held that the employer was not subject to the RLA.⁸ In contrast, one court held, in a case involving overtime claims under the Fair Labor Standards Act (FLSA), that an entity was covered by the RLA because its services, which included information technology services, were “an integral part of the air carriers’ transportation function” that historically had been performed by airline employees.⁹

International Operations. It is well established that employees of United States carriers who work entirely outside the United States are not subject to the RLA.¹⁰ Employees based in the United States who have a “reasonable expectation of continued employment” within the US are covered by the RLA.¹¹

⁷ Aeroguard, Inc., 28 NMB at 516-17; Sky Valet, 23 NMB 155, 160 (1996).

⁸ System One Corp., 322 NLRB 732 (1996) (IT company, which at time of decision was one-third owned by Continental Airlines Holding, Inc., and formerly had been wholly owned by Continental, was engaged in developing and selling travel management software products and maintained a travel-related computer reservation system).

⁹ Verrett v. SABRE Group, Inc., 70 F.Supp.2d 1277, 1282 (N.D. Okla. 1999). Accord Cybernetics & Systems, Inc., 10 N.M.B. 334 (1983) (data processing unit of major railroad, spun off as separate corporation, which did 80% of its data processing work for the railroad, was covered by the RLA).

¹⁰ Allen v. CSX Transp. Inc., 22 F. 3d 1180 (D.C. Cir. 1994); IUFA v. Pan American World Airways, 923 F.2d 678 (9th Cir. 1991), opinion withdrawn on other grounds, 140 L.R.R.M. (BNA) 2110 (9th Cir. 1992); Rastall v. CSX Corp., 696 F. Supp. 683 (D.D.C. 1988) (RLA does not apply to railroad employees who work solely in Canada and carrier cannot compel their grievance to be heard by National Railroad Adjustment Board); Gen. Comm. of Adjustment, UTU v. Burlington Northern, 563 F.2d 1279 (8th Cir. 1977) (National Railroad Adjustment Board has no authority to hear claims involving work performed exclusively in Canada unless longstanding custom allows reference to NRAB); ALSSA v. Trans World Airlines, 273 F.2d 69 (2d Cir. 1959) (per curiam), cert. denied, 362 U.S. 988 (1960) (employees flying on entirely foreign segments of flights between the U.S. and foreign cities not subject to RLA); ALSSA v. Northwest Airlines, 267 F.2d 170 (8th Cir.), cert. denied, 361 U.S. 901 (1959) (same); ALDA v. NMB, 189 F.2d 685 (D.C. Cir.), cert. denied, 342 U.S. 849 (1951) (employees stationed permanently at foreign bases not subject to RLA).

¹¹ Swissair, 16 NMB 146 (1989)

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Intermodal Facilities. Port and dock facilities, or other terminals where railroads and other carriers, either ships or trucks, interchange freight, and the interchange facility itself, may be subject to the Railway Labor Act or the National Labor Relations Act, depending on how they are structured and what kind of services are rendered. ILA v. North Carolina Ports Auth., 370 F. Supp. 33 (E.D.N.C. 1974), aff'd, 511 F.2d 1007 (4th Cir. 1975) (docks subject to RLA); United States v. Feaster, 330 F.2d 671 (5th Cir. 1964), appeal after remand, 376 F.2d 147 (5th Cir.), cert. denied, 389 U.S. 920 (1967), 410 F.2d 1354 (5th Cir.), cert. denied, 396 U.S. 962 (1969) (same).

Trucking Exemption. The “carrier” definition of the RLA expressly excludes an employer which is affiliated with a carrier but performs trucking services. A similar trucking service exclusion appears in the Railroad Retirement Act, 45 U.S.C. § 231(a)(1)(ii), the Railroad Retirement Tax Act, and the Railroad Unemployment Tax Act. Missouri Pacific Truck Lines v. United States, 3 Cl. Ct. 14 (1983), aff'd, 736 F.2d 706 (Fed. Cir. 1984), held that a railroad’s trucking subsidiary that engaged in intermodal operations, unloading and transporting trailers from flatcars, was not covered by the Railroad Retirement Tax Act. The NMB has stated that it is not necessarily bound by such jurisdictional precedents under the other three Acts, although the jurisdictional language of the RLA is virtually identical. The NMB’s own decisions on trucking employers are inconsistent. See, e.g., Federal Express Corp., 23 N.M.B. 32, 69–70 (1995) (Federal Express and all of its sorting employees and truck drivers subject to RLA); Florida Express Carrier, 16 N.M.B. 407 (1989) (trucking subsidiary of railroad that predominately transported trailers carried on flatcars is covered by RLA, despite

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motor carrier certificate); Southern Region Motor Transport, 5 N.M.B. 298 (1975) (trucking subsidiary that held an Interstate Commerce Act motor carrier certificate is not an RLA carrier); Holston Trans. Co., 5 N.M.B. 307 (1975) (motor carrier subsidiary of railroad, without motor carrier certification was carrier covered by the RLA). See also Chicago Truck Drivers Union v. NLRB, 599 F.2d 816 (7th Cir. 1979)(trucking activity integrally related to air carrier operations is covered by RLA); Adams v. Federal Express Corp., 547 F.2d 319 (6th Cir. 1976) cert. denied, 431 U.S. 915 (1977) (drivers covered by RLA).

In a case involving a trucking subsidiary of United Parcel Service, the NLRB, without making a jurisdictional referral to the NMB, determined that the RLA was not applicable to United Parcel Service's trucking subsidiary.¹² The DC Circuit affirmed, based on the NLRB's use of NMB criteria that a trucking company, to be covered by the RLA, must (1) perform services principally for an RLA carrier with which it is affiliated, (2) be an integral part of the RLA carrier, and (3) provide services essential to the RLA carrier's operations. UPS did not meet this test because UPS, Inc. received less than one-tenth of its business from its affiliated air carrier, and had long been categorized as an NLRA employer.¹³

¹² United Parcel Service, Inc., 318 NLRB 778, 150 LRRM 1049 (1995), enforced, United Parcel Service, Inc. v. NLRB, 92 F.3d 1221, 153 LRRM 2001 (D.C. Cir. 1996). The NLRB's analysis of the merits of the statutory coverage issue is discussed in Section II.E. of this Chapter.

¹³ Id. at 1228. See Federal. See also Chicago Truck Drivers, Helpers & Warehouse Workers Union v. NLRB, 599 F2d 816, 101 LRRM 2624 (CA 7, 1979) (holding that court lacked jurisdiction to review NLRB determination that RLA applied to Federal Express truck drivers, and declining to decide on the merits which statute applied).

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Aviation Maintenance; Fixed Base Operations. A fixed base operation in the airline industry offers fuel, ground services, and repairs for general aviation aircraft and small private airplanes. Some fixed base operators have charter operations and may be engaged in interstate commerce and be carriers in their own right. AMR Combs – Memphis, Inc.; 18 N.M.B. 381 (1991) (12% of gross income derived from air taxi service); Jimsair Aviation Services, Inc., 15 N.M.B. 85 (1988). Other fixed base operators and maintenance facilities may be owned or controlled by carriers, and therefore also could be found to be subject to the RLA. See Cross Continent Aircraft Services, Inc., 17 N.M.B. 107 (1990); Intertec Aviation, L.P., 17 N.M.B. 487 (1990) (maintenance corporation owned by carrier is subject to RLA). Without ownership or control by a carrier, the performance of this type of function is not sufficient to bring an entity under the coverage of the RLA. See, e.g., Mercury Services, Inc., 9 N.M.B. 104 (1981).

Divisions. The NMB's traditional view has been that all divisions of a carrier were also part of the carrier and subject to the RLA, regardless of what functions the division performed. However, in Emery Worldwide Airlines, Inc., 28 N.M.B. 216 (2001), the Board held that Emery, when operating as an airline, was subject to the RLA; however, its employees working in the priority mail processing center, who sorted mail under contract with the US Postal Service, were covered by the NLRA. Courts have not always agreed with NMB's prior blanket assertion of jurisdiction. For example, in Piedmont Aviation, Inc., 7 N.M.B. 69 (1979), the NMB asserted jurisdiction over the employees of Piedmont's General Aviation Division, akin to a fixed base operator. The

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Middle District Court of North Carolina held in Piedmont Aviation v. NMB, C-77-281 (M.D.N.C. 1981), that these employees were not subject to the Act automatically, simply because of Piedmont's status as a carrier; RLA jurisdiction depended instead upon the control exercised by Piedmont over the General Aviation Division. The NMB thereupon reversed its jurisdictional determination. 8 N.M.B. 691, 693, 695 (1981). Compare Biswanger v. Boyd, 32 Labor Cases (CCH) ¶ 70,840 (D.D.C. 1957) (Pan Am's Cocoa Beach missile base employees are subject to RLA), with Pan American World Airways v. Int'l Brotherhood of Carpenters, 324 F.2d 217 (9th Cir. 1963), cert. denied, 376 U.S. 964 (1964) (Pan Am's employees at nuclear test site not subject to RLA); Northwest Airlines v. Jackson, 185 F.2d 74 (8th Cir. 1950), cert. denied, 342 U.S. 812 (1951) (employees engaging in aircraft construction for military are not exempt from Fair Labor Standards Act on grounds that they are subject to RLA, where their activities bear only a remote and nebulous connection to common carriage by air.)

B. NLRB Deference.

When an issue of RLA coverage of an employer arises before the National Labor Relations Board, the NLRB usually refers the matter to the National Mediation Board for a jurisdictional determination, accompanied by the NLRB file. The National Mediation Board makes a decision that the employer is or is not subject to the Railway Labor Act. Ground Services, Inc., 7 N.M.B. 509 (1980) (making jurisdictional determination without notice to the parties, or any further proceedings); Ground Services, Inc., 8 N.M.B. 112 (1980); Ground Handling, Inc., 278 N.L.R.B. 946 (1986). There are occasions, however, when the NLRB itself has evaluated the jurisdictional issues. United

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Parcel Service v. NLRB, 92 F.3d 1221 (D.C. Cir. 1996) (NLRB reaffirmed its general policy of referring questions of possible RLA jurisdiction to the NMB for an initial jurisdictional opinion, but noted that referral is unnecessary where the NLRB previously had exercised uncontested jurisdiction over the corporate entity or it was clear that employees were “in no way engaged in activity involving airline transportation functions.”); Chicago Truck Drivers Union v. NLRB, 599 F.2d 816 (7th Cir. 1979) (court will not review NLRB’s decision that Federal Express employees were subject to RLA); Dobbs Houses, Inc. v. NLRB, 443 F.2d 1066, 1072 (6th Cir. 1971) (“[c]oncededly, there is no statutory requirement that this question of jurisdiction be submitted for answer first to the National Mediation Board”).

C. Employee.

The Act defines employee as

every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official

45 U.S.C. § 151, Fifth.

Applicants. In Nelson v. Piedmont Aviation, 750 F.2d 1234 (4th Cir. 1984), cert. denied, 471 U.S. 1116 (1985), a pilot who had been a strike-breaker at Wien Air Alaska subsequently sought employment with Piedmont Aviation, but was unsuccessful. The pilot filed a lawsuit claiming that he had been blackballed by the pilots union and that such action interfered with his protected rights under the Railway Labor

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Act.¹⁴ The Fourth Circuit held that the Railway Labor Act protects only employees, not applicants for employment; since the pilot was no longer an employee at Wein there was no RLA cause of action.

Trainees. In a 1986 strike, TWA had hired 800 new flight attendants who were still in training when the strike ended, although they were on the payroll. While legally enforceable commitments had been made to the trainees, the Eighth Circuit found that they were not yet employees under the RLA, and that returning strikers were therefore entitled to the 800 positions. The court relied on the literal language of the statute which defines an employee as one who “renders service” for the benefit of the carrier; the court concluded that the trainees had not rendered such service. IFFA v. Trans World Airlines, 819 F.2d 839 (8th Cir. 1987), rev’d on other grounds, 489 U.S. 426 (1989). Accord ALPA v. United Air Lines, 802 F.2d 886 (7th Cir. 1986), cert. denied, 480 U.S. 946 (1987); Eastern Air Lines v. ALPA, 920 F.2d 722 (11th Cir. 1990), cert. denied, 112 S. Ct. 278 (1991).

III. REPRESENTATION DISPUTES: EMPLOYEE RIGHT TO CHOOSE UNION REPRESENTATION; CARRIER DUTY OF NON-INTERFERENCE

The RLA expressly provides for the right of employees to choose union representation free from carrier interference or retribution.¹⁵ Section 2, Fourth establishes this right:

¹⁴ Under the National Labor Relations Act, such an applicant would be protected by specific language referring to discrimination in hiring. 29 U.S.C. § 158(a).

¹⁵ Employee rights under the NLRA arguably are broader because the NLRA also protects the right to engage in concerted activities, which may not always involve a union. It has been held that employee rights are not coextensive under the Railway Labor Act and the National Labor Relations Act. Johnson v.

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Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative No carrier . . . shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization

45 U.S.C. § 152, Fourth.

Section 2, Ninth was added to the RLA in 1934¹⁶ to establish the authority of the NMB to protect this right and to control all aspects of a representation dispute:

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. . . . In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who

Express One Int'l, Inc., 944 F.2d 247 (5th Cir. 1991) (employee not entitled to have representative present for disciplinary interview; no protected "concerted activities" under RLA.)

¹⁶ Following passage of the RLA, some rail carriers had strongly encouraged the formation of "house" unions which were subject to carrier influence. The 1934 Amendments added Sections 2 Fourth, and Ninth, to clarify that such carrier conduct was prohibited. See Virginian Ry v. System Federation, No. 40, 300 U.S. 515 (1937).

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may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

45 U.S.C. § 152, Ninth.

A. NMB Jurisdiction Exclusive; No Judicial Review.

Section 2, Ninth was intended to establish exclusive authority in the National Mediation Board to determine the chosen representative of employees. In Switchmen's Union v. NMB, 320 U.S. 297, 303 (1943), the Supreme Court held

Where Congress took such great pains to protect the Mediation Board in its handling of an explosive problem, we cannot help but believe that if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say on any aspect of the problem, it would have made its desire plain.

Therefore, the Court held there was no judicial review. It linked this holding to the limited NMB role, emphasizing that the NMB is to act only as a “referee”; it is to “find the fact and then cease”; it makes no “order”; it does not issue findings beyond the certificate; and it has no enforcement functions. Id. at 304-05.¹⁷ Since Switchmen's, the standard for judicial review of the National Mediation Board's representation decisions has been one of the narrowest known to the law. The Board was reversed on Constitutional grounds, for interfering with the carrier's free speech, in US Airways v.

¹⁷ Notwithstanding the NMB's limited powers, the dissent in the 4-3 decision pointed out that the majority appeared to allot powers of statutory construction, in that the agency could misconstrue the law without judicial correction. (Reed, J. dissenting, 320 U.S. at 312).

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NMB, 77 F. 3d 985 (D.C. Cir. 1999), but few other challenges have succeeded. While Switchmen's has often been criticized as an anomaly in modern administrative law,¹⁸ courts generally deny judicial review even when they criticize the NMB's actions.¹⁹

In Brotherhood of Ry. & S.S. Clerks v. Association for Benefit of Non-Contract Employees, 380 U.S. 650 (1965), the Supreme Court held that a court can overturn an order of the NMB "made in excess of its delegated powers and contrary to a specific prohibition in the Act." 389 U.S. at 660 (citing Leedom v. Kyne, 358 U.S. 184, 188 (1958) (emphasis deleted)). Although the "failure to investigate" at all is a violation of the Act, the Court concluded that the Section 2, Ninth command to investigate is "broad and sweeping" and "as the nature of the case requires." 389 U.S. at 662. Accordingly, the courts consistently have refused to review NMB decisions which are based upon a facet of a representation case within the discretion of the Board, such as the

¹⁸ Switchmen's has often been criticized as inconsistent with modern concepts of administrative law and the presumption of reviewability contained in the Administrative Procedure Act. Louis L. Jaffe, The Right To Judicial Review, Part I, 71 Harv. L. Rev. 401, 428-32, and Part II, 71 Harv. L. Rev. 791 (1958).

¹⁹ Switchmen's declined to address whether violation of Constitutional rights could be grounds for overturning an NMB certification. Subsequent lower court decisions have suggested that constitutional violations could be grounds for review of NMB actions, but have consistently failed to find the alleged violations to be of Constitutional dimension. In America West Airlines v. NMB, 743 F. Supp. 693 (D. Ariz. 1990), aff'd, 969 F.2d 777, 140 L.R.R.M. (BNA) 2765 (9th Cir. 1992), the NMB found carrier interference and, in a new election, furnished a notice to employees that stated it had violated the RLA. The Ninth Circuit held that the NMB exceeded its powers by appearing to have adjudicated conduct in violation of §§ 2, Third and Fourth. The district court reasoned that announcing such conclusions could violate the carrier's due process rights. See Teamsters v. NMB, 363 F.2d 311 (D.C. Cir.), cert. denied, 385 U.S. 929 (1966) (Teamsters' argument that it was deprived of its constitutional rights for lack of time to campaign); UNA Chapter, Flight Engineers Int'l Ass'n v. NMB, 294 F.2d 905 (D.C. Cir. 1961), cert. denied, 368 U.S. 956 (1962) (FEIA argues that it was denied due process when the chairman of the NMB investigating committee rode in a United aircraft cockpit and viewed allegedly atypical crew proceedings on an ex parte basis); Air Florida, Inc. v. NMB, 534 F. Supp. 1 (S.D. Fla. 1982), appeal dismissed, 720 F.2d 686 (11 Cir. 1983) (in-house union's claim that the NMB violated its constitutional rights by refusing to consider it an incumbent in an election conducted at the behest of another union); and 534 F. Supp. at 5 (Air Florida's argument that the NMB's ex parte communications with the petitioning union violated its constitutional rights).

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sufficiency of a showing of interest,²⁰ voter eligibility,²¹ voting procedures,²² or the decision whether or not to conduct an investigation.²³ Indeed, courts have held that even the NMB's failure to follow its own rules is not grounds for judicial review.²⁴

In a few cases, however, an NMB decision has been overturned due to the Board's failure to investigate. Russell v. NMB, 714 F.2d 1332 (5th Cir. 1983), cert. denied, 467 U.S. 1204 (1984) (reversing NMB refusal to process an application by an individual who sought to decertify an incumbent union); International In-Flight Catering Co. v. NMB, 555 F.2d 712 (9th Cir. 1977) (reversing certification based on authorization cards, where there was strong evidence the employees had been told that signing cards

²⁰ Varig Brazilian Airlines v. NMB, 112 L.R.R.M. (BNA) 3348 (E.D.N.Y. 1983) (dues check-off cards rather than authorization cards).

²¹ Virgin Atlantic Airways v. NMB, 956 F.2d 1245, 1250-51 (2d Cir. 1992), petition for cert. filed, 60 U.S.L.W. 3829 (May 19, 1992) (No. 91-1873) (including discharged employees whose dismissal was upheld by court prior to vote count); IAM v. Trans World Airlines, 839 F.2d 809 (D.C. Cir.), modified, 848 F.2d 232 (D.C. Cir.), cert. denied, 488 U.S. 820 (1988) (passenger service employees temporarily working as flight attendants not allowed to vote in passenger service election); Professional Cabin Crew Ass'n v. NMB, 872 F.2d 456 (D.C. Cir.), cert. denied, 493 U.S. 974 (1989) (unreinstated strikers remain eligible to vote); USAir, Inc. v. NMB, 711 F. Supp. 285 (E.D. Va.), aff'd per curiam, 894 F.2d 403 (4th Cir. 1989) (excluding employees who transferred into craft after cut-off date); British Airways Board v. NMB, 685 F.2d 52 (2d Cir. 1982) (use of eligibility cut-off date two years earlier than date of NMB decision).

²² USAir, Inc. v. NMB, 711 F. Supp. 285 (E.D. Va.), aff'd per curiam, 894 F.2d 403 (4th Cir. 1989) (counting write-in votes for another union towards majority of certified union); Zantop Int'l Airlines v. NMB, 732 F.2d 517 (6th Cir. 1984) (same); Aeronautical Radio v. NMB, 380 F.2d 624 (D.C. Cir.), cert. denied, 389 U.S. 912 (1967) (same).

²³ Teamsters v. NMB, 136 L.R.R.M. (BNA) 2193 (D.D.C. 1990) (union's challenge to NMB's decision to conduct election under merger procedures without showing of interest by employees not subject to judicial review); IAM v. Alitalia Airlines, 600 F. Supp. 268 (S.D.N.Y. 1984), aff'd per curiam, 753 F.2d 3 (2d Cir. 1985) (NMB, when it split up certified craft into three certifications, need not investigate whether employees in one of the new units actually support the union since no employees in the new unit invoked the NMB's services); Lamoille Valley R.R. v. NMB, 539 F. Supp. 237 (D. Vt. 1982) (NMB requires individual applicant to comply with Labor-Management Reporting and Disclosure Act before Board will process application).

²⁴ Air Canada v. NMB, 107 L.R.R.M. (BNA) 2028 (S.D.N.Y. 1980), aff'd mem., 659 F.2d 1057 (2d Cir.), cert. denied, 454 U.S. 965 (1981) (NMB's published rules on timeliness of authorization cards need not be strictly followed); Hawaiian Airlines v. NMB, 107 L.R.R.M. (BNA) 3322 (D. Hawaii 1979), aff'd mem., 659 F.2d 1088 (9th Cir.), opinion replaced, 109 L.R.R.M. (BNA) 2936 (9th Cir. 1981), cert. denied, 456 U.S. 929 (1982) (NMB Representation Manual not binding on Board).

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was only to obtain an election). In America West Airlines v. NMB, 969 F.2d 777 (9th Cir. 1992), the Ninth Circuit ruled that the NMB acted in excess of its statutory authority when it issued a notice to employees in a rerun election implying that it had found the carrier guilty of violations of the RLA in the first election. In fact, the NMB had no power to make such an adjudication.

The NMB's exclusive jurisdiction over representation disputes precludes judicial involvement in contract disputes which are "inextricably intertwined" with representation issues. AFA v. Delta Air Lines, 879 F.2d 906 (D.C. Cir. 1989), cert. denied, 494 U.S. 1065 (1990); International Bhd. of Teamsters v. Texas Int'l Airlines, 717 F.2d 157 (5th Cir. 1983); ALPA v. Texas Int'l Airlines, 656 F.2d 16 (2d Cir. 1981); Brotherhood of Ry. & S.S. Clerks v. United Air Lines, 325 F.2d 576 (6th Cir. 1963), cert. dismissed, 379 U.S. 26 (1964).

The NMB's exclusive jurisdiction over representation issues has also been held to preclude picketing or other self-help in support of a union demand for recognition. Summit Airlines v. Teamsters Local No. 295, 628 F.2d 787 (2d Cir. 1980). Thus, the NMB is the only recourse for a union seeking certification under the Act.

B. Scope of Bargaining Unit

1. Systemwide Units.

Under the Railway Labor Act, the National Mediation Board has held for over 50 years that all union representation must be system-wide for each craft or class of employees. The rationale for such a rule is to avoid a strike at one location which could have the effect of shutting down the entire carrier even though the employees at other

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locations are not represented by the same union, and to allow the negotiation of uniform work rules. The Board has held that its rule is required by the statute, although no language in the RLA says precisely that. See Summit Airlines v. Teamsters Local No. 295, 628 F.2d 787 (2d Cir. 1980); Northern Illinois Regional Commuter R.R., 16 N.M.B. 175, 179 (1989).

Scope of the System. If a unit is to be system-wide, the threshold issue is to determine what is and is not part of the system. The issue first arose when large railroads began to acquire smaller carriers, creating railroad holding companies and giant railroad systems. The smaller railroads had often been fully organized, but with patterns of union representation different from those on the larger system. The Board quickly evolved criteria for determining the scope of the system, *i.e.*, whether two railroads that became related would be a single carrier or separate carriers for representation purposes. As early as the NMB's First Annual Report, the Board stated:

The Board has ruled generally that where a subsidiary corporation reports separately to the Interstate Commerce Commission, and keeps its own pay roll and seniority rosters, it is a carrier as defined in the Act, and its employees are entitled to representation separate from other carriers who may be connected with the same railroad system. If the operations of a subsidiary are jointly managed with operations of other carriers and the employees have also been merged and are subject to the direction of a single management, then the larger unit of management is taken to be the carrier rather than the individual subsidiary companies.²⁵

²⁵ First Annual Report, National Mediation Board 22 (1935) (quoted in, *e.g.*, New York & L.B. R.R., 5 N.M.B. 331, 333 (1974); Donora Southern R.R., 2 N.M.B. 80, 83-84 (1952)).

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In a number of early NMB cases, separate reporting to the ICC was held to show conclusively that the merged railroads were still separate carriers.²⁶ In later cases, however, merger of management and employees into a single operating unit came to be the important consideration and separate ICC reporting became secondary.²⁷ Single carrier status was to be determined by integrated operations, finances, schedules, and facilities, interlining and/or leasing agreements, interchange of personnel and maintenance work, common ownership, officers, and employees, sharing of payroll and computer facilities, and the history of collective bargaining.²⁸ The unification of control over labor policy outweighed other factors that indicated differences, including the fact that the employees of the two consolidated companies had separate collective bargaining agreements.²⁹

The NMB's current single carrier test in its Representation Manual § 19.501 is as follows:

Factors Indicating a Single Transportation System

The following are some indicia of a single transportation system:

- (1) published combined schedules or combined routes;
- (2) standardized uniforms;
- (3) common marketing, markings or insignia;
- (4) integrated essential operations such as scheduling or dispatching;

²⁶ E.g., St. Louis-Southwestern System, NMB Case No. R-54 (1934); New York, Chicago & St. Louis R.R., 1 N.M.B. 1 (1935), Donora, *supra* note 17, at 84-85.

²⁷ Maine Central R.R., 4 N.M.B. 290 (1967). San Antonio, Uvalde & Gulf R.R., 2 N.M.B. 157, 166-67 (1950).

²⁸ Air Florida, Inc., 7 N.M.B. 61 (1979).

²⁹ Trans World Airlines/Ozark Airlines, 14 N.M.B. 218, 236 (1987); Airlift Int'l, Inc., 4 N.M.B. 142 (1967).

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- (5) centralized labor and personnel operations;
- (6) combined or common management, corporate officers, and board of directors;
- (7) combined workforce; and
- (8) common or overlapping ownership.

NMB Merger Procedures. In the NMB's current Merger Procedures at Section 19 of the Representation Manual, the NMB will investigate representation issues stemming from a merger upon application by an organization or individual who files a showing of interest.³⁰

Double-Breasted Carriers. The NMB's merger procedures do not necessarily apply to transactions where an airline or railroad creates a new carrier to operate as a sister or "double breasted" corporation. In Transamerica Airlines/Trans Int'l Airlines, 12 N.M.B. 204 (1985), the NMB begged the question by holding that there is no representation issue properly before the Board in such a case of double-breasting unless the union representing employees on one of the carriers furnishes a showing of interest. In another case, however, the NMB did not require a showing of interest other than the seniority list at one of the carriers in order to begin a single carrier investigation. The issue of the necessary showing of interest was not resolved when the case was dismissed on other grounds. Eastern Air Lines, Inc., 17 N.M.B. 432 (1990).

³⁰ In the late 1980's, the NMB promulgated Merger Procedures to govern representation issues arising in the course of carrier mergers. Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Airline Industry, 14 N.M.B. 388 (July 31, 1987); Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Railroad Industry, 17 N.M.B. 44 (Nov. 27, 1989). In these Merger Procedures, the NMB in effect allowed a carrier to initiate representation proceedings. The D.C. Circuit struck down these procedures because the Act provides that only an employee or employee representative can initiate an NMB investigation.. RLEA v. NMB, 29 F. 3d 655 (D.C. Cir. 1994), cert. denied, 514 U.S. 1032 (1995).

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The double-breasted issue arose in ALPA v. Texas Int'l Airlines, 656 F.2d 16 (2d Cir. 1981), where Texas International Airlines formed a holding company, Texas Air Corporation, which formed New York Air. The Second Circuit agreed with New York Air that the matter presented a representation dispute within the exclusive jurisdiction of the NMB. But see ALPA v. Transamerica Airlines, 817 F.2d 510 (9th Cir.), cert. denied, 484 U.S. 963 (1987) (court has jurisdiction to adjudicate whether creation of related airline would violate RLA status quo requirements, where it is alleged that new carrier would replace part of existing business and operate in same economic climate).

Successorship. Outside of the merger context, there have been surprisingly few cases under the RLA raising the issue of successorship to the duty to bargain with a certified incumbent union. In RLEA v. Wheeling & Lake Erie Ry., 736 F. Supp. 1397 (E.D. Va.), 741 F. Supp. 595 (E.D. Va), aff'd, 914 F.2d 53 (4th Cir. 1990), the Fourth Circuit refused to adjudicate a claim that a newly-formed railroad, that purchased assets and hired a majority of its employees from a predecessor railroad, was a “successor” which should be required to bargain with the predecessor’s unions. The court held that the successorship question presented a representation dispute for the NMB alone to decide. Although the NMB’s certification states that it is binding on “successors,” the NMB has rarely decided a successorship question.³¹ In North Carolina State Ports Authority,⁹ N.M.B. 398 (1982), the ILA had been certified to represent certain workers at the state-

³¹ Following the decisions in Wheeling & Lake Erie, supra, the NMB held conventional elections and did not evaluate whether the unions were entitled to representation as successors, without the need for an election.

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owned dock facility which included a small terminal railroad. After the state transferred its railroad operations to a separate department, the union argued that its representation rights automatically should extend to the new entity as a “successor.” The NMB held, however, that the two entities became separate and employees did not transfer from one to the other; therefore, it declined to transfer the certificate.

2. Craft or Class.

The second issue the Board must determine in a representation case is the scope of the “craft or class” of employees. The Board consistently has held that it does not have discretion to create an “appropriate bargaining unit,” as under the NLRA, Air Florida, Inc., 7 N.M.B. 162, 164-65 (1979), but only to recognize craft or class lines as they historically have evolved in the industry. Chicago & N.W. Ry., 1 N.M.B. 52, 54 (1937). The Board’s Representation Manual, § 9.1, provides that it will review each application for investigation of a representation dispute to determine whether the group of employees for whom representation is sought constitute a craft or class, considering “many factors, including the composition and relative permanency of employee groupings along craft or class lines; the functions, duties, and responsibilities of the employees; the general nature of their []work; and the extent of community of interest existing between job classifications.”³²

The NMB traditionally has resisted recognizing new composite crafts or classes, even where there is cross utilization. Union Pacific R.R., 27 N.M.B. 247 (2000); White City Terminal, 9 N.M.B. 23, 25-26 (1981); America West Airlines, Inc., 16

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N.M.B. 135 (1989) (NMB employs preponderance-of-duties test instead of recognizing composite craft of individuals who serve either as flight attendants or passenger service employees). Such fragmentation often has made it difficult for management to utilize its workforce efficiently, as well as to bargain.

Railroad Crafts or Classes. In the railroad industry the words “craft or class” had taken on a defined meaning by 1926; each craft or class was defined along the lines that the rail Brotherhoods had evolved historically. There was a separate “craft or class” for porters, for carmen, for engineers, for firemen, and for almost everything, resulting in some very small and fragmented crafts or classes.³³ Only recently has the NMB recognized composite crafts in the railroad industry, combining engineers, trainmen and conductors. Kansas City Southern Ry., 29 N.M.B. 410 (2002).

Fireman-Engineer Interchange. The railroad craft or class pattern includes a historical anomaly: firemen and engineers on railroads very often were interchangeable

³² National Mediation Board, Representation Manual § 9.1 (2003). NMB regulations provide that the Board has discretion to convene a craft or class hearing. 29 C.F.R. § 1202.8.

³³ Today, typical major railroads have crafts or classes represented by the following unions:

- American Train Dispatchers Association (ATDA)
- Brotherhood of Locomotive Engineers (BLE)
- Brotherhood of Maintenance of Way Employees (BMWE)
- Brotherhood of Railroad Signalmen (BRS)
- International Brotherhood of Boilermakers and Blacksmiths (IBB&B)
- International Brotherhood of Electrical Workers (IBEW)
- International Brotherhood of Firemen and Oilers (IBF&O)
- Sheet Metal Workers International Association (SMWIA)
- Transportation Communications International Union (TCU) and the Carmen Division (TCU-Carmen Division)
- United Transportation Union (UTU-T and UTU-E)
- International Association of Machinists (IAM)

In recent years, some of the rail unions have merged and formed into larger unions, but their contracts often still follow those “craft or class” lines originally evolved on the railroads.

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and yet they had two strong unions which were archrivals, the Brotherhood of Locomotive Firemen, later merged into the United Transportation Union (“UTU”), and the Brotherhood of Locomotive Engineers (“BLE”). As a result of the unions’ rivalry, Congress wrote into the RLA the ability of the individual who moves back and forth between two crafts to pay dues and remain a member of only one of the organizations -- whichever he chooses. 45 U.S.C. § 152, Eleventh (c). Thus, an employee working as an engineer may remain a member of the UTU and have the UTU represent him in arbitration under the BLE collective bargaining agreement. See Landers v. National Railroad Passenger Corp., 485 U.S. 652 (1988) (although minority union representation must be allowed in arbitration, the statute does not mandate that an employee have a union other than the collective bargaining representative represent him or her in the processing of grievances at lower levels). This obviously creates friction when one union takes a position on the interpretation of the other union’s agreement that is not consistent with the position of the union that negotiated the collective bargaining agreement.

Airline Crafts or Classes.

Pilots and Flight Engineers. In the airline industry, the Board easily found that pilots are a “craft or class,” although for many years the third or fourth person in the cockpit, the flight engineer (who was not pilot-qualified), was a separate craft or class. With the advent of jets, the flight engineer in many cases became pilot-qualified. After much dispute between the Air Line Pilots Association and the Flight Engineers International Association, the Board held in 1961 that all pilot-qualified individuals in the cockpit are in the craft or class of pilots, to be represented by one bargaining

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representative. United Air Lines, Inc., 3 N.M.B. 56 (1961); see also Zantop Int'l Airlines, 8 N.M.B. 596 (1981).³⁴

Flight Attendants; Mechanics and Related. Flight Attendants were a relatively easy craft or class to define in the airline industry, as were airline mechanics, who are licensed by the Federal Aviation Administration.³⁵ The Board's standard craft or class certification for mechanics, however, also includes so-called "related" employees, which generally include employees who work closely with mechanics, doing jobs such as washing aircraft and parts, and maintaining the physical plant and buildings. United Airlines, Inc.; 28 N.M.B. 533 (2001); Mercury Services, Inc., 9 N.M.B. 104, 112-13 (1981); United Airlines Inc., 5 N.M.B. 65, 71 (1968); United Airlines, Inc., 6 N.M.B. 134, 135 (1977).

The "1706" Craft: Passenger Service, Fleet Service, Office & Clerical.

Beyond those relatively well defined categories there was no standard practice in the airline industry on the job groupings of ground employees. Cross utilization was common, especially at small airlines and small locations. Even today, there are widely varying patterns of utilization among airline ground employees. In 1947, the Board decided "Case No. 1706," which placed all airline ground employees other than mechanics into a single craft or class, which became known as the "1706" craft. National Airlines, Inc., 1 N.M.B. 423 (1947).

By the late 1960's, the Board decided that the 1706 craft was too large and diverse a unit. Coincidentally, the unions had experienced difficulty organizing the 1706

³⁴ The flight engineer representation issue was a source of major controversy and disruption. The Board's decision was a virtual death-knell for the flight engineers' independent union.

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craft because it was so large and diverse at most major carriers. The NMB began to certify separate components of the “1706” group as appropriate crafts. E.g., Eastern Air Lines, Inc., 6 N.M.B. 561 (1978). In Japan Air Lines Co., 7 N.M.B. 217, 222 (1980), the Board established a presumption that the 1706 “craft or class” would thereafter be broken into three separate units at major air carriers: office and clerical, passenger service (all customer contact employees, including reservationists, ticket agents, gate agents) and fleet service³⁶ (employees who work outdoors on the ramp other than mechanics; primarily baggage handlers and cleaners).³⁷

3. Management Officials.

Only “employees” and “subordinate officials” are covered by the Act; if the NMB determines that an employee is a management official, he is excluded from the electorate. Pan American World Airways, Inc., 5 N.M.B. 112, 115 (1973); NMB, Representation Manual § 9.211. The Board reviews the following factors: (1) the power to hire, fire or discipline, or to effectively recommend the same; (2) the authority to supervise; (3) authority over other job elements such as overtime, work assignments, and transfers; (4) exercise of independent judgment; (5) formulation of carrier policy and budget; (6) rank in the management hierarchy; (7) compensation common to upper management; and (8)

³⁵ Airframe mechanics hold an “A” license; powerplant (engine) mechanics hold a “P” license. Many airline mechanics have both licenses.

³⁶ There are recurrent issues as to whether the employees who fuel and clean the airplane are fleet service employees or mechanic-related. United Air Lines, Inc., 5 N.M.B. 65 (1968), 6 N.M.B. 134 (1977); Northwest Airlines, Inc., 14 N.M.B. 76 (1986).

³⁷ The Board declared in Japan Airlines that the 1706 “craft or class” would not be utilized thereafter at a major air carrier. Subsequently, in the Northwest-Republic merger, there were different patterns of representation at Northwest and Republic. Despite Japan Airlines, the Board retained the 1706 unit and conducted a system-wide election among all three groups combined. Northwest Airlines, Inc., 14 N.M.B. 76 (1986). Thus, the Board has broad discretion and is not always consistent or predictable.

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authority to commit carrier funds and resources with outside parties.³⁸ Actual functions, rather than job titles or paper authority, are determinative. Allegheny Airlines, Inc., 6 N.M.B. 332, 335-36 (1977). Unlike the NLRA, the fact that an individual possess some supervisory attributes does not necessarily exclude him from coverage. See Lum v. China Airlines, 413 F. Supp. 613, 616 (D. Haw. 1976); Air Florida, Inc., 7 N.M.B. 162, 166 (1979).

C. Unique Election Procedures.

Required “Showing of Interest”. Under NMB regulations a union must file with the Board authorization cards from 35% of the workforce in a particular craft or class in order to invoke an NMB election within a group that was previously non-union; 50% of the workforce if the craft or class is represented by an incumbent union with a contract. 29 C.F.R. § 1206.2.³⁹

Unique Voting Procedures. The NMB Representation Manual sets out voting procedures and standards on voter eligibility.⁴⁰ The NMB has established unique election procedures under the RLA. Under the Act, in the Board’s view, a majority of majority is required. In an RLA election a majority of the employees must participate. If less than 50% plus one of the employees participate, no union will be certified. If more than 50% plus one participate, a union will be certified and it will be the union that gets

³⁸ The secretaries of managers, while not themselves management officials, are not eligible to vote if they “are so substantially intertwined with the significant managerial responsibilities of those officials that they are effectively the managers’ alter ego” China Airlines, Ltd., 6 N.M.B. 434, 440 (1978); Pan Am Express, 14 N.M.B. 108, 118 (1986).

³⁹ The cards must be dated and signed; they are effective for one year. 29 C.F.R. § 1206.3. The Board will check the date on each card and will do a signature check comparing signatures with company records to validate them. NMB, Representation Manual § 5.7.

⁴⁰ The voter eligibility standards (for part-time employees, temporary employees, furloughed employees, etc.) are not dissimilar from the NLRA, but there are minor variations. For example, under the NLRA strikers remain eligible to vote for only one year. The NMB has allowed eligibility beyond one year. Professional Cabin Crew Ass’n v. NMB, 872 F.2d 456, 461 (D.C. Cir.), cert. denied, 493 U.S. 974 (1989).

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the majority of the votes cast. Brotherhood of Ry. & S.S. Clerks v. Association for Benefit of Non-Contract Employees, 380 U.S. 650 (1965). Thus, if an election is held in which more than 50% of the employees vote, and one union gets 26% of the total ballots and the other union gets 25%, the union that received 26% of the votes will be certified as the representative of the entire group under the Railway Labor Act. There is no place on the ballot to vote “no-union” in an NMB election; the way to vote “no-union” is to not vote. This unfamiliar system requires much effort to educate the employees on the way to vote “no” or to vote “no union,” i.e., to not vote.

Telephone Electronic Voting. Because of the geographic spread of the unit, and the work schedules of employees, the Board’s historical procedure was a mail ballot election, usually taken over a three- to six-week period, instead of a ballot-box election on one day. Today, the NMB’s standard procedure is telephone voting. NMB, Representation Manual §§ 13.0 – 13.210 Employees receive voting instructions and identification numbers in the mail, and have approximately 21 days in which to call a toll-free number to vote, according to voice prompts. At the end of the voting period the electronic system automatically tallies the votes.

No Contract Bar Doctrine. Under the National Labor Relations Act the “contract bar” doctrine provides that when an incumbent union has a collective bargaining agreement extending to a date certain within three years, no other union can seek an election to represent the employees during that time. The contract serves as bar to a new election. General Cable Corp., 139 N.L.R.B. 1123 (1962). There is no similar doctrine under the Railway Labor Act. Metro North R.R., 10 N.M.B. 345, 350 (1983). A

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competing union can seek an election without regard to the existence or duration of a labor contract. If a new union is certified after an election by the Board, it will simply take over administration of the predecessor union's contract. AFA v. U.S. Airways, 24 F. 3d 1432 (D.C. Cir 1991), IAM v. Northwest Airlines, 843 F. 2d 1119, vacated 854 F. 2d 1088 (8th Cir. 1988); ATE v. Western Airlines, 105 L.R.R.M. (BNA) 3004 (C.D. Cal. 1980).

Certification Bar. Under the RLA the NMB will not entertain a request for an RLA election for a two-year period following certification of a union, 29 C.F.R. § 1206.4(a). There is a one year bar if a union has unsuccessfully sought an election or lost the election. 29 C.F.R. § 1206.4(b).

D. Carrier Interference.

The RLA says a carrier shall not “interfere . . . influence or coerce” its employees in the choice of representative. 45 U.S.C. § 152, Fourth. The Supreme Court has recognized that influence does not mean simple expression of views, that the statute did not repeal the First Amendment and employer free speech is allowed.⁴¹ The employer is free to express its views, as long as there is no threat of retribution for supporting a union, and no promise of benefits for staying non-union. US Airways v. NMB, 177 F.3d 985 (D.C. Cir. 1999); Teamsters v. Braniff, 70 L.R.R.M. (BNA) 3333

⁴¹ Texas & N.O. R.R. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548, 568 (1930):

“Interference” with freedom of action and “coercion” refer to well-understood concepts of the law. . . . The use of the word [“influence”] is not to be taken as interdicting the normal relations and innocent communications which are part of all friendly intercourse, albeit between employer and employee. “Influence” in this context plainly means pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls “self-organization.” The phrase covers the abuse of relation or opportunity so as to corrupt or override the will

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(D.D.C. 1969). The NMB, however, has sometimes applied standards of election conduct more restrictive than the standards evolved by the NLRB and the courts as to the scope of permissible employer conduct during a union election campaign. In USAir, Inc., 17 N.M.B. 377 (1990), for example, the NMB disapproved of campaign tactics routinely used and found acceptable under the NLRA, such as a poster criticizing past experiences of other groups of employees with the Teamsters. The NMB also found USAir’s speech to be coercive where the carrier predicted that the likelihood of strikes would increase, and that the employees would have to pay union dues. In US Airways, 24 N.M.B. 354 (1997), rev’d, 177 F.3d 985 (D.C. Cir. 1999), the Board found interference where the carrier stated that employee committees were an alternative to unionization, and the committees would be disbanded if a union were elected – speech which the D.C. Circuit held was protected by the First Amendment.

Other carrier misconduct which has resulted in re-run elections or special election procedures includes threats to close down the enterprise,⁴² laying off workers,⁴³ and making benefit increases or withholding increases during the election period.⁴⁴ In Laker Airways, 8 N.M.B. 236, 248-50 (1981), supervisors collected the ballots that employees received in the mail from the Board. Since the supervisors knew who gave them the ballots, they knew who was “voting” non-union. The Board held this to be “per

⁴² Mid Pacific Airlines, 13 N.M.B. 178, 190 (1986).

⁴³ Washington Central R.R., 20 N.M.B. 191, 233-34 (1993) (discharge, among other conduct, warrants Key ballot); Transkentucky Transp. R.R., 8 N.M.B.495 (1981) (discharge of employees who collected authorization cards); American Inter-Island, 8 N.M.B.410 (1981) (discharge of union supporters); Florida East Coast Ry., 17 N.M.B. 177, 187 (1990).

⁴⁴ Key Airlines, 16 N.M.B. 296, 309-10, reconsid. denied, 16 N.M.B. 358, 365 (1989); America West Airlines, 17 N.M.B. 79, 98 (1990).

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se” misconduct, set aside the election and conducted a rerun election with special procedures.⁴⁵ In Sky Valet, 23 NMB 276 (1996), the carrier committed an “outrageous” violation when management stated they knew which employees had signed authorization cards, and that these employees would be fired, and 14 who signed cards were fired out of a total workforce 65; this violation was so egregious that the Board issued a certification to the union without an election, based only on a card check.

One unique feature of the Railway Labor Act is that if an RLA employer does engage in unlawful conduct, such as retaliation for union organizing activity, the NMB does not have the authority to remedy that conduct. Unlike the NLRB, the NMB is not a law enforcement agency. See America West Airlines v. NMB, 969 F.2d 777 (9th Cir. 1992). The remedial power for statutory violations under the Railway Labor Act remains with the federal courts.⁴⁶ The Board’s sole remedies relate to the representation process. When it is possible that the dispute would be resolved in NMB procedures, the courts have been reluctant to assert jurisdiction over allegations of unlawful conduct. See Texidor v. Ceresa, 590 F.2d 357 (1st Cir. 1978); AMFA v. United Airlines, 406 F. Supp. 492 (N.D. Cal. 1976). The courts may assert jurisdiction to stop egregious employer conduct which the Board cannot remedy, such as discharge of employees, Stepanischen

⁴⁵ The NMB has devised several election procedures and ballots designed to help the union in a rerun election. In Laker Airways, 8 N.M.B. 236, 256-57 (1981), the NMB used a ballot that contained a choice “yes” or “no” for the petitioning union. The union was elected unless more employees voted no than yes. In other words, the presumption in a normal NMB election that non-voters prefer no union was cast aside in a rerun election to correct for carrier interference. In Key Airlines, 16 N.M.B. 296, 311-13 (1989), to correct for “egregious” carrier interference, the NMB used a ballot that said, “[a]re you opposed to representation” by the union. Unless a majority returned the ballot, the union was certified.

⁴⁶ The criminal penalties for carrier interference have rarely been invoked. See United States v. Winston, 558 F.2d 105, 108 (2d Cir. 1977).

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v. Merchants Despatch Transp. Corp., 722 F.2d 922 (1st Cir. 1983); Lum v. China Airlines Co., 413 F. Supp. 613 (D. Haw. 1976), but otherwise will defer to the Board to control the representation process.⁴⁷

E. Decertification.

There is no express provision in the Railway Labor Act for decertification of a certified representative.⁴⁸ Although, the Mediation Board once took the view that the Act favors the organization of employees, and would not entertain decertification petitions, this position was struck down by the Fifth Circuit on the grounds that the Act also protects employee freedom of choice. Russell v. NMB, 714 F.2d 1332 (5th Cir. 1983), cert. denied, 467 U.S. 1204 (1984). See also In re Chamber of Commerce, 14 N.M.B. 347 (1987).

Historically, RLA employees have pursued decertification by means of a straw-man election, a proceeding in which an employee or group seeks certification as a new representative solely for the purpose of ousting the incumbent. Once certified by the Board, the new representative disclaims his status and the employees are then unrepresented.⁴⁹

⁴⁷ In some circumstances, charges of carrier interference are dismissed because the matter is subject to arbitration. E.g., IAM v. Northwest Airlines, Inc., 673 F.2d 700 (3d Cir. 1982).

⁴⁸ Decertification of a union expressly is provided for under § 9(c)(1) of the National Labor Relations Act, 29 U.S.C. § 159(c)(1).

⁴⁹ In 1985 the Chamber of Commerce of the United States filed a petition suggesting that the Board establish formal decertification procedures. After lengthy hearings and development of a voluminous record, the Board decided that such procedures were not necessary, because of the availability of the straw-man method. See Chamber of Commerce, 14 N.M.B. 347 (1987).

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In Atchison, T. & S.F. Ry., 8 N.M.B. 469 (1981), the Board refused to process a “straw-man” application. The Fifth Circuit subsequently ordered the Board to process the application, stating:

The Act supports but does not require collective bargaining, and in our view, the implicit message throughout the Act is that the “complete independence” of the employees necessarily includes the right to reject collective representation.

Russell, 714 F.2d at 1343 (footnote omitted).

F. Voluntary Recognition.

Under the Railway Labor Act an employer is free, but not required, to recognize a union voluntarily if it has a good faith belief that the union represents the work force. NMB, Representation Manual § 6.0. The employer is free to recognize a union for less than an entire “craft or class,” that is, less than a system-wide group. Summit Airlines v. Teamsters Local No. 295, 628 F.2d 787, 795 (2d Cir. 1980); Burlington Northern v. ARSA, 503 F.2d 58, 63 (7th Cir. 1974), cert. denied, 421 U.S. 975 (1975). Historically, there were many voluntary recognitions in both the airline and the railroad industries.⁵⁰

⁵⁰ At Continental Airlines, the International Association of Machinists was voluntarily recognized but in 1985, following an unsuccessful strike, Continental management was presented with evidence that the majority of mechanics no longer desired IAM representation. Continental then withdrew its voluntary recognition. The union had little recourse except, if it truly had majority support, to secure an NMB election and certification because the court held the matter to be a representation dispute. IAM v. Continental Airlines Corp., No. H-85-5883 (S.D. Tex. 1987). Compare IAM v. Alitalia Airlines, 600 F. Supp. 268 (S.D.N.Y. 1984), aff’d per curiam, 753 F.2d 3 (2d Cir. 1985) (carrier may not withdraw recognition from certified union).

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IV. MINOR DISPUTES

Sections 153 and 184 of the RLA require that a dispute about the interpretation or application of an agreement must be resolved in arbitration. Such a dispute has come to be labelled a “minor” dispute under the RLA:

The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. . . . [T]he claim is to rights accrued, not merely to have new ones created for the future.

Elgin, J.&E. Ry. v. Burley, 325 U.S. 711, 723 (1945). The classification of a dispute as minor does not, however, turn upon or reflect the importance of the issues or the amount involved. There is a presumption in favor of arbitrability (as under the National Labor Relations Act) so that any dispute even arguably covered by the agreement goes to arbitration. Consolidated Rail Corp. v. RLEA, 491 U.S. 299 (1989). The definition of a minor dispute, however, is deceptively simple. The proper classification of such disputes has been the source of much litigation under the RLA.⁵¹

⁵¹ UTU v. Kansas City So. Ry., 172 F.3d 582 (8th Cir. 1999) (commingling of joint owners’ employees at switching yard presented major dispute; lower court failed to consider all the potential Agreements that might govern the dispute); BMWE v. Atchison, Topeka & S.F. Ry., 138 F.3d 635 (7th Cir.), cert. denied, 525 U.S. 869 (1998) (in determining whether dispute over travel allowances presented major or minor dispute, lower court erred in considering only contract language; when Presidential Emergency Board record which led to final contract is considered, carriers’ interpretation is arguably justified and thus dispute is minor); ALPA v. Eastern Air Lines, 869 F.2d 1518 (D.C. Cir. 1989) (contract with other carrier for strike preparation services creates minor disputes); ALPA v. Eastern Air Lines, 863 F.2d 891 (D.C. Cir. 1988), cert. dismissed, 112 S.Ct. 37 (1991) (furloughs in connection with downsizing airline create minor dispute); Local 553, Transport Workers Union v. Eastern Air Lines, 695 F.2d 668 (2d Cir. 1983) (Eastern’s purchase of Braniff South American routes and proposed use of foreign national flight attendants not covered by union contract creates major dispute.)

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A. National Railroad Adjustment Board; Special and Public Law Boards.

The RLA creates and defines the role of a federal agency, the National Railroad Adjustment Board, which is a federally funded arbitration service for the railroad industry. The NRAB is often years in backlog because of budgetary limits and other problems. As an alternative, labor and management can, but rarely do, agree to form a Special Board of Adjustment under the first paragraph of Section 3, Second. Rail labor and management in 1966 secured special statutory amendments, comprising the second paragraph of § 3, Second, which give them the option to create other arbitration boards, which have come to be called “Public Law Boards” (named after the Public Law No. 89-456). Upon request of either party, the carrier and the union must agree to refer any contract dispute to such a private arbitration board rather than to the NRAB. The NMB pays for the neutral arbitrator.

B. Airline System Boards.

When the RLA was amended to include airlines, the statute carried forward the obligation for mandatory arbitration, but did not create a national airline adjustment board. 45 U.S.C. § 184. Congress left for future determination whether such a Board was necessary. 45 U.S.C. §185. Such a Board has never been established. Instead air carriers and their unions have been left to create their own private arbitration mechanisms, which have become known as “System Boards of Adjustment.” The RLA does not require that there be a neutral arbitrator; it simply requires that there be an arbitration mechanism. Thus, if the parties agree that there shall be a four-man board, consisting of two union and two company representatives, and that board deadlocks and

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the parties have not provided for a neutral, in theory there would be no resolution of the grievance.

Typical airline labor agreements have several preliminary steps leading to an evenly divided board, and finally to a board that includes a professional neutral labor arbitrator who actually resolves the dispute.⁵²

C. Judicial Review and Other Court Action In Minor Disputes.

Under section 3, First (q), of the RLA, 45 U.S.C. § 153 First(q), grounds for overturning an arbitration award are limited to failure to conform to the RLA, action in excess of jurisdiction, or fraud. Thus, judicial review of Adjustment Boards is exceedingly narrow. Union Pacific R.R. v. Sheehan, 439 U.S. 89, 93 (1978); Loveless v. Eastern Air Lines, 681 F.2d 1272, 1275-76 (11th Cir. 1982). An award can be reversed only if it is “wholly baseless and completely without reason.” Gunther v. San Diego & A.E. Ry., 382 U.S. 257, 261 (1965).

The fact that arbitration is mandatory means that an employee with a grievance must forego resort to the courts. Andrews v. Louisville & Nashville R.R., 406 U.S. 320 (1972); Union Pacific R.R. v. Price, 360 U.S. 601 (1959). Characterizing a grievance as a tort claim likewise is precluded.⁵³ See Andrews, supra; Kansas City Ry. Co. v. Gant, 738 S.W.2d 490 (Mo. App. 1987). Neither federal nor state courts have

⁵² The National Mediation Board maintains a roster of professional arbitrators who are available to assist in dispute resolution. The Board will designate an arbitrator on request, or will provide a list of names for selection by the parties. Many contracts provide that where the parties cannot agree on a neutral, either party can ask the Board to designate an arbitrator or to provide a list of possible arbitrators.

⁵³ Preemption of state law is judged on the same standard as under the NLRA. Preemption will occur if a state-law claim requires interpretation of the collective bargaining agreement. Preemption will not occur if the claim arises under the state law, rather than under the collective bargaining agreement, even if there are

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authority to interpret RLA labor contracts. ORC v. Pitney, 326 U.S. 561, 565-66 (1946); Slocum v. Delaware, L.&W. R.R., 339 U.S. 239, 243-44 (1950).

An employee or union with a grievance may not resort to a strike or self-help of any sort. The sole remedy is the grievance arbitration process. Brotherhood of R.R. Trainmen v. Chicago River & I. R.R., 353 U.S. 30, 40-42 (1957) (injunction available to bar self-help in a minor dispute).

In contrast to the limitations on employee and union self-help in a minor dispute, a carrier may act upon its interpretation of the agreement so long as its position is even “arguable”. Consolidated Rail Corp. v. RLEA, 491 U.S. 299 (1989). Only where such action would be incapable of remedy following arbitration will the courts entertain the possibility of enjoining carrier conduct in a minor dispute. BLE v. Missouri-K-T R.R., 363 U.S. 528 (1960); IAM v. Eastern Air Lines, 826 F.2d 1141 (1st Cir. 1987); UTU v. Burlington Northern, 458 F.2d 354 (8th Cir. 1972). Thus, the categorization of a dispute as “major” or “minor” is one of fundamental significance in defining the parties’ rights. Unions generally assert that disputes are not “minor” disputes about contract interpretation, but are instead “major” disputes where the carrier has simply disregarded the clear meaning of the collective bargaining agreement and changed the agreement without bargaining. If the dispute is minor, the carrier can act upon its interpretation of the agreement and a strike can be enjoined; if the dispute is major, the union can enjoin the carrier’s change, and a union strike cannot be enjoined.

factual issues that might be the same before an Adjustment Board and in the state court proceeding. Hawaiian Airlines v. Norris, 512 U.S. 246 (1994).

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V. MAJOR DISPUTES

In Elgin, J.&E. Ry. v. Burley, 325 U.S. 711, 723 (1945), the Supreme Court defined the process of collective bargaining under the RLA as a “major dispute” which entails

the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

D. Duty to Exert Every Reasonable Effort to Make Agreements.

Section 2, First of the RLA requires that a carrier and the representative of its employees “exert every reasonable effort to make and maintain agreements” about “rates of pay, rules, and working conditions.” 45 U.S.C. § 152, First. This provision has been called the “heart of the Railway Labor Act,” Brotherhood of Ry. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 377-78 (1969), and is judicially enforceable. Chicago & N.W. Ry. v. UTU, 402 U.S. 570, 576-77 (1971). The substantive duty to bargain includes the duty to bargain in good faith.⁵⁴ The case law applying this duty is not dissimilar from the case law on the same subject under the NLRA. The major U.S. rail carriers historically have bargained jointly as a multi-employer bargaining unit, the

⁵⁴ For example, where it appears that a carrier’s purpose is solely to frustrate the bargaining process, the courts may find that management has not bargained in good faith. AFA v. Horizon Air Industries, 976 F.2d 541 (9th Cir. 1993). The remedy is an injunction to resume the bargaining process at the point when bad faith intruded, and to start over. If there has been a strike in the meantime and employees were out of work for any period of time, the carrier could be liable for backpay for having caused the strike by its unlawful bad faith conduct. IFFA v. Trans World Airlines, 682 F. Supp. 1003, 1022 (W.D. Mo. 1988), aff’d, 878 F.2d 254 (8th Cir 1989), cert. denied, 493 U.S. 1044 (1990).

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National Railway Labor Conference (“NRLC”).⁵⁵ Air carriers historically have bargained separately, except for multi-carrier bargaining with IAM in the 1960s.

Direct Bargaining With Employees. While a carrier lawfully may communicate with employees about the status of bargaining, a carrier does not have the right to bargain directly with employees and bypass the union’s status as the bargaining representative. See, e.g., ALPA v. Flying Tiger Line, 659 F. Supp. 771, 774 (E.D.N.Y. 1987); Brotherhood of Ry. Trainmen v. Richmond, F.&P. R.R., 69 L.R.R.M. (BNA) 2884 (E.D. Va. 1968).

E. Scope of Bargaining Subjects.

The subjects of the duty to bargain under the Railway Labor Act are “rates of pay, rules, and working conditions.”⁵⁶ “Working conditions” generally include almost all subjects that affect the interests of an employee. In Order of Railroad Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330 (1960), the Supreme Court held that a decision to close certain little-used stations was subject to bargaining under the RLA. See also

⁵⁵ NRLC has a staff of professional negotiators who report to a Board of Directors composed of representatives of the major railroads. NRLC negotiates an industry-wide contract for all of the major railroads which elect to join national bargaining by giving NRLC a power of attorney. NRLC does not usually bargain on behalf of smaller carriers or short line railroads. The major carriers often enter into local agreements to supplement the national agreement. The Rail Labor Executives Association (“RLEA”) is the multi-union counterpart to the NRLC in national rail bargaining. There has been litigation about whether and when a carrier or union must participate in national bargaining and whether industry practice may commit certain topics to national bargaining. General Committee v. Burlington N. S.F. Ry., 295 F.3d 1337 (D.C. Cir. 2002); ARASA v. Soo Line R.R., 891 F.2d 675 (8th Cir. 1989); UTU v. Grand Trunk Western R.R., 901 F.2d 489 (6th Cir. 1989).

⁵⁶ Section 2, Eleventh expressly authorizes union security agreements under the RLA. The RLA does not contain a provision like section 14(b) of the NLRA, that allows the states to prohibit compulsory unionism; therefore, RLA union shop agreements are not invalidated by state right-to-work laws. Railway Employees’ Dep’t v. Hanson, 351 U.S. 225 (1956). The Supreme Court has held that only financial core membership can be required, not actual membership, and that such funds may not be used to support political causes unrelated to collective bargaining. See Brotherhood of Ry. & S.S. Clerks v. Allen, 373 U.S. 113 (1963); IAM v. Street, 367 U.S. 740 (1961).

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Detroit & T.S.L. R.R. v. UTU, 396 U.S. 142 (1969) (change in reporting point from central yard to outlying points is major dispute). These cases gave rise to an issue as to whether the mandatory subjects of bargaining under the RLA are more inclusive than under the NLRA. The Supreme Court noted, but did not resolve, this issue in discussing the NLRA duty to bargain in First National Maintenance Corp. v. NLRB, 452 U.S. 666, 686 n.23 (1981), stating:

Construing the scope of bargaining required by § 2 First, of the [RLA] the Court [in Telegraphers] held that the union's effort to negotiate was not "an unlawful bargaining demand," Although the Court in part relied on an expansive interpretation of § 2, First, which requires railroads to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions," . . . its decision also rested on the particular aims of the Railway Labor Act and national transportation policy. The mandatory scope of bargaining under the Railway Labor Act and the extent of the prohibition against injunctive relief in Norris-LaGuardia are not coextensive with the National Labor Relations Act and the Board's jurisdiction over unfair labor practices. [Citations omitted.]

Subsequently, in Pittsburgh & Lake Erie R.R. v. RLEA, 491 U.S. 490 (1989) ("P&LE"), the Supreme Court recognized the concept of "management prerogative" for the first time under the RLA, holding that a decision to leave the railroad business entirely was a non-bargainable management prerogative.⁵⁷ Lower courts subsequently have extended the rationale of P&LE to the sale of less than all of a railroad's lines. CSX Transportation v. UTU, 950 F.2d 872 (2d Cir. 1991); RLEA v.

⁵⁷ The P&LE Court held that the carrier had an obligation to bargain about the effects of a decision to cease operations but that even this obligation ceased when the transaction was consummated. 491 U.S. at 512.

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CSX Transp., 938 F.2d 224, 229 (D.C. Cir. 1991), cert. denied, 112 S.Ct. 1169 (1992); RLEA v. Chicago & N.W. Transp. Co., 890 F.2d 1024, 1025-26 (8th Cir. 1989), cert. denied, 110 S. Ct. 3237 (1990). Thus, the issue has been clarified, but not fully resolved.⁵⁸

F. Bargaining Procedures and Status Quo Requirement.

1. Section 6 Opener.

Section 6 of the RLA, 45 U.S.C. § 156, establishes the initial procedures for collective bargaining as follows:

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of

⁵⁸ In the railroad and airline industries, the ICC and CAB/DOT historically conditioned many major corporate transactions upon the carrier's agreement to labor protective provisions ("LPPs") providing seniority integration procedures, pay protection for those displaced into a lower paying position, pay continuation or a lump sum allowance for those who lost jobs altogether, and moving allowances. See New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979); Allegheny Airlines-Mohawk Airlines Merger, 59 C.A.B. 22 (1972). In 1979, following the Airline Deregulation Act, airline agencies announced that they would no longer routinely impose LPPs. ALPA v. DOT, 838 F.2d 563, 565 (D.C. Cir. 1988); IUFA v. DOT, 803 F.2d 1029, 1032-33 (9th Cir. 1986). Although carriers have a duty to bargain about the effects of managerial decisions, P&LE, 491 U.S. at 512, effects bargaining in the railroad industry is affected by the necessity to arrive at an "implementing agreement" under the ICC's LPPs. See generally Norfolk & Western Ry. v. ATDA, 111 S. Ct. 1156 (1991) (implementing agreement forged by arbitration under LPPs relieves carrier of necessity to bargain before changing conditions).

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conferences without request for or proffer of the services of the Mediation Board.

In essence, section 6 provides that a party that desires to amend or change a contract must first give a written notice to that effect. This notice, called a section 6 notice, triggers the duty to bargain. The other parties have ten days to respond to the notice, to agree to meet, and the meeting must start within thirty days. This initial phase of negotiations consists of direct bargaining between the parties. The duration of such direct bargaining is open ended; it usually continues as long as both parties find it productive.⁵⁹

2. Status Quo.

As section 6 expressly provides, once a section 6 notice has been served, neither side can change the status quo. In Detroit & T.S.L. R.R. v. UTU, 396 U.S. 142, 153 (1969), the Supreme Court defined the status quo as “those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose” Neither side can change current practice under the prior agreement, whether or not the practice is reflected in the terms of the written agreement, until all of the bargaining procedures of the Act have been exhausted.⁶⁰ The expiration

⁵⁹ The last phrase of Section 6 creates a ten-day “window” period after termination of direct bargaining. If neither party invokes mediation within that ten-day period, the bargaining procedures of the Act are concluded. Iberia Air Lines v. NMB, 472 F. Supp. 104 (S.D.N.Y. 1979), aff’d, 636 F.2d 1201 (2d Cir. 1980), cert. denied, 450 U.S. 999 (1981). In practice, at least one party usually invokes mediation.

⁶⁰ Where there is no prior agreement (e.g., during bargaining for an initial contract), section 6 does not impose a status quo requirement. Williams v. Jacksonville Terminal Co., 315 U.S. 386, 399-400 (1942); Virgin Atlantic Airways v. NMB, 956 F.2d 1245, 1253 (2d Cir. 1992), petition for cert. filed, 60 U.S.L.W. 3829 (May 19, 1992) (No. 91-1873); IAM v. Trans World Airlines, 839 F.2d 809, 814 (D.C. Cir.), cert. denied, 488 U.S. 820 (1988); Regional Airline Pilots v. Wings West Airlines, 915 F.2d 1399, 1402-03 (9th Cir. 1990), cert. denied, 111 S. Ct. 2891 (1991); but see IAM v. Transportes Aereos Mercantiles, 924 F.2d 1005, 1008-10 (11th Cir.), cert. denied, 112 S. Ct. 167 (1991) (unratified agreement represented status quo).

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date of the agreement, if any, makes no difference; the parties remain locked in the status quo. Where the past practice has been to allow management to make changes, however, that right continues to be available. Consolidated Rail Corp. v. RLEA, 491 U.S. 299, 311-12 (1989). The scope of the status quo requirement is the source of litigation under the RLA.⁶¹ The parties can define what the status quo will be at the expiration of the contract. ALPA v. Pan American World Airways, 765 F.2d 377 (2d Cir. 1985) (despite fact that wage concessions were in effect up to contract termination date, provision that wages “snap back” to former level as post-contract status quo will be given legal effect).

3. Mediation.

At any time in the direct bargaining process under section 6, either party can invoke the mediation services of the National Mediation Board under section 5 of the Act. Mediation is usually invoked as the parties approach the final or most difficult issues. Invocation of mediation is often used as a delay tactic by a party less interested in early agreement. From that point on, the parties continue to bargain, albeit in the presence of an NMB mediator. The mediation is indefinite, sometimes more than a year. The National Mediation Board decides, in its sole discretion, when the parties will be released from mediation. Litigation to compel the Board to release the parties from mediation has been uniformly unsuccessful. E.g., IAM v. NMB, 930 F.2d 45 (D.C. Cir.), cert. denied, 112 S. Ct. 173 (1991); IAM v. NMB, 425 F.2d 527 (D.C. Cir. 1970).

⁶¹ E.g., ALPA v. Transamerica Airlines, 817 F.2d 510 (9th Cir.), cert. denied, 484 U.S. 963 (1987); IAM v. Aloha Airlines, 776 F.2d 812 (9th Cir. 1985).

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4. NMB Release.

When the Board concludes that further bargaining is not likely to be productive, it can “release” the parties from bargaining by a two step process specified in section 5. First the Board issues a “proffer of arbitration,” which invites the parties to submit their contract dispute to an interest arbitrator to whom they assign authority to reach agreement on their behalf. One side or the other almost always rejects that proffer of interest arbitration, usually because it is unwilling to put its freedom of contract, and economic fate, in the hands of an arbitrator.

Once the arbitration proffer is rejected by either party, section 5 requires the Board to send a notice terminating its official services. That notice starts a thirty-day cooling off period, during which the obligation to preserve the status quo continues. Thereafter, thirty days from the denial of the proffer of arbitration, each side is free to exercise self-help. The union is free to strike and management is free to implement whatever terms and conditions of employment have been reasonably encompassed in its original section 6 notice and subjected to the bargaining process.

5. Presidential Emergency Board.

Section 10 of the Railway Labor Act, 45 U.S.C. § 160, provides that if a dispute is not resolved through sections 5 and 6, and the NMB determines that the dispute threatens a substantial disruption to interstate commerce, the NMB may recommend that the President create an Emergency Board. The President usually establishes an

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Emergency Board upon the NMB recommendation.⁶² Under section 10, an Emergency Board consists of three neutrals, appointed by the President, who are assigned to investigate the dispute for 30 days and issue a report. During the Emergency Board's investigation, and for an additional 30 days, the parties are bound to the status quo.

RLEA v. Boston & Maine Corp., 639 F. Supp. 1092, 1102-04 (D. Me.), aff'd in pertinent part, 808 F.2d 150, 156 (1st Cir. 1986), cert. denied, 484 U.S. 830 (1987). Section 9A provides a different PEB procedure for commuter railroads. Although Emergency Boards have been frequent in the railroad industry, there were no airline Emergency Board for three decades, and only three since 1997.

6. Congressional Action.

While the Presidential Emergency Board is the final step in the RLA's statutory scheme, Congress has frequently intervened in railroad labor disputes to prevent a railroad strike. When an Emergency Board has failed to resolve a dispute, faced with a nationwide rail strike, Congress has several times created another study commission (similar to an Emergency Board) and/or adopted the substantive recommendations of the Emergency Board or study commission and effectively imposed a new agreement on the parties by law. E.g., Pub. L. No. 88-108, 1963 U.S.C.C.A.N. 144 (Arbitration Board 282 resolves fireman crew consist dispute and imposes solution on parties for two-year period); Pub. L. No. 97-262, 1982 U.S.C.C.A.N. 1130 (resolving BMW/Guilford dispute following widespread secondary boycott). Similar Congressional action has been

⁶² Only in the case of the Eastern Airlines dispute with its Machinists union in 1989 has the President failed to follow the recommendation of the NMB to create an Emergency Board.

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rare in the airline industry. The courts have upheld the constitutionality of Congressional action imposing substantive labor contract terms. E.g., Maine Central R.R. v. BMW, 835 F.2d 368, 371 (1st Cir. 1987), cert. denied, 486 U.S. 1042 (1988).

G. Self Help

1. Strikes and Injunctions.

In a major dispute, the union may obtain an injunction to hold the carrier to the status quo prior to the period of self-help. Ruby v. TACA Int'l Airlines, 439 F.2d 1359 (5th Cir. 1971). The carrier also may obtain a strike injunction to hold the union to the status quo before the parties are free for self help. Delta Air Lines, Inc. v. ALPA, 238 F.3d 1300 (11th Cir. 2001), cert denied, 532 U.S. 1019 (2001); United Air Lines, Inc. v. IAM, 243 F.3d 349 (7th Cir. 2001), cert. denied, 122 S. Ct. 202 (2001) (injunction in IAM slowdown); Atlanta & W.P. R.R. v. UTU, 439 F.2d 73 (5th Cir.), cert. denied, 404 U.S. 825 (1971). *See also* Chicago & N.W. Ry. v. UTU, 402 U.S. 570 (1971) (duty to bargain can be enforced by strike injunction). If the carrier has violated the status quo by walking away from its collective bargaining agreement, however, it is possible that it could not obtain a strike injunction. *See* Order of Railroad Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330 (1960).

Where carrier or union conduct threatens to violate the RLA, injunctive relief is available and the anti-injunction ban of the Norris-LaGuardia Act does not apply. An injunction may issue to restore the parties to the procedures prescribed by the Act. E.g., Chicago & N.W. Ry. v. UTU, 402 U.S. 570 (1971) (duty to bargain can be enforced by strike injunction); Brotherhood of R.R. Trainmen v. Chicago River & I. R.R., 353

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U.S. 30 (1957) (carrier can obtain injunction against union strike in minor dispute);

Summit Airlines v. Teamsters Local No. 295, 628 F.2d 787, 795 (2d Cir. 1980)

(picketing enjoined in representation dispute). After the parties have exhausted major dispute procedures, self help is lawful: the union may strike and the carrier may implement changes in rates of pay, rules and working conditions.

2. Expiration Dates; Moratorium Clauses; and Scope of Implementation.

There is debate about whether the agreements under the Railway Labor Act ever expire. Railroad contracts historically have been drafted and treated as continuous documents, without expiration dates. When the parties reached an agreement they would further agree not to reopen the agreement, or certain provisions in that agreement, for a defined period of time. Such a provision is a “moratorium” clause. Railroad labor contracts historically have included such moratorium clauses, but have not included duration clauses.

Airline labor contracts historically have followed the pattern, common under the National Labor Relations Act, of having a duration clause providing that the agreement shall expire – or at least become amendable - at a date certain. It is unclear under the case law whether the contract remains in effect beyond the stated expiration date, or whether the parties are simply maintaining terms and conditions of employment pursuant to statutory requirement. See EEOC v. United Air Lines, 755 F.2d 94, 97-99 (7th Cir. 1985).

Scope of Implementation. In Brotherhood of Ry. & S.S. Clerks v. Florida East Coast Ry., 384 U.S. 238, 247 (1966), the Supreme Court held that, once self-help is

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available in a railroad dispute, the carrier cannot “tear up and annul” the entire collective bargaining agreement. In light of its “duty” to continue operations as a common carrier, however, in addition to the changes it has bargained, it can make additional changes “reasonably necessary” to continue operating in the strike. The court emphasized, however, that such changes will receive close judicial scrutiny. RLEA v. Boston & Maine Corp., 639 F. Supp. 1092, 1104 n.5 (D. Me.), aff’d in relevant part, 808 F.2d 150 (1st Cir. 1986), cert. denied, 484 U.S. 830 (1987); Cox v. Northwest Airlines, 319 F. Supp. 92 (D. Minn. 1970).

In contrast, in the airline industry, the Ninth Circuit has held that where a contract expires by its terms and the parties have completed Section 6 bargaining on whatever items were opened, the carrier is free to change any terms whatsoever. IAM v. Reeve Aleutian Airways, 469 F.2d 990 (9th Cir. 1972), cert. denied, 411 U.S. 982 (1973). The Eighth Circuit, however, has held that only those terms actually subject to bargaining can be changed upon release. Trans World Airlines v. IFFA, 809 F.2d 483 (8th Cir. 1987), aff’d by equally divided Court, 485 U.S. 175 (1988) (per curiam).⁶³

As to items that are bargained, it is sometimes argued by a union that when the RLA bargaining process is exhausted management is free to implement only its last offer. Yet management’s last offer represents an effort to reach compromise. Management will have moved, presumably, from its opening position towards the union in an effort to secure compromise and agreement. When the negotiations are

⁶³ In TWA, provisions not bargained continued in effect because the contract at issue there did not expire by its terms, but automatically renewed itself. The decision thus could be explained in part as premised on the contract language, rather than on the RLA.

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unsuccessful, the law should not lock management into its last position, and thereby create a new floor every time management makes a concession. Such a rule would create a reward and an incentive to a union not to reach an agreement early, and would be a disincentive to management to make any movement at all in the bargaining process.⁶⁴

The scope of implementation is more correctly stated as

When, after compliance with the procedural requirements of the Act relating to a proposed change . . . resort to collective bargaining fails without the fault of management, it may thereafter freely exercise its managerial prerogatives in such areas of operation as may have been up to then disputed.

BLE v. Baltimore & O. R.R., 310 F.2d 503, 511-12 (7th Cir. 1962), aff'd, 372 U.S. 284 (1963).

3. Slowdowns - Sitdowns.

Once self-help is permitted, the union can institute a strike. In Pan American World Airways v. International Bhd. of Teamsters, 894 F.2d 36 (2d Cir. 1990), the Second Circuit held that “intermittent” or “quickie” strikes after the parties have been released for self help are not enjoined under the RLA. Although such activity is “unprotected” under the NLRA,⁶⁵ nothing in the RLA expressly deems it illegal; therefore the Norris-LaGuardia Act precludes an injunction.

⁶⁴ Under the NLRA, the standard is that the employer may implement any proposal made to the union during negotiations, Gulf States Mfg. v. NLRB, 704 F.2d 1390, 1398 n.4 (5th Cir. 1983), or make those changes “reasonably comprehended within its earlier proposals,” NLRB v. Intracoastal Terminal, Inc., 286 F.2d 954, 958 (5th Cir. 1961).

⁶⁵ NLRB v. Blades Mfg. Corp., 344 F.2d 998 (8th Cir. 1965) (slowdowns and employee walkouts unprotected). In National Airlines v. IAM, 416 F.2d 998, 1004-07 (5th Cir. 1969), the Fifth Circuit held that an RLA carrier was not permitted to discharge employees who engaged in an illegal wildcat strike, but merely to permanently replace them. This result is different from, and in marked contrast with, an

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In theory, a slowdown is enjoined under the RLA before the parties are released, just as any other form of self help would be enjoined while the parties are locked in the bargaining process. A good example is the injunction American Airlines obtained against the APA sickout in 1999. American Airlines, Inc. v. Allied Pilots Association, 160 L.R.R.M. (BNA) 2459 (N.D. Tex. 1999), aff'd, 228 F.3d 574 (5th Cir. 2000). In practice, however, it may be difficult for management to document the existence or causes of a slowdown and to secure effective judicial relief. Texas Int'l Airlines v. ALPA, 518 F. Supp. 203, 218-19 (S.D. Tex. 1981); Long Island R.R. v. System Federation No. 156, 289 F. Supp. 119, 125-26 (E.D.N.Y. 1968). The Eleventh Circuit held that where slowdown activity has been documented, the union has an affirmative duty to halt the activity, even if it is a wildcat job action not instigated by the union. Delta Air Lines, Inc. v. ALPA, 238 F.3d 1300 (11th Cir. 2001), cert denied, 532 U.S. 1019 (2001). Although a court may issue an injunction, courts repeatedly have held that the RLA does not create a right to claim damages for a union's unlawful strike.⁶⁶ If an injunction issues, and the union still does not end the strike, a court could hold a union in contempt and impose damages on that basis, as in American Airlines v. APA, 288 F.3d 574, where the court held the union in contempt and imposed \$45 million in damages after APA intentionally failed to comply with a temporary restraining order against a slowdown.

employer's right under the NLRA to discharge employees if they engage in a strike that is unprotected by labor laws.

⁶⁶ Norfolk Southern Ry. v. BLE, 217 F.3d 181 (4th Cir. 2000); CSX Transp., Inc. v. Marquar, 980 F.2d 359 (6th Cir. 1992); Burlington N. R.R. v. BMWE, 961 F.2d 86 (5th Cir. 1992) (same), cert. denied, 506

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4. Secondary Boycotts.

The National Labor Relations Act was amended in 1947 to create prohibitions on certain union conduct, including a prohibition of the secondary boycott.⁶⁷ In the interests of containing the controlled economic warfare of a strike, Congress determined that secondary activities should be made illegal, that as a matter of public policy, the economic battle should not be expanded beyond the primary employer. In Burlington Northern R.R. v. BMWE, 481 U.S. 429 (1987), the Supreme Court recognized that the policy of the Railway Labor Act is to prohibit strikes and avoid unnecessary interruption to Commerce, but held that since Congress did not, at the same time, create a similar prohibition in the Railway Labor Act, secondary boycott activity is not unlawful under the RLA. There was, therefore, no basis on which to override the anti-injunction provisions of the Norris-LaGuardia Act.

5. Sympathy Strikes.

Even if employees of the primary struck carrier cannot be enjoined from setting up secondary picket lines at a “stranger” carrier, at least two arguments have been made that the “stranger” carrier may nonetheless enjoin its own employees from honoring those picket lines. First, when employees picket or withhold their services in “sympathy” with other employees, in a secondary boycott situation or otherwise, their job action is enjoined if there is a “no strike” clause in their collective bargaining agreement. See Trans Int’l Airlines v. Int’l Bhd. of Teamsters, 650 F.2d 949 (9th Cir. 1980), cert. denied,

U.S. 1071 (1993); Louisville & N. R.R. v. Brown, 252 F.2d 149 (5th Cir.), cert. denied, 356 U.S. 949 (1958).

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449 U.S. 1110 (1981); Northwest Airlines v. IAM, 712 F. Supp. 732 (D. Minn. 1989); Trans World Airlines v. IAM, 629 F. Supp. 1554 (W.D. Mo. 1986).

Secondly, even without a “no-strike” clause, sympathetic picketing arguably still could be enjoined.⁶⁸ In Long Island R.R. v. IAM, 874 F.2d 901 (2d Cir. 1989), cert. denied, 493 U.S. 1042 (1990), railroads sought to enjoin their employees from honoring secondary picket lines in sympathy with striking mechanics at Eastern Air Lines. None of the collective bargaining agreements contained a “no strike” clause or provisions expressly permitting or prohibiting the honoring of picket lines. Nevertheless, the court concluded that a proscription of sympathy strikes could be implied from unspecific language of the agreements and past practice, including attendance policies and operating rules, which “contain a variety of affirmative obligations of the employer and the union employees involved, which assume a regular and on-going working relationship.” 874 F.2d at 909. The court found that these provisions created a minor dispute about the employees’ right to have a secondary picket line and that an injunction

⁶⁷ A primary employer is the one who is involved in the labor dispute, whose employees are affected directly. A secondary employer is a third party, a stranger to the operation, possibly a supplier.

⁶⁸ In contrast, a number of courts have reasoned that the primary employees’ right to engage in a strike must carry with it the right of stranger employees to honor picket lines; otherwise, the right to set up picket lines would be hollow. See, e.g., Brotherhood of Locomotive Firemen & Enginemen v. Florida East Coast Ry., 346 F.2d 673, 675-76 (5th Cir. 1965) (sympathy strike treated as part of primary strikers’ major dispute); Arthur v. United Air Lines, 655 F. Supp. 363, 367 (D. Colo. 1987) (carrier violated RLA by terminating nonunion employee who honored ALPA picket lines); Western Maryland R.R. v. System Bd. of Adjustment, 465 F. Supp. 963, 975 (D. Md. 1979) (honoring strangers’ picket lines not enjoined); Northwest Airlines v. TWU, 190 F. Supp. 495, 498 (W.D. Wash. 1961) (sympathy strike is part of major dispute). See also Eastern Air Lines v. ALPA, 710 F. Supp. 1342 (S.D. Fla.), aff’d, 136 L.R.R.M. (BNA) 2392 (11th Cir. 1989) (Eastern pilots could engage in strike in “sympathy” with Eastern mechanics, as long as they would not have struck absent the primary strike, despite evidence that pilots’ real motivation was their own major dispute with Eastern).

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against such conduct was appropriate pending arbitrations. See also SEPTA v. Bhd. of R.R. Signalmen, 882 F.2d 778 (3d Cir. 1989), cert. denied, 493 U.S. 1044 (1990).

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