

Ploughshares into Swords from Buffalo Forge?

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I. INTRODUCTION

The two major statutes that regulate private sector labor relations in the United States provide for arbitration, conciliation, mediation and fact-finding as alternatives to strikes over labor disputes. The Railway Labor Act¹ requires that statutory procedures be exhausted before a strike can occur. The National Labor Relations Act establishes mediation, conciliation and fact-finding procedures, and has been construed as favoring arbitration,²

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1. 45 U.S.C. §§ 151-88 (1976 & Supp. III 1979).

2. See notes 72-154 *infra* and accompanying text.

but leaves to the labor and management parties the decision whether to avail themselves of such alternatives to the strike.³

The two statutory schemes are distinct, although the courts have been willing to refer to the Railway Labor Act in interpreting the National Labor Relations Act⁴ and *vice versa*.⁵ Recently, a conflict has developed among the United States Courts of Appeals in different judicial circuits as to how far principles developed under the National Labor Relations Act should influence interpretations of the Railway Labor Act regarding resort to arbitration and other peaceful procedures as an alternative to a strike. One line of cases would significantly limit the effectiveness of the Railway Labor Act approach.⁶

This article reviews the separate policies embodied in the two statutory schemes, analyzes the main Supreme Court and Court of Appeals cases, and concludes that the law limiting the availability of peaceful procedures under the National Labor Relations Act should not be imported into the Railway Labor Act.

II. BASIC POLICIES—RAILWAY LABOR ACT AND NATIONAL LABOR RELATIONS ACT

The starting point for sound development of principles of construction of labor statutes is an understanding of the basic concepts embodied in the statutes.⁷ The overriding policy of the Railway Labor Act⁸ is different from the policy of the National Labor Relations Act⁹ regarding the appropriateness of strikes. In addition, the role of arbitration, mediation, conciliation and fact-finding in these two statutes is different in historical origin. From these differences should grow different legal principles as to the availability of strike action as an alternative to peaceful procedures.

A. THE RAILWAY LABOR ACT

The first of several enumerated purposes of the Railway Labor Act is "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein. . . ."¹⁰ Nowhere in the Act is the right to strike expressly established, although the Supreme Court has implied such a

3. See notes 127-134 *infra* and accompanying text.

4. 29 U.S.C. §§ 141-188; see *Boys Markets v. Retail Clerks Union Local 770*, 398 U.S. 235, 250-52 (1970).

5. See, e.g., *Brotherhood of Ry. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383-84 (1968).

6. See notes 165-189 *infra* and accompanying text.

7. See generally F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* 169 (1930).

8. 45 U.S.C. §§ 151-88 (1976 & Supp. III 1979).

9. 29 U.S.C. §§ 141-88 (1976 & Supp. III 1979).

10. 45 U.S.C. § 151(a) (1976).

right.¹¹ In contrast, section 13 of the National Labor Relations Act contains a limitation that "[n]othing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."¹²

From the beginning the Congress perceived railroad labor legislation as aimed at reducing strikes by providing alternative mechanisms for resolving disputes. On April 22, 1886, President Cleveland sent a message to the Congress proposing federal legislation:

Something may be done under Federal authority to prevent the disturbances which so often arise from disputes between employers and the employed, and which at times seriously threaten the business interests of the country; and, in my opinion, the proper theory upon which to proceed is that of voluntary arbitration as the means of settling these difficulties.¹³

Ultimately, Congress enacted a measure similar to that proposed by the President.¹⁴ The legislation provided for the federally funded arbitration of disputes if both parties consented.¹⁵ It also provided for the establishment of a temporary fact-finding commission by the President to examine the causes of a controversy, the conditions accompanying it, and the best means for adjusting it. Such commission was to report its findings to the President and the Congress.¹⁶

The legislative history makes it clear that the theory of the legislation was to provide a mechanism for focusing public opinion on railroad labor disputes; compulsion was rejected.¹⁷ Opponents criticized the legislation as illusory unless it provided for compulsory arbitration, and possibly government operation of a struck carrier.¹⁸ Its supporters insisted that compulsion would require resort to military force, and that the incidence of strikes would be reduced if there existed a fact-finding mechanism.¹⁹

The fact-finding provisions of the 1888 legislation were used only once, and its arbitration provisions not at all.²⁰ Nevertheless, its basic principles have been continued in all subsequent railroad legislation, with one unsuccessful exception.²¹ The Erdman Act of 1898²² continued the dis-

11. See *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1968); *Brotherhood of Locomotive Eng'rs v. Baltimore & O.R.*, 372 U.S. 284 (1963).

12. 29 U.S.C. § 163 (1976).

13. 17 CONG. REC. 3761 (1886).

14. Arbitration Act, Ch. 1063, 25 Stat. 501-504 (1888).

15. *Id.* § 5, 25 Stat. 502.

16. *Id.* § 6, 25 Stat. 503.

17. 19 CONG. REC. 3098 (1888).

18. 19 CONG. REC. 3100 (1888) (remarks of Mr. Tillman).

19. 19 CONG. REC. 3101 (1888) (remarks of Mr. Buchanan).

20. See Rehmus, *Evolution of Legislation Affecting Collective Bargaining in the Railroad and Airline Industries*, *The Railway Labor Act at Fifty* 1, 4 (1977).

21. Fact finding or mediation or both was provided for in the Erdman Act of 1898, the New-

inction and mediation and conciliation.²³ It expressly provided that an arbitration award was to be judicially enforceable, and limited the right of employers or employees to engage in economic action during the pendency of arbitration proceedings, or for a fixed period of time after an award was entered.²⁴

The Newlands Act of 1913²⁵ followed the same approach as the Erdman Act, while establishing a Board of Mediation and Conciliation to conduct the mediation and conciliation stages. The Board's express mandate was to attempt to induce the parties to submit their dispute to arbitration if mediation was unsuccessful.²⁶ However, the 1913 Act contained no express provision limiting resort to economic action while the arbitration machinery was in use.

The Transportation Act of 1920,²⁷ which provided for the return of the railroads to private control after operation by the Federal Government during World War I, contained comprehensive provisions to deal with labor disputes.²⁸ The statute built upon previous legislation by imposing an express duty on labor and management to avoid interruptions to commerce by bargaining.²⁹ Unlike earlier statutes, it distinguished between disputes over grievances and disputes over rates of pay.³⁰ Grievances were to be submitted to adjustment boards for arbitration.³¹ A railroad Labor Board was established to consider grievances not decided by an adjustment board, and to decide "just or reasonable" rates of pay.³² The Board also was empowered to suspend agreed-upon increases in rates of pay if the increases were such as to necessitate a substantial readjustment in the rates of any carrier.³³

The 1920 Act departed from previous legislation in two important ways. First, it established a distinction between disputes over the applica-

lands Act of 1913, the Transportation Act of 1920 and the Railway Labor Act of 1926. Voluntary arbitration in differing forms was authorized by the same statutes. See text accompanying notes 22-49 *infra*.

22. Ch. 370, 30 Stat. 424-428 (1898).

23. *Id.* §§ 2-3, 30 Stat. 425 (1898).

24. *Id.* § 7, 30 Stat. 427 (1898).

25. Ch. 6, 38 Stat. 103-108 (1913) (current version at 45 U.S.C. §§ 101-125 (1976)).

26. *Id.* § 2, 38 Stat. 104 (1913).

27. Ch. 91, 41 Stat. 456-499 (1920) (current version is codified in scattered sections of 45, 49 U.S.C.).

28. *Id.* 41 Stat. 469-474.

29. *Id.* § 301, 41 Stat. 469.

30. Compare ch. 91, § 303, 41 Stat. 469-470 (1920) with ch. 91 § 307(b) 41 Stat. 471 (1920).

31. Ch. 91 § 303, 41 Stat. 469-470 (1920).

32. Ch. 91 § 307, 41 Stat. 470-471 (1920) (current version at 45 U.S.C. §§ 131-146 (1976)).

33. Ch. 91 § 307(b), 41 Stat. 471 (1920) (current version at 45 U.S.C. §§ 131-146 (1976)).

tion of existing agreements, and disputes over the establishment of new terms and conditions of employment. This innovation was accepted and continues to the present.³⁴ Second, it provided for compulsory determination by the government of appropriate wage levels.³⁵ This feature, and a determination by the United States Supreme Court that the Board's decisions were not enforceable, led to a breakdown of the Act's machinery.³⁶

In 1926, the Congress enacted, virtually without changes, legislation agreed upon between Rail Labor and Rail Management to replace the 1920 statute.³⁷ The Railway Labor Act of 1926 continued the distinction between "major" and "minor" disputes. Minor disputes were to be arbitrated by adjustment boards voluntarily established by the parties.³⁸ The Railroad Labor Board was abolished.³⁹ A permanent Board of Mediation was established, with jurisdiction over minor disputes not resolved by an adjustment board, disputes over changes in rates of pay, rules, or working conditions, and "any other dispute(s)."⁴⁰ The pattern established by the Newlands Act was followed, in that the Mediation Board was to attempt to induce the parties to submit disputes not resolved by mediation to arbitration.⁴¹ The pattern of the Arbitration Act was followed, in that disputes not resolved by agreement, or by mediation, and not submitted to arbitration could be subjected to fact-finding by an Emergency Board to be created by the President of the United States.⁴² Congress rejected proposals by non-railroad business interests that the legislation provide for suspension of wage increases that might lead to large rate increases.⁴³ It considered proposals by the same interests that amendments to the labor-management draft were necessary to make it clear that strikes were prohibited until all of the procedures under the Act, including the Emergency Board procedure, had been exhausted.⁴⁴ Railroad and Rail labor spokesmen had assured House and Senate committees that the agreed-upon draft sufficiently precluded such strikes, and the committees accepted those assurances.⁴⁵ The tone of the

34. See 29 U.S.C. §§ 153, 155-157 (1976).

35. Ch. 91 § 307(b), 41 Stat. 471 (1920) (current version at 45 U.S.C. §§ 131-146 (1976)).

36. See *Pennsylvania R.R. v. United States Ry. Labor Bd.*, 261 U.S. 72, 84 (1923).

37. See *Hearings on S. 2306 Before the Senate Comm. on Interstate Commerce*, 69th Cong., 1st Sess. 9, 34 (1926) (statement of A.P. Thom & Statement of Donald R. Redberg) [hereinafter cited as *1926 Senate Hearings*]. Compare ch. 347, 44 Stat. 577 (1926) with S. 2306, 69th Cong., 1st Sess. (1926).

38. Ch. 347, § 3, 44 Stat. 578 (1926) (current version at 45 U.S.C. § 151 (1976 & Supp. III 1979)).

39. *Id.* § 14, 44 Stat. 587 (1926) (current version at 45 U.S.C. § 163 (1976)).

40. *Id.* §§ 4-5, 44 Stat. 577 (1926) (current version at 45 U.S.C. §§ 155 & 156 (1976)).

41. *Id.* § 5 (c), 44 Stat. 580 (1926) (current version at 45 U.S.C. § 155 (1926)).

42. *Id.* § 10, 44 Stat. 586 (1926) (current version at 45 U.S.C. § 160 (1976)).

43. See *1926 Senate Hearings*, *supra* note 39, at 50-51.

44. *Id.* at 54-56.

45. *Id.*

hearings and the committee reports make it clear that the purpose of the legislation was to put an end to railroad strikes.⁴⁶

In 1934, the Railway Labor Act was amended to protect employees' rights to organize and to strengthen the mechanisms for resolving minor disputes.⁴⁷ A National Railroad Adjustment Board was established to adjudicate minor disputes not determinable by adjustment boards voluntarily established by the parties.⁴⁸ The provisions of the 1926 Act regarding mediation, voluntary arbitration, and Emergency Board fact-finding were left substantially unchanged, except that the Board of Mediation was renamed the "National Mediation Board" and divested of jurisdiction over minor disputes.⁴⁹

During the hearings on the original Railway Labor Act, testimony by the drafters indicated that the Act was to be judicially enforceable.⁵⁰ However, a number of judicial decisions, spanning forty-five years, were necessary to clarify the scope of this enforcement.⁵¹

During the first thirty years of the Act's history, the courts suggested that an accommodation between the Act's policies against work stoppages and the Norris-LaGuardia Act's protection of work stoppages was appropriate. Nevertheless, work stoppages over grievances were not uncommon.⁵² However, in 1957, the Supreme Court, in *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*,⁵³ expressly held that the Norris-LaGuardia Act must yield to the Railway Labor Act where minor disputes are involved.⁵⁴ The Court rejected the union's contention that arbitration was meant to be an optional remedy and that a union could strike over a minor dispute pending before the Adjustment Board if it wished. The Court reasoned that specific provisions of the Railway Labor Act must take precedence over more general provisions of the Norris-LaGuardia Act.⁵⁵ In a footnote, it distinguished major and minor disputes by pointing out that the Railway Labor Act does not provide a process for finally deciding major disputes like that of the Adjustment Board in a minor dispute case.⁵⁶

The *Chicago River* Court addressed the accommodation question in the factual framework of a minor dispute *pending* before an Adjustment

46. *Id.* at 16-17, 35.

47. Ch. 691, 48 Stat. 1185 (1934) (current version at 45 U.S.C. §§ 151-161 (1976)).

48. See H.R. REP. No. 1944, 73d Cong., 2d Sess. 7-8 (1934).

49. See *id.* at 11-12.

50. See *Hearings Before the House Comm. on Interstate and Foreign Commerce*, 69th Cong., 1st Sess. 40-41, 66-67, 91-94 (1926) [hereinafter cited as 1926 *House Hearings*].

51. See notes 51-71, *infra*.

52. See J. KAUFMAN, *COLLECTIVE BARGAINING IN THE RAILROAD INDUSTRY*, 142-46 (1954).

53. 353 U.S. 30 (1957).

54. *Id.* at 40.

55. *Id.* at 42.

56. *Id.*

Board. Six years later, in *Brotherhood of Locomotive Engineers v. Louisville & Nashville Railroad Co.*,⁵⁷ the Supreme Court addressed the question of whether a union could strike to enforce the award of an Adjustment Board. The union argued that once an award had been rendered by the Adjustment Board, the union should be free to enforce the award as it wished—by invoking judicial enforcement procedures of the Railway Labor Act or by resorting to economic force.⁵⁸ The Supreme Court disagreed, over dissents by Justices Black, Goldberg, and Douglas. It reasoned that a strike in the circumstances of the post-award situation would be no less disruptive of the statutory grievance procedure than was the strike enjoined in the *Chicago River*.⁵⁹ Earlier, the Supreme Court had rejected, in dictum, a strike to protest an Adjustment Board award in *Union Pacific Railroad Company v. Price*.⁶⁰ The courts of appeals have applied the basic principles of *Chicago River* to bar a strike over a minor dispute *before* it is submitted to an adjustment board.⁶¹ These cases would appear to block every avenue of lawful economic action over a minor dispute, establishing arbitration as the exclusive remedy.

Judicial elucidation of the right to strike over major disputes took longer. In *Brotherhood of Railroad Trainmen, Enterprise Lodge v. Toledo, Peoria & Western Railroad Co.*,⁶² the Supreme Court refused to enjoin a strike because the railroad had rejected arbitration of the major dispute.⁶³ The Court held that the Norris-LaGuardia Act barred an injunction because the railroad had not agreed to final and binding arbitration of the dispute under Section 7 of the Railway Labor Act, thereby violating the requirement under Section 8 of the Norris-LaGuardia Act that every reasonable effort to settle the dispute be made.⁶⁴

Later, the Supreme Court held that strikes over major disputes are permissible once the Railway Labor Act mechanisms have been exhausted. The court held that the major dispute processes are mandatory and must be exhausted before a strike is permitted. In *Detroit & Toledo Shore Line R.R. v. United Transportation Union*,⁶⁵ the carrier sued to enjoin a strike over its unilateral changes in work assignments. The Supreme Court held

57. 373 U.S. 33 (1963).

58. *Id.* at 40.

59. *Id.* at 42.

60. 360 U.S. 601, 611 n.10 (1959).

61. See *Railway Clerks v. Railway Express Agency, Inc.*, 391 F.2d 657 (8th Cir. 1968); *Brotherhood of Ry. Carmen v. Chicago & N.W. Ry.*, 354 F.2d 786 (8th Cir. 1965); *Louisville & N.R.R. v. Brown*, 252 F.2d 149 (5th Cir. 1958), *cert. denied*, 356 U.S. 949 (1958) *cf.* *United Transport. Union v. Penn Central Transport Co.*, 505 F.2d 542, 545 (1974) (no strike threat).

62. 321 U.S. 50 (1944).

63. *Id.* at 65.

64. *Id.*

65. 396 U.S. 142 (1969).

that, because the railroad had violated the obligations imposed on it by changing the *status quo*, the union "cannot be expected to hold back its own economic weapons, including the strike."⁶⁶ Narrowly read, *Shore Line* holds that the carrier is required to exhaust the processes of the Act before resorting to self-help—in this case, unilateral promulgation of new terms and conditions of employment—and that the union is permitted to strike when this obligation is violated. But, *Shore Line* generally is understood to stand for the proposition that the Act's processes must be exhausted by both sides, in order to promote industrial peace.⁶⁷

In 1969, the Court, in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*,⁶⁸ found implicit in the Act's statutory scheme the ultimate right of the disputants to resort to self-help.⁶⁹ Not until 1971, in *Chicago & North Western Railroad Company v. United Transportation Union*⁷⁰ did the Supreme Court directly decide that a strike could be enjoined until the Act's major dispute mechanisms had been exhausted.⁷¹

In summary, railroad labor legislation was intended from the outset to prevent disruptions to the continued operation of carriers covered by the legislation. Congress considered an outright prohibition against strikes to be impracticable, and perhaps unconstitutional.⁷² Instead, it adopted a compulsory set of processes which were required to be exhausted before the right to strike would exist. These processes included mandatory arbitration of "minor" disputes, and mandatory negotiation, mediation, and fact-finding with respect to major disputes.⁷³

B. THE NATIONAL LABOR RELATIONS ACT

The National Labor Relations Act⁷⁴ evolved in a climate that should have focused Congressional attention on dispute prevention even more strongly than when the Railway Labor Act of 1926⁷⁵ was enacted. The number of employee days lost to strikes in 1933 was the greatest in any year since 1921.⁷⁶ In 1934 a threatened steel strike,⁷⁷ and violent con-

66. *Id.* at 155.

67. See, e.g., *Carbone v. Meserve*, 645 F.2d 96, 98 (1st Cir. 1981).

68. 394 U.S. 369 (1969).

69. *Id.* at 378.

70. 402 U.S. 570 (1971).

71. *Id.* at 584. See generally *Chicago R.I. & Pac. R. Co. v. Switchmen's Union*, 292 F.2d 61 (2d Cir. 1961), *cert. denied*, 370 U.S. 936 (1962).

72. See 1926 Senate Hearings, *supra* note 37, at 89-90.

73. See 29 U.S.C. §§ 153, 156, 160 (1976).

74. The National Labor Relations Act of 1935 was amended by the Labor Management Relations Act of 1947.

75. See generally I. BERNSTEIN, *TURBULENT YEARS* (1970).

76. *Id.* at 173.

77. See *id.* at 198-99, 202.

frontations involving Auto Lite employees in Toledo,⁷⁸ teamsters in Minneapolis,⁷⁹ longshoremen in San Francisco,⁸⁰ and textile workers in the South and New England⁸¹ required Presidential intervention and the use of military force.⁸² In each of the major confrontations, mediation and voluntary arbitration occurred on an *ad-hoc* basis.⁸³

It is notable that the National Labor Relations Act⁸⁴ emerged in so different a form from the Railway Labor Act. As in the railroad industry, the burning public policy issues in the 1920's and 1930's involved the right of independent trade unions to represent employees who favored such representation by a majority vote.⁸⁵ The National Labor Relations Act⁸⁶ established legal machinery almost exclusively concerned with selection of the bargaining representative and establishment of the bargaining relationship, with little regard to dispute settlement.⁸⁷ It was perceived that legal protection of the right to organize, without more in the way of government intervention, would reduce industrial unrest.⁸⁸

Before the enactment of the National Industrial Recovery Act in 1933,⁸⁹ federal labor legislation applicable to commerce and industry generally had focused on restricting the power of federal courts to limit labor disputes. The Clayton Act of 1914⁹⁰ and the Norris-LaGuardia Act of 1932⁹¹ both contained precatory language endorsing the right to organize. However, their remedial provisions were limited to defining narrowly the jurisdiction of federal courts to grant injunctions against strikes or other con-

78. *See id.* at 222-27.

79. *See id.* at 242-50.

80. *See id.* at 272-90.

81. *See id.* at 305-10.

82. *Id.*

83. On June 14, 1934, AFL President Green promised the rank and file of the Association of Iron, Steel and Tin Workers that President Roosevelt would establish a special board to investigate, mediate and propose voluntary arbitration. This promise abated a threat to launch a steel strike. *Id.* at 202. The Autolite strike was settled by negotiation in June, 1934, after ad-hoc mediation and a proposal for arbitration. *Id.* at 222-27. The Minneapolis truckers strike was settled through White House directed mediation on August 21, 1934. *Id.* at 250. Labor Secretary Frances Perkins believes that the refusal of employees to arbitrate worsened the San Francisco strike. *Id.* at 289-90. In the Cotton Textile strike, the President appointed a board of inquiry to make recommendations and to promote voluntary arbitration. *Id.* at 310.

84. 29 U.S.C. § 153.

85. S. REP. No. 573 74th Cong., 1st Sess. 1-2 (1935).

86. *Supra*, note 84.

87. S. REP. No. 573, 74th Cong., 1st Sess. 1-2 (1935).

88. *Id.*

89. Ch. 90, 48 Stat. 195 (1933).

90. Clayton Act, ch. 323, 38 Stat. 730 (current version at 15 U.S.C. § 18 (1976 & Supp. III 1979)).

91. Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (current version at 29 U.S.C. §§ 101-115 (1976)).

certed activity.⁹²

Section 7 of the National Industrial Recovery Act⁹³ required codes established under the Act to contain provisions protecting the right of employees to organize and bargain collectively.⁹⁴ After the National Recovery Administration experienced difficulty in interpreting Section 7, a National Labor Board was created.⁹⁵ The Board engaged in mediation and arbitration activities aimed at dispute adjustment.⁹⁶ However, the Board's effectiveness was limited by employers, refusals to cooperate⁹⁷ and by Presidential settlement of a threatened automobile strike in 1933 that rejected the Board's position on exclusive representation.⁹⁸

On March 1, 1934, Senator Wagner introduced legislation to place the National Labor Board on firmer footing. His bill defined a number of "unfair labor practices" which could be prevented by the Board, acting if necessary through federal district courts.⁹⁹ Other sections of the bill authorized the Board to proffer mediation and conciliation and to engage in arbitration if consented to by the parties.¹⁰⁰ The existing Conciliation Service in the Department of Labor was to remain, although the respective responsibilities of the Board and the Service were not clearly defined.¹⁰¹

After hearings in March and April, 1934, the Senate Labor Committee reported a substitute bill sponsored by Senator Walsh. That bill created a National Industrial Adjustment Board within the Department of Labor.¹⁰² The Board would have authority to adjudicate unfair labor practice charges, but only after mediation and conciliation had failed.¹⁰³

President Roosevelt preferred an *ad-hoc* approach to the establishment of formal machinery and was sensitive to management pressure against the Wagner and Walsh bills.¹⁰⁴ On June 12, 1934, he proposed a measure that became Public Resolution No. 44,¹⁰⁵ enacted by the Con-

92. Clayton Act, ch. 323, § 20, 38 Stat. 738 (1914) (current version at 15 U.S.C. § 52 (1976 & Supp. III 1979)); Norris-LaGuardia Act, ch. 90, § 1, 47 Stat. 70 (1932) (current version at 29 U.S.C. § 101 (1976)).

93. National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933) (current version at 15 U.S.C. § 701 (1976)).

94. *Id.* § 7, 48 Stat. 198 (current version at 15 U.S.C. § 705-707 (1976)).

95. I. BERNSTEIN, *supra* note 75, at 173.

96. Exec. Order No. 5611 (December 16, 1933).

97. (Statement of Senator Wagner Introducing S. 1958) 79 CONG. REC. 2371 (1935) (Statement of Sen. Wagner).

98. I. BERNSTEIN, *supra* note 75, at 185.

99. S. 2926, 73d Cong., 2d Sess., §§ 5, 6 (1934).

100. S. 2926, 73d Cong., 2d Sess., §§ 204 (mediation) & 206 (arbitration) (1934).

101. S. 2926, 73d Cong., 2d Sess., § 301 (1934).

102. *Id.* § 4.

103. S. REP. NO. 1184, 79th Cong., 2d Sess. 3 (1946).

104. I. BERNSTEIN, *supra* note 75, at 190-91.

105. *Id.* at 200.

gress on June 15.¹⁰⁶ This legislation authorized the President to establish "Boards" to investigate issues in labor disputes, to hold representation elections where appropriate, and to petition circuit courts for enforcement of their procedures.¹⁰⁷ Under authority of the resolution, the President established a National Steel Labor Relations Board on June 28,¹⁰⁸ and a National Labor Relations Board on June 29.¹⁰⁹

The Steel Board was involved almost immediately in settling the threatened steel strike.¹¹⁰ The National Labor Relations Board was involved more-or-less informally in the Toledo, Minneapolis, San Francisco, and Textile confrontations mentioned *supra*.¹¹¹ In each of these cases, the disputes were resolved by a process of mediation and sometimes voluntary arbitration.¹¹² Nevertheless, the Board's first two chairmen, Lloyd Garrison and Francis Biddle, emphasized the Board's quasi-judicial functions.¹¹³ Both were prominent members of the bar and sought to defuse management opposition to the Board by stressing impartiality and reliance on traditional legal procedures.¹¹⁴ However, the Board's effectiveness was limited by its inability to enforce its decisions.¹¹⁵

After overwhelming Democratic Party successes in the 1934 elections, Senator Wagner again introduced legislation.¹¹⁶ This time the legislation was more limited in scope, and aimed at strengthening the National Labor Relations Board as a quasi-judicial agency.¹¹⁷ Although the Railway Labor Act was cited favorably as precedent, supporters of the Wagner bill emphasized the need to keep the Board's quasi-judicial functions separate from conciliation, mediation and arbitration.¹¹⁸ The resulting statute, unlike Senator Wagner's 1934 bill, did not authorize the Board to engage in dispute settlement through mediation or arbitration nor did it require resort to such procedures.¹¹⁹

In 1947, the Congress undertook to overhaul the National Labor Rela-

106. 78 CONG. REC. 12237 (1934).

107. Pub. Res. No. 44, 73d Cong., 2d Sess. (1934).

108. Exec. Order No. 6751 (June 28, 1934).

109. Exec. Order No. 6763 (June 29, 1934).

110. See I. BERNSTEIN, *supra* note 73, at 200-205.

111. See *id.* at 227-28, 241-51, 271-93.

112. See *id.* at 228, 249-50, 294-95.

113. *Id.* at 319.

114. *Id.* at 337.

115. *Id.* at 322.

116. S. 1958, 74th Cong., 1st Sess. (1935).

117. I. BERNSTEIN, *supra* note 75 at 323.

118. See *Hearings on S. 1958 Before the Committee on Education and Labor*, 74th Cong., 1st Sess. 86-87 (testimony of Francis Biddle); 1462-63 (undesirable for Labor Board to be involved in conciliation and mediation); 103; (experience under the Railway Labor Act) (1936).

119. The final legislation deleted section 12 of Senator Wagner's original S. 1958, which provided for the Labor Board to engage in arbitration.

tions Act.¹²⁰ Responding to a wave of strikes during the later years of World War II and immediately afterward, attention was given specifically to strengthening dispute settlement.¹²¹ The result was a modest move in the direction of mandatory negotiation and the opportunity for mediation before a strike could be called. Section 8(d) of the resulting legislation¹²² required 60 days advance notice of a desire by either party to modify or terminate a collective bargaining agreement, and prohibited strikes during such period.¹²³ Notice of disputes not resolved in negotiation was to be given to the Federal Mediation and Conciliation Service, a new agency established by the legislation.¹²⁴ This provision is similar in some respects to Section 6 of the Railway Labor Act, in that it prohibits economic action during a statutorily defined period of negotiation.¹²⁵ However, Section 8(d), unlike Section 6, does not continue the prohibition against economic action during mediation.¹²⁶ The Mediation Service under the new legislation is authorized to seek to induce the parties to submit their dispute to arbitration, like the Mediation Board under the Railway Labor Act.¹²⁷ Thus, after the 1947 amendments, the National Labor Relations Act recognized the appropriateness of mediation and arbitration of disputes over new agreements but did not require resort to the processes.

The 1947 amendments to the National Labor Relations Act also added a terminal fact-finding stage similar to the Emergency Board procedure under the Railway Labor Act. Section 206 permits the President to appoint a "board of inquiry" to inquire into the issues involved in a threatened or actual strike and make a written report. Section 207 authorizes the President to direct the Attorney General to seek an injunction against a strike for a period of 60 days.¹²⁸

The effect of both the Railway Labor Act and the National Labor Relations Act terminal stages is to provide for a judicially enforceable 60-day "cooling-off" period and for a public report on the facts of the dispute. The rationale of the mechanism is to bring public opinion to bear on the parties, but both provisions have been criticized as ineffective and inhibitive of the

120. See S. Rep. No. 105 on S.1126 at 1-3, 80th Cong., 1st Sess. (1947).

121. See S. REP. NO. 105 on S.1126 at 13, 80th Cong., 1st Sess.

122. 29 U.S.C. § 148(d) (1976).

123. See S. REP. NO. 80TH CONG., 1ST SESS. at 21; Committee of Conference on Labor-Management Relations Act, 80th Cong., 1st Sess., *reprinted in* [1947] U.S. CODE CONG. & AD. NEWS 1135, 1140-41.

124. See note 123 *supra*.

125. 45 U.S.C. § 148(d) (1976).

126. 29 U.S.C. § 148(d) (1976).

127. See Committee of Conference on Labor-Management Relations Act, 80th Cong., 1st Sess., *reprinted in* [1947] U.S. CODE CONG. & AD. NEWS 1168-69.

128. *Id.*

bargaining process.¹²⁹

Theoretically, the obligations of Section 8(d) of the National Labor Relations Act¹³⁰ can be enforced in the same manner as requirements of Section 6 of the Railway Labor Act.¹³¹ A strike occurring before the statutory notice periods and the opportunity for mediation and conciliation have been satisfied can be enjoined. The Railway Labor Act provisions are enforceable judicially at the insistence of the employer.¹³² The National Labor Relations Act provisions are judicially enforceable by the National Labor Relations Board, which is empowered by Section 10 to seek injunctive relief against unfair labor practices.¹³³

Practically, however, injunctive relief under Section 10 rarely is necessary because Section 8(d)(4) of the National Labor Relations Act provides that employees who engage in a strike in violation of the provisions of 8(d) lose their protected status under the Act.¹³⁴ Thus, the employer can discharge them and hire replacements, with no obligation to re-employ the strikers. Usually, this is a sufficient deterrent against strikes in violation of the section.

Injunctions have been granted under the emergency fact-finding provisions of Section 206.¹³⁵ In this respect the deferral of the right to strike under the terminal stage of both statutes is similar; the strike must be postponed until public opinion can be focused on the dispute by a neutral panel appointed in each case.

The treatment of grievance arbitration under the two statutes is strikingly different. Specific machinery for the adjustment of grievances had been included in rail labor legislation since the 1920 Act.¹³⁶ In contrast, the 1935 National Labor Relations Act contained no reference to such adjustment.¹³⁷ In the 1947 amendments a precatory provision was added declaring that "final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."¹³⁸ However, no machinery or compulsion to arbitrate grievances was included.

129. See A. Cox & D. Bok, *LABOR LAW 945 (Railway Labor Act), 955 (Labor Management Act) (1969)*.

130. 29 U.S.C. § 148(d) (1976).

131. 45 U.S.C. § 156 (1976).

132. See *Chicago & N.W. R. v. Transportation Union*, 402 U.S. 570, 584 (1971).

133. 29 U.S.C. § 151(e) (1976).

134. 29 U.S.C. § 148(d) (4) (1976).

135. See *United Steelworkers v. United States*, 361 U.S. 39 (1959).

136. See text accompanying notes 34-38, *supra*.

137. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-166 (1976 & Supp. III 1979)).

138. 29 U.S.C. §§ 173(d), 203(d) (1976).

As noted *supra*, arbitration of grievances in the railroad industry has been required since 1920.¹³⁹ In industry generally, little use was made of grievance arbitration until the Second World War.¹⁴⁰

During the War, the War Labor Board¹⁴¹ strongly encouraged the use of grievance arbitration.¹⁴² After the war, grievance arbitration spread rapidly. According to one commentator, by 1952 98% of all collective bargaining agreements provided for arbitration.¹⁴³ Today, the International Labor Organization estimates that more than 90% of American agreements provide for arbitration.¹⁴⁴

Nevertheless, grievance arbitration, despite its prevalence, remains voluntary under the Labor Management Relations Act. This fact is crucial to an understanding of the differing legal principles that govern the relationship between rights, arbitration and strikes under the Labor Management Relations Act as compared with the Railway Labor Act.¹⁴⁵

In 1960, the Supreme Court expressed a national labor policy in favor of arbitration as a substitute for industrial strife. In *United Steelworkers of America v. Warrior & Gulf Navigation Co.*,¹⁴⁶ the court said, "A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement."¹⁴⁷ In addition, the Court broadly construed this contractual duty to arbitrate.¹⁴⁸

Ten years later, in *Boys Markets, Inc. v. Retail Clerks*,¹⁴⁹ the Supreme Court held that a strike in violation of a collective agreement that contained an arbitration provision could be enjoined notwithstanding the Norris-LaGuardia Act.¹⁵⁰ Crucial to the Court's reasoning was the proposition that "any incentive for employers to enter into [arbitration arrangements] is necessarily dissipated if the principal and most expeditious method by which the no-strike obligation can be enforced is eliminated."¹⁵¹

In 1976, the Supreme Court decided *Buffalo Forge Co. v. Steelworkers*,¹⁵² which limited the application of *Boys Markets* to strikes over arbitrable grievances. The Court reasoned that the purpose of *Boys Markets* was

139. See notes 34-38, *supra*.

140. See A. Cox & D. Bok, *supra* note 129, at 519.

141. See *id.* at 519.

142. See *id.*

143. See *id.*

144. See INTERNATIONAL LABOUR OFFICE, CONCILIATION AND ARBITRATION PROCEDURES IN LABOUR DISPUTES 65 (1980).

145. See *Boys Markets v. Retail Clerks*, 398 U.S. 235 (1970) (arbitration is voluntary).

146. 363 U.S. 574 (1960).

147. *Id.* at 578.

148. *Id.* at 584-85.

149. 398 U.S. 235 (1970).

150. *Id.* at 253.

151. *Id.* at 248.

152. 428 U.S. 397 (1976).

to encourage arbitration, and that this purpose could not be furthered by enjoining strikes over disputes that were not clearly subject to arbitration. Thus, the Court established the principle that the parties themselves should decide the scope of the arbitration remedy,¹⁵³ and that a strike over disputes not covered by that remedy was permissible under the national labor policy.¹⁵⁴

The core of these Supreme Court decisions is that arbitration, being desirable but voluntary, should be enforced by injunction only where the parties have provided for it. This is the balance struck between the express policy favoring arbitration and the right to strike. This logic is applicable only to the scheme of the Labor Management Relations Act, not to the Railway Labor Act where there is no express policy in favor of the right to strike but there is statutorily mandated arbitration. Under the Railway Labor Act, the purpose of an injunction against a strike is to enforce the statute, not to provide an incentive for the parties to agree to arbitration, since arbitration is required no matter what the parties wish.

III. RECENT CASES CREATING A PRE-EXHAUSTION RIGHT TO STRIKE FOR THE RAILWAY LABOR ACT.

The courts in three judicial circuits have considered the scope of permissible strike activity under the Railway Labor Act in the situation where the right to strike had not been gained because "major dispute" procedures of the Act had not been exhausted. Out of these cases, three quite different conceptual approaches have arisen to accommodate the Railway Labor Act and the Norris-LaGuardia Act, which divest the federal courts from jurisdiction to issue injunctions against strikes except under certain circumstances. One approach is to permit an injunction only where the dispute giving rise to the strike is arbitrable; which is the equivalent of applying *Buffalo Forge*¹⁵⁵ to the Railway Labor Act. Another approach is to apply the *policy* against disruption of the Railway Labor Act to permit injunctions, except in the context of an impasse in negotiations which has been pursued through all of the Act's major dispute steps. An intermediate approach is to interpret the jurisdiction of the agencies established by the Act broadly so as to permit injunctions only to protect the Act's procedures rather than its policies, but to make injunctions available in most cases. This section reviews these decisions and seeks to extract from the courts' opinions the main elements of the conflicting approach to accommodation.

Wien Air Alaska v. Teamsters,¹⁵⁶ involved a refusal to perform struck

153. *Id.* at 411-12.

154. *Id.* at 407.

155. 428 U.S. 397 (1976).

156. 93 L.R.R.M. 2934 (D. Alas. 1976).

work by employees of Wien. Wien had been granted authority by the Civil Aeronautics Board to serve routes normally served by Alaska Airlines, which was on strike. Certain Wien employees refused to work on these routes on the basis that to do so would cast them in the role of strike breakers.¹⁵⁷ The employees argued that the Norris-LaGuardia Act, and the analysis suggested by *Buffalo Forge*,¹⁵⁸ deprived the court of jurisdiction to enjoin their sympathetic action.

The district court disagreed and granted an injunction. It expressed doubt that *Buffalo Forge* had any application to Railway Labor cases because of the unique policy considerations of the Act.¹⁵⁹ However, on the facts before it, the court concluded that the applicability of *Buffalo Forge* was not a crucial issue and that the dispute was not a sympathy strike but a protest against work assignments made by Wien. Accordingly, the dispute arguably was an arbitrable grievance and *Buffalo Forge* would not prohibit an injunction.¹⁶⁰

*Summit Airlines v. Teamsters*¹⁶¹ involved organizational picketing by a Teamsters local seeking the right to represent cargo handlers at JFK Airport.¹⁶² The court noted that the Railway Labor Act did not refer explicitly to the resolution of disputes over the recognition of a union as a bargaining representative.¹⁶³ However, it also observed that the Railway Labor Act, unlike the National Labor Relations Act, was specifically designed to avoid interruptions to the operation of any carrier.¹⁶⁴ Thus, it concluded that the mechanism for resolving recognition disputes under Section 2 of the Act, combined with the grant of jurisdiction in Section 5(d) to the National Mediation Board in cases involving "any other dispute not decided in conference between the parties," provided sufficient positive command to avoid the bar of the Norris-LaGuardia Act.¹⁶⁵ The availability of a specific procedure under the Act under the court's interpretation thus did not make it necessary to decide whether the Act's policies, by themselves, would permit an injunction.

*Federal Express Corp. v. Teamsters*¹⁶⁶ involved similar facts, but the Court of Appeals for the Ninth Circuit reached a result opposite to the result in the *Summit Airlines* case. Federal Express facilities in South San Francisco were picketed by Teamsters, members protesting wages and labor

157. *Id.*

158. *Id.*

159. *Id.* at 2935.

160. *Id.*

161. 628 F.2d 787 (2d Cir. 1980).

162. *Id.* at 788.

163. *Id.* at 790.

164. *Id.* at 794.

165. *Id.* at 794-95.

166. 617 F.2d 524 (9th Cir. 1980).

standards in effect for Federal Express employees. Although the court did not explicitly find that the picketing was intended to force recognition of the Teamsters, that undoubtedly was its purpose.¹⁶⁷ The starting point for the court's analysis was the proposition that, "when no specific legal command of the Railway Labor Act is violated . . . the Norris-LaGuardia Act generally deprives the courts of jurisdiction to enter injunctions."¹⁶⁸ Failing to find any procedure under the Act applicable to the dispute between Federal Express and the Teamsters, it concluded that an injunction could not issue.¹⁶⁹

Wien, *Summit Airlines*, and *Federal Express* all involved facts which could have supported a conclusion that the dispute should have been handled under procedures provided by the Railway Labor Act, thus addressing Norris-LaGuardia Act accommodation in a procedural context. Two other cases presented a different accommodation question: whether the Norris-LaGuardia Act should be accommodated to the *policies* of the Railway Labor Act.

*Seaboard World Airlines, Inc. v. Transport Workers*¹⁷⁰ involved an effort by the Transport Workers Union (TWU) to force Seaboard to modify a collective bargaining agreement to extend security benefits to navigators hired after the agreement was entered into. Seaboard refused to bargain on the ground that the original agreement prohibited modification until a later date.¹⁷¹ TWU threatened to strike and the district court issued an injunction. The district judge believed that the provision prohibiting renegotiation contained some ambiguity, thus requiring determination by an Adjustment Board under Section 3 of the Railway Labor Act.¹⁷² Thus, his reasoning was similar to that employed by the *Wien* court. The Court of Appeals determined that an injunction was proper, but for a different and much more sweeping reason. This court was unable to find any relevant question of interpretation of the collectively bargained provision.¹⁷³ Rather, the relevant dispute involved determination of the legality of an unambiguous bar to renegotiation.¹⁷⁴ The question of legality was a question for the district court, not a Railway Labor Act arbitrator.¹⁷⁵ Thus, the basis for an injunction to protect the Railway Labor Act *processes*—the basis in *Wien*, and arguably in *Summit Airlines*—was not available. However, the court went on to find a basis for the injunction in the general duty, imposed by

167. *Id.* at 526.

168. *Id.*

169. *Id.*

170. 425 F.2d 1086 (2d Cir. 1970), *aff'd*, 443 F.2d 437 (2d Cir. 1971).

171. *Id.* at 1088.

172. *Id.* at 1089.

173. *Id.* at 1090.

174. *Id.* at 1091.

175. *Id.*

Section 2 of the Act, to make every reasonable effort to settle disputes in order to avoid disruptions to commerce.¹⁷⁶ Thus, an injunction against a strike pending further consideration by the district court was proper.¹⁷⁷

On remand, the district court found the prohibition against renegotiation of the navigator security agreement to be legal and granted a permanent injunction.¹⁷⁸ The Court of Appeals affirmed.¹⁷⁹ The affirmance was based more on a review of the finding that the provision of the collective agreement was legal, than on any question of whether a legal provision would support an injunction against a strike.¹⁸⁰ The court concluded, however, that the prohibition against renegotiation of the agreement was consistent with the policy of the Railway Labor Act. To find otherwise "means that any agreement must be subject to reopening every thirty days [which] would convert an Act intended as an instrument for achieving industrial peace into a potent weapon for perpetual warfare."¹⁸¹

*Trans International Airlines v. Teamsters*¹⁸² involved facts nearly identical to *Seaboard*, but produced a different result. Trans International flight attendants had entered into a collective agreement that prohibited strikes against military operations even after the expiration of the agreement.¹⁸³ After the agreement expired, an impasse was reached in negotiations and the flight attendants struck.¹⁸⁴ An injunction against the strike, insofar as it extended to military flights, was issued.¹⁸⁵ The Court of Appeals reversed, concluding that the strike violated the agreement, but that the injunction violated the Norris-LaGuardia Act.¹⁸⁶ It found the no-strike provision unambiguous, thus presenting no question for arbitration under Section 3 of the Railway Labor Act.¹⁸⁷ It concluded that "absent a substantial nexus with statutory dispute settlement mechanisms or an agreement to arbitrate, an injunction may not issue to prevent a plain breach of a no-strike clause by a union."¹⁸⁸ Conceding statutory policies in favor of private activity to prevent strikes, it found other statutory policies in favor of the ultimate right to strike to be more forceful.¹⁸⁹

The cases reviewed in the preceding section present three conceptual

176. *Id.*

177. *Id.* at 1092.

178. See 443 F.2d 437, 438 (2d Cir. 1971).

179. *Id.* at 440.

180. *Id.* at 439-40.

181. *Id.* at 439.

182. 650 F.2d 949 (9th Cir. 1980), *cert. denied*, 449 U.S. 1110, 49 U.S.L.W. 3515 (1981).

183. *Id.* at 953.

184. *Id.* at 954.

185. *Id.*

186. *Id.* at 968.

187. *Id.* at 960.

188. *Id.* at 962.

189. *Id.* at 961.

questions, the answers to which will profoundly affect how the Norris-LaGuardia Act should be accommodated with the Railway Labor Act in judicial actions to prevent strikes. First, how broadly should specific procedural and jurisdictional provisions of the Railway Labor Act be construed so as to permit injunctions under the view that accommodation is appropriate only to protect Railway Labor Act processes? Second, should the duty under Section 2, first "to . . . maintain agreements"¹⁹⁰ be construed to permit injunctions against violation of explicit unambiguous agreement provisions, even when recourse to one of the administrative agencies established by the Act is not appropriate? Third, should the policy against disruption be applied to permit injunctions in other cases, e.g. where no bargaining relationship exists and therefore the duty to maintain agreements is not applicable. Each of these questions must be addressed separately.

The first question relates to the scope of the procedures of the Railway Labor Act. The Ninth Circuit views accommodation of the Act with the Norris-LaGuardia Act as appropriate only to protect those procedures.¹⁹¹ Accordingly, the availability of anti-strike injunctions will be determined by the scope of the Railway Labor Act processes. Respectable arguments exist for viewing the Railway Labor Act as providing comprehensive machinery for virtually any type of dispute that may arise.

The Railway Labor Act provides procedures for handling two types of disputes: "major disputes" and "minor disputes."¹⁹² Major disputes relate to the negotiation of new terms and conditions of employment (interest disputes), while minor disputes involve disagreements over the interpretation or application of existing terms and conditions of employments (rights disputes).¹⁹³ Additionally, as the *Summit Airlines* court noted, Section 5(c) of the Act invests the National Mediation Board with jurisdiction over "any other dispute not decided in conference between the parties."¹⁹⁴ The legislative history of this provision, reviewed by the court, focuses on representation disputes as the "other" type of dispute within NMB jurisdiction. However, the language is broad enough to exclude the possibility that the Congress intended any class of disputes to be beyond the Act's ken. Similarly, the Supreme Court, in the *Elgin* case, noted that the jurisdiction of an adjustment board was not intended to be limited to interpretation of explicit provisions in formal collective bargaining agreements. It defined minor disputes, within the jurisdiction of an adjustment board, to include disputes over "omitted" cases. "In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those

190. 45 U.S.C. § 152 (1976).

191. See notes 166-169 & 182-189 and accompanying text, *supra*.

192. See *Elgin, Joliet & Easter Ry. v. Burley*, 325 U.S. 711 (1945).

193. *Id.* at 723.

194. 628 F.2d at 790.

covered by the collective agreement"¹⁹⁵ Certainly the statutory language of Section 5(c), combined with the interpretative language of the *Elgin* courts, is sufficient to support an approach that virtually any dispute under the Railway Labor Act is referable either to the National Mediation Board, thus delaying the right to strike, or to an adjustment board, thus eliminating a right to strike.

No judicial decision has been found that excludes the possibility of a dispute being outside the coverage of Railway Labor Act procedures. Nevertheless, strong support appears to exist for the expansive reading of the *Wien* and *Summit Airlines* courts. Moreover, this interpretation of the Act's procedural and jurisdictional provisions would have permitted an injunction to be issued in all five cases. An injunction was issued in *Wien* because the court found the dispute to be arbitrable and thus within the minor dispute jurisdiction of an adjustment board. It equally well could have concluded that the dispute was a sympathy strike, not covered by any statutory procedure. The injunction in *Seaboard* could have been justified on the basis that the application of the restriction against renegotiation should have been addressed by an adjustment board. Even if no interpretation was called for, how the agreement should be applied in light of industrial relations considerations was surely a question within the competence of an adjustment board. In *Summit Airlines*, the approach to statutory construction suggested here was utilized to support the issuance of an injunction. Similarly, the *Federal Express* court could have recognized the picketing for what it was—an effort to organize Federal Express—and granted an injunction under the same reasoning employed by the *Summit Airlines* court. Finally, the *Trans International* court could have concluded that the no-strike clause, while unambiguous, necessitated resolution of questions of application, properly referable to an adjustment board. All that is necessary to reach these conclusions is the acceptance of the principle that Congress intended the dispute resolution machinery of the Railway Labor Act to be expansive.

The second question—whether contractual obligations can be enforced by injunction when resort to statutory processes is inappropriate—presupposes that a class of disputes exists which are outside the jurisdiction of the Act's agencies. Such a class of disputes would include those over provisions in collective agreements which are so unambiguous as not to need interpretation by an adjustment board. An obvious example is the type of no-strike clause at issue in the *Trans International* case, or the limitation on renegotiation at issue in the *Seaboard* case. Both of these provisions limited the availability of certain rights under the Act: the right to

195. 325 U.S. at 723.

strike after the exhaustion of major dispute procedures and the right to compel bargaining.

The Second Circuit would make such provisions enforceable by injunction under the duty of Section 2 to "make and *maintain* agreements."¹⁹⁶ The Ninth Circuit would not.¹⁹⁷ Basic to these differing applications of Section 2 is a conflicting interpretation of the basic policy preference of the Railway Labor Act. The *Seaboard* opinion emphasizes the Congressional policy against disruptions.¹⁹⁸ The *Trans International* opinion emphasizes the policy in favor of the ultimate right to strike.¹⁹⁹ The *Trans International* opinion also seems to import concepts borrowed from the National Labor Relations Act while acknowledging that such importation is inappropriate in some cases.²⁰⁰ The *Seaboard* approach is preferable, and consistent with the recognition of a limited right to strike when a negotiating impasse survives the delay envisioned by the Act's major dispute processes.

The problem with the *Trans International* approach is not so much that it is wrong logically, but that it will prove to be unworkable in practice. If the parties to a Railway Labor Act agreement draft the agreement clearly, and then one party violates an unambiguous provision, the reasoning of *Trans International* would permit a strike to occur; not only a strike in violation of a clear no-strike clause as under the facts of the case, but also a strike in protest of a clear violation by the employer under the logic of the opinion. Such strikes could result from day-to-day administration of collective agreements; a result obviously inconsistent with the policy of the Railway Labor Act to promote the maintenance of agreements and to avoid strikes.

The *Seaboard* approach, while construing the jurisdictional provisions of the Act narrowly, avoids this problem, but concludes that a strike in violation of a collective agreement can be enjoined even if it appears that no real dispute over the interpretation of the agreement exists. In addition, by making voluntary undertakings by management and labor practically enforceable by injunction, the *Seaboard* holding encourages the parties to resolve their differences privately. This procedure is more in line with the Act's policies.

The third question, whether the Act's policies against strikes should be applied by themselves to support injunctions against strikes or picketing, presents more difficult legal and policy questions. Yet the question is presented directly by the facts in *Federal Express* as the Court of Appeals understood them.²⁰¹ The picketing complained of by Federal Express was

196. See text accompanying notes 170-181 and accompanying text, *supra*.

197. See notes 166-169 and accompanying text, *supra*.

198. 443 F.2d at 439.

199. 650 F.2d at 962.

200. 650 F.2d at 959.

201. 617 F.2d at 525.

conducted by persons neither employed by Federal Express nor representative of its employees. Obviously, therefore, no question of the Section 2 duty to maintain agreements could be involved. Similarly, absent a purpose to organize Federal Express employees, it is difficult to find jurisdiction for a Railway Labor Act administrative agency, even under the expansive reading of the Act's procedural coverage advocated *supra*.

However, it should be remembered that the question of whether an injunction is available requires application of two statutes: the Railway Labor Act and the Norris-LaGuardia Act. The latter Act is not necessarily infinite in its reach, protecting as it does only disputes "arising or growing out of labor disputes."²⁰² Thus, the question in a factual setting like that in *Federal Express* involves a determination whether the "involving or growing out of a labor dispute" language in the Norris-LaGuardia Act should be given a restrictive interpretation when disruption to a Railway Labor Act carrier will result absent an injunction.

Commentators and courts have noted that the Norris-LaGuardia Act was intended especially to protect union organizing efforts.²⁰³ Thus, it may be less consistent with the Norris-LaGuardia Act for injunctions to issue against area standards picketing as in *Federal Express* or other types of activity intended to protect or enhance the representational status of a labor organization than it is for injunctions to issue against secondary picketing.²⁰⁴

However, a type of pressure against a Railway Labor Act carrier can be conceived of that is unrelated to the interests specifically sought to be protected by the Norris-LaGuardia Act, which nevertheless could not be enjoined under either the process-accommodation theory or any of the Railway Labor Act section 2 theories set forth *supra*. For example, a Railway Labor Act carrier might be picketed in order to force it to change its position on a public policy issue. For example, the carrier might be picketed by trucking employees concerned about loss of market share from the motor carrier mode to the rail mode, or, as has happened recently in the ocean shipping industry, Railway Labor Act carriers could be picketed to prevent the transportation of goods destined for a particular country.²⁰⁵

202. 29 U.S.C. § 101 (1976).

203. See Perritt, *Am I My Brother's Keeper? Secondary Picketing Under the Norris-LaGuardia Act*, 68 Geo. L.J. 1191 (1980); *Ashley Drew & N. Ry. v. Transportation Union*, 625 F.2d 1357 (8th Cir. 1980).

204. See note 203, *supra*.

205. In *New Orleans Steamship Assoc. v. Longshore Workers*, 626 F.2d 455 (5th Cir. 1980), and *Baldovin v. Longshoremen's Assoc.*, 626 F.2d 445 (5th Cir. 1980), *cert. granted*, 49 U.S.L.W. 3725 (1981), the court considered the legality of a boycott of cargo destined for the Soviet Union. In *New Orleans Steamship*, the court concluded that a strike called to further political objectives does "involve or grow out of a labor dispute" for purposes of the Norris-LaGuardia Act. Accordingly, it reversed the grant of an injunction against the strike before the question of its per-

Surely in such circumstances, the underlying purpose of the Railway Labor Act to permit the uninterrupted operation of railroads and airlines could only be served by permitting injunctions to be issued. The only legal justification for such injunctions would be the policy against disruption taken by itself.

IV. APPLICATIONS TO A CONFLICT INVOLVING PUBLIC EMPLOYEES AS "STRANGER PICKETS"

These situations may be illustrated by reviewing the positions of the various parties in the 1981 subway and bus strike in Philadelphia.²⁰⁶ The Southeastern Pennsylvania Transportation Authority (SEPTA) provides mass transportation service in the Philadelphia metropolitan area. Some services are provided directly, and some services through contract.²⁰⁷ Subway and bus service within the city of Philadelphia is provided directly, through SEPTA's City Transit Division. Certain other services are provided through SEPTA's Red Arrow and Frontier Divisions, and by contract with Consolidated Rail Corporation (Conrail).²⁰⁸

At 12:01 A.M. on March 15, 1981, Local 234 of the Transport Workers Union (TWU) began a legal strike against SEPTA after negotiations covering employees in the City Transit Division had reached an impasse.²⁰⁹ Shortly thereafter, picket lines were set up at City Transit facilities.²¹⁰ On March 16, and subsequently, Local 234 also set up picket lines at Red Arrow Division, Frontier Division, and Conrail facilities.²¹¹ The legality of the extended picketing was determined in state court under state law.²¹²

Local 234's attempt to exert pressure on Conrail provides an interesting example in which the legal principles reviewed in this section could have been applied. Local 234 and the City Transit Division were covered by Pennsylvania's Public Employee Relations Act.²¹³ Neither was covered by the National Labor Relations Act²¹⁴ because SEPTA is not an "employer" and Local 234 is not a "labor organization" under the definitions of

missibility had been arbitrated, 626 F.2d at 469, and affirmed an injunction enforcing an arbitration award under the rationale of *Boys Markets v. Retail Clerks*, 398 U.S. 235 (1970), 626 F.2d at 445. In *Baldovin*, the court affirmed the district court's denial of an injunction requested by the NLRB against the "secondary picketing" on the grounds that the dispute between the Longshoremen and the Soviet Union was not "in commerce" and thus was not within the NLRB's jurisdiction. 626 F.2d at 454.

206. See generally *Southeastern Pennsylvania Transp. Auth. v. Transp. Workers*, No. 2667 (Phila. C.P. Pa. 1981) [hereinafter cited as SEPTA].

207. See SEPTA Complaint at para. 1,6,7.

208. See SEPTA Preliminary Injunction at 1.

209. See SEPTA Plaintiff's Memorandum of Law at 1-2.

210. See *id.* at 2.

211. See SEPTA Preliminary Injunction at 2.

212. See generally SEPTA, March 6, 1981 transcript.

213. PA. STAT. ANN. tit. 43, §§ 1101.101 *et seq.* (Supp. 1965-1980) (Purdon).

214. 29 U.S.C. § 141 (1976 & Supp. III 1979).

that Act.²¹⁵ Conrail and its employees were covered by the Railway Labor Act.²¹⁶ The National Labor Relations Act did not apply to Conrail or its employees for the same reason that Act did not apply to SEPTA.²¹⁷

While the Local 234 pickets were present at Conrail facilities, virtually no Conrail employees crossed the picket lines. These Conrail employees will be referred to as the "non-crossers." Certain groups of Conrail employees also refused to work regardless of whether it would have been necessary for them to cross a picket line in order to work. These Conrail employees will be referred to as the "sympathy strikers." The picketing members of Local 234 were not Conrail employees. They will be referred to as the "stranger pickets."

If Conrail had filed an action in federal court to seek relief from the disruption to its commuter activities caused by the picketing, it could have sought injunctions against three types of defendants: the *non-crossers*, the sympathy strikers, and the stranger pickets. The conflicting principles of *Federal Express*,²¹⁸ *Summit*²¹⁹ and *Seaboard World Airways*²²⁰ would have led to different results, depending on the type of defendant.

An injunction against the sympathy strikers should have been available on a minor dispute theory. Since the sympathy strikers were employees of Conrail, both parties were subject to the Railway Labor Act. If Conrail had framed the issues as a dispute over whether express provisions of its collective bargaining agreements, or past practice, prohibited sympathy strikes, and the facts arguably supported its position, a federal court should have issued an injunction under the rationale of *Chicago River*,²²¹ *Trans International*²²² and *Federal Express*.²²³

Similarly, an injunction against the non-crossers should have been available on the same minor dispute theory. The non-crossers also were

215. Section 2 of the National Labor Relations Act, 29 U.S.C. § 152 (1976), excluded "any state or political subdivision thereof" from the definition of employer and defines labor organization as an organization which "exists for the purpose . . . of dealing with 'employers' . . ."

216. 45 U.S.C. §§ 151-88 (1976).

217. See note 215, *supra*.

218. See notes 166-169 and accompanying text, *supra*.

219. See notes 161-165 and accompanying text, *supra*.

220. See notes 170-181 and accompanying text, *supra*. The carrier would argue that the conduct by its employees is a "minor dispute" requiring the interpretation of a collective bargaining agreement (or the rights flowing from an unwritten "practice"), or that it is an "omitted case," i.e. a dispute that has arisen incidentally in the course of employment. Such disputes also are minor disputes under the Railway Labor Act and are subject to compulsory adjustment according to the Act's procedures under section 3. *Elgin, J. & E. Ry. v. Burley*, 325 U.S. at 722-24, *Airline Flight Attendants v. Texas Intl. Airways*, 411 F. Supp. 954, 961 (S.D. Tex. 1976), *aff'd*, 566 F.2d 104 (5th Cir. 1978).

221. See notes 53-56 *supra* and accompanying text.

222. See notes 170-181 *supra* and accompanying text.

223. See notes 166-169 *supra* and accompanying text.

Conrail employees, and if Conrail could have offered facts supporting a colorable position that past practice required its employees to cross stranger picket lines, the same cases would have permitted an injunction.²²⁴

A much harder case would have been presented if Conrail had sought an injunction against the stranger pickets—the most practicable course of action. The stranger pickets were not employees of Conrail, and thus no minor dispute existed. Under *Federal Express*²²⁵ no injunction would have been permitted. However, the stranger pickets also did not seek to organize Conrail employees, and the rationale of *Summit* would not have supported an injunction either. Only *Seaboard World Airways*²²⁶ could have articulated a basis for an injunction against the stranger pickets, and the principle of that case would have had to be extended considerably beyond the facts before the *Seaboard World Airways* court. An injunction against the stranger pickets could have been supported only if the policy of the Railway Labor Act²²⁷ against disruption were strong enough to preclude interference by any third party in the functioning of the employer-employee relationship.

While *Virginian Railway*,²²⁸ *Chicago River*²²⁹ and *Seaboard World Airways*²³⁰ justified injunctive relief in part because of the policy of the Railway Labor Act²³¹ against disruption of services, the facts of all three cases involved disputes between a Railway Labor Act carrier and its own employees. Only in *Summit* was an injunction available against strangers to the employment relation, and there, the organizational objective meant that specific Railway Labor Act procedures under Section 2²³² were available to those strangers.²³³ Therefore, reference to legal principles beyond those associated with the particular labor statutes covered by this article is necessary to resolve the issue.

Before moving to an examination of those principles, it should be noted that an injunction against the stranger pickets probably would have been available under *Ashley, Drew and Northern v. Transportation*

224. See *Chicago & Ill. Midland Ry. v. Railroad Trainmen*, 315 F.2d 771, 774 (7th Cir. 1963), vacated as moot, 375 U.S. 18 (1963) (refusal to cross picket line violates RLA duty to confer); see also *Lakefront Dock & R.R. Term. v. Longshoremen*, 333 F.2d 549 (6th Cir. 1962) (injunction against honoring picketing line).

225. See notes 166-169 *supra* and accompanying text.

226. See notes 170-181 *supra* and accompanying text.

227. 45 U.S.C. §§ 151-188 (1976 & Supp. III 1979).

228. 300 U.S. 515 (1938).

229. 353 U.S. 30 (1957).

230. 425 F.2d 1086, *aff'd*, 443 F.2d 439 (2d Cir. 1971).

231. 45 U.S.C. § 152 (1976).

232. 45 U.S.C. § 142 (1976).

233. 628 F.2d 787 (2d Cir. 1980).

Union.²³⁴ There, the Eighth Circuit found an affirmative basis for jurisdiction to enjoin stranger picketing under the Interstate Commerce Act.²³⁵ However, the subject of inquiry here is limited to whether an affirmative basis can be found in the Railway Labor Act itself, a question which the *Ashley-Drew* court did not reach.²³⁶

The question might be framed this way: When relations established by a federal statute are interfered with by a person not covered by the statute, does a federal court have jurisdiction to enjoin the interference? In a number of specific areas not involving labor law, the answer is "yes." For example, an injunction may issue to prevent interference by a third party with the performance of the statutory duty owed by a common carrier to a shipper or consignee under the Interstate Commerce Act.²³⁷ It is also true under general equitable principles that a person may be enjoined against interfering with performance of a contract of employment.²³⁸

The same answer should obtain when the interference is with the employment relationship established by the Railway Labor Act.²³⁹ That employment relationship closely resembles a common law contract relationship, except that the statute limits the rights of the parties to terminate or modify the contract. There is no logical reason why these limitations, which are intended to prevent disruption of service,²⁴⁰ should make it legally easier for a third person to cause disruption than under common law.

The reasoning of the courts that made third-party interference with Interstate Commerce Act duties enjoined²⁴¹ also should lead to the conclusion that third-party interference with Railway Labor Act duties should be enjoined. In the case of the Interstate Commerce Act, the defendants are interfering with performance of a statutory duty by the plaintiff: the common carrier obligation. In the case of the Railway Labor Act, the defendants are interfering with realization by the plaintiff of statutory rights: continuity of service by plaintiff's employees. The relationship between the plaintiff and the statutory burdens and benefits of the two statutes would seem to make

234. 625 F.2d 1357 (8th Cir. 1980). In the case of services provided by Conrail to SEPTA, it was not clear that common carrier obligations under the Interstate Commerce Act were applicable.

235. *Id.* at 1370.

236. *Id.*

237. *Id.*

238. See 42 AM. JUR. 2d *Injunctions* § 99 (1969).

239. 45 U.S.C. §§ 141-88 (1976).

240. 45 U.S.C. § 142(1) (1976).

241. See *Ashley, Drew & Northern Ry. v. Transportation Union*, 625 F.2d 1357, 1370 (8th Cir. 1980); *Chicago & Ill. Midland Ry. v. Railroad Trainmen*, 315 F.2d 771, 774 (7th Cir. 1963); *Lakefront Dock & R.R. Term v. Longshoremen*, 333 F.2d 549, 552 (6th Cir. 1962); *Railroad Trainmen v. New York Central R.R.*, 246 F.2d 114, 122 (6th Cir. 1957), *cert. denied*, 355 U.S. 877 (1967).

the case for an injunction against third-party interference stronger under the Railway Labor Act than under the Interstate Commerce Act.

In *Tunstall v. Locomotive Enginemen & Firemen*,²⁴² the Supreme Court held that federal courts have jurisdiction to enjoin acts which violate Railway Labor Act duties, even though the conduct (racial discrimination by a labor organization) is not subject to regulation by the major or minor dispute procedures or by the representation procedures of the Act. This precedent also supports the availability of an injunction against stranger pickets. Conrail, like the individual negro employees in *Tunstall*, is protected by the Act. The defendants, stranger pickets in the Conrail case, and a labor organization in *Tunstall*, are causing violation of a goal of the Act: uninterrupted rail service in Conrail, fair representation in *Tunstall*. Indeed, the only important distinction between the stranger picket case (Conrail) and *Tunstall* would seem to be that in *Tunstall* the defendant was a person directly regulated by the Railway Labor Act whereas the stranger pickets are not directly regulated by the Act.

Finally, an injunction against the stranger pickets would appear to be warranted under the Supreme Court's analysis in *Cort v. Ash*.²⁴³ *Cort v. Ash* identified four factors to be considered by a federal court in determining whether a remedy for violation of a statutory right should be implied:

1. Whether the plaintiff is a member of a class protected by the statute;
2. Whether there is indication of explicit or implicit legislative intent to create the remedy or to deny it;
3. Whether it is consistent with the underlying purposes of the legislative scheme to imply the remedy sought by the plaintiff; and
4. Whether plaintiff's cause of action is one traditionally relegated to state law, so as to make it inappropriate to infer a cause of action based on federal law.²⁴⁴

Each of these factors would seem to militate in favor of granting an injunction against the secondary pickets. Conrail, as a carrier, is a member of the class protected by the Railway Labor Act. The Railway Labor Act contains no express jurisdictional or remedial provisions, and all of the cases, beginning with *Virginian Railway*,²⁴⁵ support the proposition that the legislature intended injunctive relief to be available to protect rights created by the Act. It is consistent with the underlying scheme of the Act—the prevention of disruptions to rail service—to permit third parties disrupting such service to be enjoined. Finally, *Andrews v. L & N Railroad Co.*²⁴⁶ supports the con-

242. 323 U.S. 210 (1944).

243. 422 U.S. 66 (1975).

244. *Id.* at 78. The implication of remedies under the Railway Labor Act has been considered in a recent article: Arouca, *Damages for Unlawful Strikes Under the Railway Labor Act*, 32 *HASTINGS L.J.* 779 (1981).

245. 300 U.S. 515 (1938).

246. 406 U.S. 320 (1972).

clusion that an action against stranger pickets is more closely associated with federal law than with state law because the right interfered with—the Conrail employment relation—is a creature of federal law, thus resolving the fourth *Cort* factor of granting an injunction.

Accordingly, it would seem that the best reasoning in the hypothetical federal action for an injunction against the stranger pickets would be the following: (1) The purpose of the stranger picketing is to cause Conrail employees not to perform service under collective bargaining agreements entered into under the Railway Labor Act. (2) Failure to perform service under the agreements could be enjoined if the Conrail employees themselves were the actors.²⁴⁷ (3) An injunction against third party interference with legal relationships is permitted under general equity principles.²⁴⁸ (4) Injunctions have been determined to be the appropriate means of protecting other Railway Labor Act rights. (5) Implying an injunctive remedy against third party interference with Railway Labor Act duties meets the tests articulated by the Supreme Court for implied remedies. (6) The Norris-LaGuardia Act does not preclude an injunction against the stranger pickets.²⁴⁹ (7) Therefore, an injunction should issue.

This result is different from *the result* which would be reached with respect to stranger picketing of an employer covered by the National Labor Relations Act.²⁵⁰ Under that act, the affirmative basis for an injunction would have to be based on specific performance of a contract under the authority of section 301.²⁵¹ The *Boys Markets*²⁵² doctrine as interpreted by *Buffalo Forge*²⁵³ permits jurisdiction only to the extent necessary to vindicate an agreement to arbitrate.²⁵⁴ The Norris-LaGuardia Act²⁵⁵ would be accommodated only to the extent necessary to further consensual arbitration.²⁵⁶ Thus, the stranger picketing, being covered by the Norris-LaGuardia

247. See notes 53-61, *supra*.

248. See 42 AM. JUR. 2d *Injunctions* § 99 (1969).

249. See Perritt, *supra* note 203, which considers the question whether the Norris-LaGuardia Act precludes federal jurisdiction to enjoin secondary action. The issue addressed here is whether the Railway Labor Act provides an affirmative basis for such jurisdiction.

250. See *New Orleans Steam Ship Assoc. v. Longshore Workers*, 626 F.2d 455 (5th Cir. 1980). "Stranger picketing" involves picketing by persons not covered by the collective agreement in force at the picketed workplace. Hence, an injunction against such picketing cannot be supported logically as intended to enforce that collective agreement against a party thereto.

251. 29 U.S.C. § 185(a) (1976); see *New Orleans Steam Ship Assoc. v. Longshore Workers*, 626 F.2d 455, 465 (5th Cir. 1980).

252. *Boys Markets v. Retail Clerks*, 398 U.S. 235 (1970).

253. *Buffalo Forge v. Steelworkers*, 428 U.S. 397 (1976).

254. See notes 152-154 and accompanying text, *supra*.

255. 29 U.S.C. §§ 101-115 (1976).

256. See *New Orleans Steam Ship Assoc. v. Longshore Workers*, 626 F.2d 455 (5th Cir. 1980).

dia Act—at least in the Fifth Circuit²⁵⁷—and not being within the contractual arbitration clause would not be enjoined.²⁵⁸

But, the Congressional purpose of the Railway Labor Act, being distinguishable from the purpose of the National Labor Relations Act,²⁵⁹ would provide an affirmative basis for an injunction, and the Norris-LaGuardia Act would not preclude an injunction.²⁶⁰

The history of the Railway Labor Act, reviewed in this article, shows that the Act is intended to eliminate the disruption caused by strikes and other economic action except by the immediate parties after they have exhausted the procedures of the Act. Its primary aim is to promote peaceful resolution of disputes. The article also shows that the National Labor Relations Act envisions a greater role for economic action. The policy of the latter Act should not be applied to distort realization of the policy goals of the former Act. *Buffalo Forge*²⁶¹ should not permit "ploughshares to be beaten into swords."

257. *See id.*

258. *See* note 250, *supra*.

259. *See* text accompanying notes 7-154, *supra*.

260. *See* *Ashley, Drew & Northern Ry. v. Transportation Union*, 625 F.2d 1357 (8th Cir. 1980); Perritt, *supra* note 203.

261. *Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397 (1976).

