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Aspects of Labor Law Affecting Labor-Management Cooperation in the Railroad and Airline Industries

Henry H. Perritt Jr.

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Aspects of Labor Law Affecting Labor- Management Cooperation in the Railroad and Airline Industries

Henry H. Perritt, Jr.*

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None of these individuals bears any responsibility for the contents of this article. However, they did help the author to identify issues and to characterize party positions. The author also thanks research assistants David B. Smith, Michelle Nofer, and Beth Drew for their assistance in adapting the Labor Department report.

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I. INTRODUCTION

A. *Genesis of the Article*

1. The Labor Laws Project

The United States Department of Labor (the Department) has embarked on a study to review the nation's labor laws and collective bargaining traditions and practices which may inhibit the improve-

ments of labor-management relations. The study, colloquially known as "The Laws Project," or "The Labor Laws Project," is designed to assess whether the existing legal framework impedes many of the cooperative efforts the Department publicly encourages. If so, the study examines those laws to determine whether, through interpretation or modification, the laws can be made to support both the actual components as well as the goals of labor-management cooperation rather than to conflict with them. The Department published a preliminary report in 1986 intended to increase awareness and support for labor-management cooperation and to stimulate debate on the issues encompassed by The Labor Laws Project.¹

2. The Railway Labor Act Inquiry

The Department's Bureau of Labor-Management Relations and Cooperative Programs (the Bureau) asked the author to appraise the unique characteristics of the Railway Labor Act (RLA)² pertaining to the legal barriers to labor-management cooperation and also to include a history and description of the RLA, examine methods of resolving stalemates under the RLA, and explain the National Mediation Board (NMB) approach to problem solving. The author was also asked to comment on the principles of representation under the Act, enforcement of RLA duties by the courts, and the scope of bargaining issues as they effect cooperation. This article is adapted from the author's report to the Bureau.

The RLA is the oldest federal labor relations statute. Until the early 1950s, most labor lawyers and labor relations professionals thought the Act represented an ideal legal framework for encouraging the peaceful resolution of employer-employee controversies. However, the railroads' lost market share and technological innovation in the railroad and airline industries required major adjustments to the work structure in those industries. Due to these events, collective bargaining under the Act seemed to falter as an ideal problem solving mechanism. The political nadir of the Act occurred in 1971 when the Nixon Administration proposed scrapping it entirely. More recently, the RLA has received more favorable attention as a model of labor relations law conceptually different from the National Labor

1. BUREAU OF LABOR-MANAGEMENT RELATIONS, U.S. DEP'T OF LABOR, U.S. LABOR LAW AND THE FUTURE OF LABOR-MANAGEMENT COOPERATION (1986) (BLMR 104) [hereinafter 1986 LABOR LAW REPORT].

2. 45 U.S.C. §§ 151-188 (1982).

Relations Act (NLRA),³ and one which might encourage more innovative and cooperative labor-management relationships.

B. Scope of the Article

1. Relation of Labor-Management Cooperation to Collective Bargaining

Two possible approaches exist for evaluating the legal climate of labor-management cooperation. One approach considers labor-management cooperation as a process separate and apart from collective bargaining. The other considers such cooperation to be identical to healthy collective bargaining. This article embraces the second approach based on the principles explained in this section.

Labor-management cooperation is a rather vague concept. Some commentators and decision makers define it as management and employee representatives dealing with each other in a positive spirit, taking into account the legitimate needs and aspirations of everyone as they work together to solve problems, even if accommodating the interests of opposing parties means sacrificing self-interests.⁴ This conception requires behavior that is not motivated by immediate self-interest and departs substantially from past behavioral patterns in either union or nonunion environments.

If the non-self-interested concept of cooperation could exist, collective bargaining, with its implicit potential for economic conflict,⁵ might be unnecessary. Indeed, some proposals to replace labor-management antagonism with a spirit of cooperation implicitly suggest that labor-management cooperation should supplant collective bargaining.⁶ The problem with this understanding of labor-management cooperation is that it is fundamentally at odds with the forces understood to drive a market economy. The essence of a market economy is that individual firms, by pursuing their own relatively narrow self-interest, produce an efficient allocation of resources in the aggregate.⁷ If an enterprise is to suspend the pursuit of its self-interest in managing its own work force, it is not clear how the basic assumption for a market economy continues to be satisfied.

3. 29 U.S.C. §§ 151-156 (1982).

4. See C. RANDLE & M. WORTMAN, *COLLECTIVE BARGAINING* 27-28 (1966) [hereinafter RANDLE & WORTMAN]; see, e.g., *Detroit's Strange Bedfellows*, N.Y. Times, Feb. 7, 1988, § 6 (Magazine), at 20. See generally I. SIEGEL & E. WEINBERG, *LABOR-MANAGEMENT COOPERATION* 5-28 (1982) [hereinafter SIEGEL & WEINBERG].

5. See *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 486 (1960).

6. See BUREAU OF LABOR-MANAGEMENT RELATIONS, U.S. DEPT. OF LABOR, U.S. LABOR LAW AND THE FUTURE OF LABOR-MANAGEMENT COOPERATION, 1, 11-12, 15-16 (1987) (First Intermin Report, BLMR 113) [hereinafter 1987 LABOR LAW REPORT] (comments of Donald R. Sazama and J. Bruce Johnston).

7. See A. SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1863).

A more realistic understanding of labor-management cooperation can be obtained by envisioning it as a reshaping of the forces of self-interest and the economic power to injure which have traditionally driven collective bargaining. Such an understanding is close to the traditional ideas of free collective bargaining.⁸ According to this concept, employee and management representatives engage in mutual problem solving while pursuing their somewhat disparate self-interests in light of both parties' capacity to impose injury on the other through economic pressure.⁹ This understanding of labor-management cooperation suggests that opportunities for asserting economic pressure and pursuing litigation should be re-evaluated in order to give the institutions of collective bargaining a better problem solving orientation.

This approach to labor-management cooperation discourages focusing narrowly on particular legal principles which restrict management from aiding union representatives or from sponsoring certain kinds of employee representation arrangements. Rather, it encourages considering the full range of legal rights and obligations that shape collective bargaining.

2. Judging Criteria for Collective Bargaining

Defining labor-management cooperation in the collective bargaining context is further complicated by lack of agreement on the criteria used to judge the success of collective bargaining. Management commentators tend to judge collective bargaining by its ability to accommodate competitive forces.¹⁰ Union commentators, however, tend to judge collective bargaining by its effectiveness in protecting and improving the economic and psychological welfare of employees.¹¹ The competitive view emphasizes the moderation or reduction of labor costs,¹² whereas the employee welfare view emphasizes limiting competition in the labor markets.¹³

8. See T. KOCHAN, *COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS* 14, 26 (1980) (free collective bargaining described as negotiations without outside intervention). See generally RANDLE & WORTMAN, *supra* note 4, at 9-11 (discussing characteristics of collective bargaining).

9. See Moberly, *New Directions in Worker Participation and Collective Bargaining*, 87 W. VA. L. REV. 765 (1985) (arguing that collective bargaining, freed of artificial legal restrictions, could accomplish most types of labor-management cooperation).

10. RANDLE & WORTMAN, *supra* note 4, at 11-13.

11. *Id.* at 12-13.

12. *Id.* at 17, 33.

13. *Id.* at 16; see W. GOULD, *JAPAN'S RESHAPING OF AMERICAN LABOR LAW* 1 (1984).

Management's competitive view accepts the premise that market forces are desirable. Market forces require that an enterprise become more efficient over time in order to meet low cost challenges from other firms in the same industry and from firms in other industries offering substitute products or services.¹⁴ Meeting these competitive challenges requires the adjustment of labor costs, usually downward, by means of improved productivity or actual reductions in employee compensation.¹⁵ Healthy collective bargaining, according to this view, responds to product market competition by permitting employers to restructure the work force, improve labor productivity by capital investment in new technology, and hold wage levels to those existing in relevant external labor markets.¹⁶ This view encourages concessionary or accommodation bargaining. Such bargaining occurs when employee representatives agree to change work rules or moderate wage and benefit demands in exchange for sharing power or for other rights considered of value to union institutions or rank-and-file employees which do not impose substantial economic costs on employers.¹⁷

The employee welfare view acknowledges the existence of competitive pressures on enterprises, but seeks to limit the human costs of such competition.¹⁸ Adherents to this view stress that human costs can be limited by restricting the competition itself or by compensating employees for the harmful effects of that competition. Threats to enterprise viability—translating into threats to employee security—from intra-industry competition should be met by limiting labor cost competition within an industry, either by governmentally imposed minimum labor standards,¹⁹ by economic regulation of rates of entry and exit, or by industry-wide collective bargaining which standardizes work rules and wage and benefit levels.²⁰ Threats to enterprise viability from inter-industry competition should be met by expanding

14. See C. COLE, *MICROECONOMICS: A CONTEMPORARY APPROACH* 231 (1973).

15. *Id.*

16. W. MIERNYK, *THE ECONOMICS OF LABOR AND COLLECTIVE BARGAINING* 228 (1965).

17. See, e.g., Moberly, *supra* note 9, at 766-67 (discussing workers as members of company boards of directors).

18. See Rehmus, *Collective Bargaining and Technological Change on American Railroads*, in *COLLECTIVE BARGAINING AND TECHNOLOGICAL CHANGE IN AMERICAN TRANSPORTATION* 85, 87-88 (1971) [hereinafter Rehmus, *Collective Bargaining*] (technological advances should not be borne solely by workers).

19. See Remarks by R. L. Crandall, Chairman and President, American Airlines, Inc., before the Airline Industrial Relations Conference (June 17, 1987) (proposing that government set floor for medical insurance, pension benefits and other issues affecting airline labor costs).

20. See Levinson, *Collective Bargaining and Technological Change in the Trucking Industry*, in *COLLECTIVE BARGAINING AND TECHNOLOGICAL CHANGE IN AMERICAN TRANSPORTATION*, *supra* note 18, at 18-24 [hereinafter Levinson, *Collective Bargaining*] (evolution of national bargaining in trucking industry to limit inter-city competition).

the scope of collective bargaining to those competing industries or by government intervention to control competitive threats from industries providing substitute goods or services. For example, rail industry employee groups have an economic incentive to oppose coal slurry pipelines which are able to divert coal traffic from railroads.²¹

Obviously, the competitive and employee welfare views are in opposition, the former emphasizing meeting the competition, the latter emphasizing limiting it. The two views are not irreconcilable, however. Both require frank and accurate identification of the competitive threats to a particular employer. Both acknowledge the need for some response to the threats. Both allow for a wide variety of collectively bargained for responses.

Labor-management cooperation in the context of collective bargaining is desirable to increase managerial and employee control over their enterprise's economic future. Absent this cooperation, firms will fail to survive in a market economy with resultant loss of employment opportunities. Labor-management cooperation also serves the public interest because without it, consumer benefits from efficient economic production will be lost. Economic disruption due to strikes and bankruptcies can also proliferate as employee and entrepreneurial interests conflict with each other over their shares of a declining economic pie.

Perhaps the best criterion for judging collective bargaining is the one suggested by Professor Thomas Kochan:

Since some of the goals of the major actors—workers, unions, employers, and the public—conflict, it is not possible to specify a single overriding effectiveness criterion. Instead we need to examine collective bargaining from the standpoint of each of the actors and then recognize that collective bargaining implies a need to balance a number of conflicting goals.²²

3. Overview of the Article

This article begins with an overview of the legal, economic, and political environment surrounding collective bargaining in the railroad and airline industries. It then identifies basic policy options for the role the law plays in promoting effective labor relations, evaluating ten specific criticisms of the RLA and the bargaining traditions spawned by the Act. This article comes to the following conclusions: (1) competing criteria exist for evaluating the success of labor-management cooperation; (2) collective bargaining provides the best set of

21. See generally *In re Burlington N., Inc.*, 822 F.2d 518 (5th Cir. 1987).

22. T. KOCHAN, *supra* note 8, at 26 (emphasis added).

guidelines for promoting labor-management cooperation; (3) collective bargaining is not primarily a creature of law; (4) economic pressure is an essential force to make collective bargaining work; (5) collective bargaining agreements should be enforceable, even when addressing novel subjects or involving parties beyond the traditional definitions of an employer or employee representative; and (6) labor law should not remove subjects from the bargaining table, either by making them "nonmandatory" or by setting substantive terms of employment directly.

The article separately considers whether labor protection helps or hurts labor-management cooperation and concludes that deregulation of the airline and railroad industries has strengthened collective bargaining. However, the viability of deregulation depends on the effectiveness of collective bargaining in addressing employee concerns. Although the issues in this article are not new,²³ conditions in the railroad and airline industries have changed, especially since deregulation. Overall, this article concludes that few amendments to the RLA are necessary, but that changing attitudes of the government would improve the administration of the Act.

II. LEGAL, ECONOMIC, AND POLITICAL ENVIRONMENT

A. Industry Structures and Economics

The economics of the railroad and airline industries differ in some ways but are similar in others. The differences relate to the much larger economic barriers to entry in the railroad industry and very low marginal costs²⁴ compared with relatively low economic barriers to entry in the airline industry and intermediate marginal costs.²⁵ For example, it costs a great deal to build a new railroad system, but to change a route, one must build another line of railroad.²⁶ Once a railroad is built, however, carrying one more car on a train costs little

23. Many of these same issues have been extensively addressed in major compendia of papers and in symposia on issues including accommodating technological change in transportation industries as well as other transportation labor issues. *See generally* NATIONAL MEDIATION BD., THE NATIONAL MEDIATION BOARD AT 50 (C. Rehmus ed. 1984) [hereinafter THE NMB AT 50]; NATIONAL MEDIATION BD., THE RAILWAY LABOR ACT AT FIFTY, COLLECTIVE BARGAINING IN THE RAILROAD AND AIRLINE INDUSTRIES (C. Rehmus ed. 1976) [hereinafter THE RLA AT FIFTY]; Levinson, *Collective Bargaining*, *supra* note 20; Rehmus, *Collective Bargaining*, *supra* note 18.

24. Rehmus, *Collective Bargaining*, *supra* note 18, at 92.

25. G. Zeh, *The Future of the Craft Structure* (unpublished report presented at the Villanova Law School Center for Continuing Legal Education during a symposium entitled *Transportation Issues for the 1980s* held on May 17-18, 1982). *See generally* J. MEYER, M. PECK, J. STENASON & C. ZWICK, *THE ECONOMICS OF COMPETITION IN THE TRANSPORTATION INDUSTRY* 133-44 (1959) [hereinafter MEYER & PECK].

26. Of course, trains can be routed in different ways over an existing rail network with little capital investment necessitated by the rerouting.

extra since fuel and labor costs are spread over scores of cars in a single train.

The expenses of starting an airline include the costs of buying or renting the airplanes. These costs are much lower than the cost of building a railroad.²⁷ Once obtained, it costs virtually nothing to fly an airplane to one city as opposed to another over comparable distances. The costs of flying another flight or running one more train are equivalent, approximating modest fuel and labor costs.²⁸ Differences between passenger and freight characteristics make quantitative comparisons between the two industries difficult, but it seems reasonable to conclude that marginal costs are low relative to fixed costs in both industries, though fixed costs are much higher in the railroad industry than in the airline industry. In other words, railroads have more of the characteristics of a natural monopoly than airlines.²⁹

In both industries, the relatively high fixed costs compared with low marginal costs tend to produce an unstable rate structure, because all carriers have an incentive to reduce rates at the margin to attract additional business.³⁰ The possibility of an unstable rate structure encourages government regulation, keeping rates high and ensuring that all carriers earn compensatory rates of return.³¹ However, the sizeable economic barriers to entry in the railroad industry create the possibility of monopolies in some markets. Monopolistic control of a market leads to inflated rate structures. To protect customers from such monopolistic abuse, the government may regulate rates the railroad industry charges. Thus, the government may sup-

27. A small commuter plane costs approximately \$300,000 and a Boeing 737 costs approximately \$5 million. Ten years ago, the date of the most recent track building, Burlington Northern Railroad built a 100-mile extension to serve coal fields in Wyoming. The cost was approximately \$100 million for the track and signal system.

28. Carrying one more passenger in an empty seat costs little more. Arguably, this is the airline equivalent of adding a car to a train and is the more appropriate measure of marginal cost.

29. A natural monopoly is an industry characterized by high threshold capital requirements and virtually unlimited economies of scale. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351-52 & n.8 (1974).

30. Dempsey, *Transportation Deregulation—On a Collision Course?*, 13 TRANSP. L.J. 329, 334-35 (1984) [hereinafter Dempsey, *Collision Course*]; see R. CAVES, AMERICAN INDUSTRY: STRUCTURE, CONDUCT, PERFORMANCE 72 (1964); P. DEMPSEY & W. THOMS, LAW AND ECONOMIC REGULATION IN TRANSPORTATION 8 (1986) [hereinafter DEMPSEY & THOMS]. See generally MEYER & PECK, *supra* note 25.

31. Dempsey, *Collision Course*, *supra* note 30, at 331-39, 356; see R. CAVES, *supra* note 30, at 72; DEMPSEY & THOMS, *supra* note 30, at 12-14, 26. See generally MEYER & PECK, *supra* note 25.

port higher rates due to the instability of the industry's rate structure, but it also may place a ceiling on such rates in a monopolistic market.³²

Both railroad and airline service are important to a community's infrastructure. Accordingly, there is often strong political pressure for government regulation ensuring adequate railroad and airline service.³³ Because service in some communities is not profitable, these political demands lead to regulations requiring carriers to cross subsidize unprofitable but mandated services with more profitable services in other markets.³⁴ In order for a cross subsidization regulatory policy to work, the regulating agency must provide the carrier some degree of protection in its profitable markets in order to produce the supernormal profit levels needed to subsidize the unprofitable markets served.³⁵ All of these factors combined tend to justify extensive government regulation of rate structures and conditions of market entry and exit.

Despite these proregulation forces, Congress has been under pressure since the mid 1970s to deregulate both the railroad and airline industries significantly. Deregulation has profoundly impacted the structure in both industries. For instance, in the railroad industry, nearly 200 short-line and regional railroads have come into existence since deregulation, operating 13,000 miles of rail lines and employing 4000 workers.³⁶

Unfortunately, almost no attention was paid to the impact of deregulation on labor markets and the institutions of collective bargaining during the deregulation phase.³⁷ Unions favor economic regulation because it restricts product market competition which often results in layoffs or reductions in wage and benefit levels.³⁸ Furthermore, the existence of comprehensive regulation provides trade unions numerous opportunities to seek political intervention designed to change the balance of power in collective bargaining, or to pursue

32. *Compare* Western Coal Traffic League v. United States, 719 F.2d 772, 778 (5th Cir. 1983) (en banc), cert. denied, 462 U.S. 1110 (1984) (ICC must regulate rates where no effective competition exists) with *Bessemer & L.E.R.R. v. ICC*, 691 F.2d 1104, 1112 (3d Cir. 1982) (ICC should analyze the level of revenue carriers needed to earn a compensatory rate of return).

33. Dempsey, *Collision Course*, *supra* note 30, at 331-39; see DEMPSEY & THOMS, *supra* note 30, at 12-14.

34. *Id.*

35. *Id.*

36. See *Chicago & N.W. Transp. Co. v. Railway Labor Executives' Ass'n*, 855 F.2d 1277 (7th Cir. 1988) (reviewing short-line phenomenon since the enactment of rail deregulation legislation).

37. D. LIPSKY & C. DONN, *COLLECTIVE BARGAINING IN AMERICAN INDUSTRY* 144 (1987) [hereinafter LIPSKY & DONN] (citing Dunlop, *Trends and Issues in Labor Relations in the Transport Sector*, TRANSP. RES. NEWS 1, 1-8 (May-June 1985)).

38. LIPSKY & DONN, *supra* note 37, at 149; Dempsey, *Collision Course*, *supra* note 30, at 336-37.

objectives through regulation not otherwise obtainable through collective bargaining.³⁹

B. Industrial Relations Environment

Collective bargaining in the railroad industry predates the development of labor law. Railroads were this country's first large scale industrial enterprise⁴⁰ and were almost completely unionized shortly after the first World War. Railroad labor law was developed to reflect the realistic collective bargaining institutions already in place.⁴¹ Since the mid-1920s, railroad management resistance to collective bargaining has been modest and sporadic.⁴² Collective bargaining has been accepted as the appropriate means for reconciling an enterprise's need to innovate with its employees' desires for economic security and improved standards of living. Potentially extreme positions taken by carriers have been muted by the long tradition of industry-wide bargaining by employers over major economic issues.⁴³ However, railroad unions generally have negotiated separately with the industry-wide bargaining conferences composed of several carriers.⁴⁴

For the last seventy years, collective bargaining has accommodated the substantial shrinkage of the railroad industry as well as technological revolutions in virtually every aspect of railroad operations. The attitudes of labor and management have alternated between high levels of cooperation, especially in the legislative arena,⁴⁵ and extreme feelings of bitterness.⁴⁶

39. See *Railway Labor Executives' Ass'n v. Pittsburgh & L.E.R.R.*, 845 F.2d 420, 429-30 (3d Cir. 1988); see also *infra* notes 382-89 and accompanying text (discussing how deregulation impacts collective bargaining).

40. See A. CHANDLER, *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 79 (1977).

41. See *Ruby v. American Airlines, Inc.*, 323 F.2d 248, 256 (2d Cir. 1963), *cert denied*, 376 U.S. 913 (1964). In "the railroad industry . . . strong unions and management had become used to dealing with each other." *Id.*

42. *Id.*

43. *But see* *Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R.*, 383 F.2d 225 (D.C. Cir. 1967) (crew consist issue must be negotiated on carrier-by-carrier basis rather than on industry-wide one, given history of bargaining in railroad industry).

44. Rehms, *Evolution of Legislation Affecting Collective Bargaining in the Railroad and Airline Industries*, in *THE RLA AT FIFTY*, *supra* note 23, at 16-17.

45. See, e.g., *The Northeast Rail Service Act of 1981*, contained in *The Omnibus Budget Reconciliation Act of 1981*, Pub. L. No. 97-35, 95 Stat. 357 (1981). See generally Rehms, *Collective Bargaining*, *supra* note 26, at 123-32.

46. See, e.g., *United States v. Florida E.C. Ry.*, 7 Fed. Empl. Prac. Cas. (BNA) 540, 7 Emp. Prac. Dec. ¶ 9218 (M.D. Fla. Feb. 28, 1974) (case involved a strike lasting over 10 years).

Airline industrial relations are more pluralistic than in the railroad industry. Collective bargaining began early in the relatively short history of the airline industry. The first collective bargaining agreement was signed between American Airlines and the Air Line Pilots Association (ALPA) in 1939.⁴⁷ Employers manifested little resistance to dealing with unions respecting some groups of employees, especially pilots and flight attendants.⁴⁸ Airline management has been more resistant to collective bargaining, however, in the clerical and maintenance areas.⁴⁹ Further, single carrier bargaining prevails in the airline industry because of strong opposition to multi-carrier bargaining by some airlines and also by most airline unions.⁵⁰ Accommodating technological change has been a problem, though, especially during the transition to jet aircraft.⁵¹

At least some of the employer acquiescence to collective bargaining in both industries can be explained by the inherent vulnerability of a transportation enterprise to strike pressure since its product cannot be stockpiled. Furthermore, the integrated nature of its operations makes it difficult to respond to a localized strike by diverting production to other facilities.⁵²

In both the railroad and airline industries, political action by employee groups has been as important a feature of the industrial relations system as collective bargaining. In the early years of the airline industry, the ALPA concentrated its political efforts on legislative activity almost to the exclusion of collective bargaining.⁵³ Even before the RLA was applied to the airline industry, the ALPA induced the National Labor Board, an agency created by the National Industrial Recovery Act, to impose a pilot compensation formula on air carriers.⁵⁴ Later, the Civil Aeronautics Act of 1938 required compliance with this formula.⁵⁵ Railroad labor groups have been similarly effec-

47. See Kahn, *Labor-Management Relations in the Airline Industry*, in THE RLA AT FIFTY, *supra* note 23, at 97, 104. The ALPA was the first effective airline labor organization. See generally G. HOPKINS, THE AIRLINE PILOTS: A STUDY IN ELITE UNIONIZATION (1971).

48. See Kahn, *supra* note 47, at 97, 108-09 (ALPA has bargained for virtually all pilots since 1942 and mechanics covered by collective agreements since 1942).

49. See, e.g., Southwest Airlines Co., 13 N.M.B. 126-2741 (1986) (case no. R-5596); Eastern Air Lines, Inc. 13 N.M.B. 312-14 (1986) (case no. R-5627). See generally LIPSKY & DONN, *supra* note 37, at 168-70 (reservation and ticket agents as well as clerical employees are the least unionized of any group in the airline industry).

50. See Kahn, *supra* note 47, at 110 (noting party opposition to multi-carrier bargaining and explaining that the only major exception was a machinist union dispute with five carriers in 1966).

51. See Pan American World Airways, Inc. v. Flight Eng'rs Int'l Ass'n., 306 F.2d 840, 843-45 (2d Cir. 1962) (detailing history of flight engineer disputes).

52. See LIPSKY & DONN, *supra* note 37, at 139.

53. See Kahn, *supra* note 47, at 104.

54. *Id.* at 101.

55. See Kahn, *supra* note 47, at 103.

tive in legislative forums. In the Emergency Railroad Transportation Act of 1933, they successfully persuaded Congress to freeze railroad industry employment and to mandate labor protection as a condition of regulatory approvals of changes in industry structure.⁵⁶ In addition, railway labor groups persuaded state legislatures to impose a variety of crew size and railroad equipment requirements on rail carriers.⁵⁷

The steady decline of railroad market share, maturation of the airline industry, and deregulation of both industries present new challenges and new opportunities for collective bargaining. The degree of unionization in the railroad industry has declined slightly, especially in light of the development of new "short-line" railroads with low degrees of union representation which have taken over lines formerly operated by larger railroads.⁵⁸ Unionized airlines face major competitive threats from the rapidly growing nonunion airlines which have acquired major shares of almost every market.⁵⁹ Responding to these challenges and opportunities requires high levels of adaptability by collective bargaining institutions.

C. The Legal Environment

Railroads and airlines are covered by the RLA⁶⁰ rather than by the National Labor Relations Act (NLRA).⁶¹ The RLA imposes more detailed dispute resolution procedures than the NLRA,⁶² but otherwise provides a less elaborate legal framework for adjusting claims of

56. Emergency Railroad Transportation Act, Pub. L. No. 91-68, § 7(b), 48 Stat. 211, 214 (1933); see *infra* notes 315-81 and accompanying text.

57. See, e.g., *Missouri Pac. Ry. v. Norwood*, 283 U.S. 249 (1931) (upholding constitutionality of Arkansas full-crew law); Perritt, *Ask and Ye Shall Receive: The Legislative Response to the Northeast Rail Crisis*, 28 VILL. L. REV. 271, 287 (1983) (discussing state full-crew and train-length legislation).

58. See *Chicago & N.W. Transp. Co. v. Railway Labor Executives' Ass'n*, 855 F.2d 1277, 1278-86 (noting opposition of rail labor to shortline acquisition in the absence of standard labor protection).

59. See LIPSKY & DONN, *supra* note 37, at 142-47; Dempsey, *Collision Course*, *supra* note 30, at 350-51; Comment, *Deregulation in the Airline Industry: Toward a New Judicial Interpretation of the Railway Labor Act*, 80 NW. U.L. REV. 1003, 1004 (1986) (finding low cost carriers to hamper union success in gaining concessions).

60. 45 U.S.C. §§ 151-163, 181-188 (1986).

61. Section 2 of the NLRA excludes "any person subject to the Railway Labor Act" from the definition of employer. 29 U.S.C. § 142 (1982). Section 3 excludes "any individual employed by an employer subject to the Railway Labor Act" from the definition of employee. *Id.* § 143; see *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 376 (1969).

62. For ease in exposition, this article refers to the National Labor Relations Act (NLRA) and the Labor Management Relations Act (LMRA) collectively as the NLRA.

statutory right.⁶³ The RLA requires that rights or grievance disputes be submitted to "adjustment boards," essentially arbitration tribunals, for final and binding resolution.⁶⁴ In the railroad industry, employment rights disputes can be submitted either to adjustment boards created through collective bargaining or to a permanent National Railroad Adjustment Board.⁶⁵ In the airline industry, carriers and employee representatives are obligated to create adjustment boards through collective bargaining for resolution of such rights disputes.⁶⁶

The RLA also provides an extensive mechanism for resolving interest disputes.⁶⁷ Such disputes must be submitted for an extended period of negotiation, followed by mediation under the auspices of the NMB.⁶⁸ These steps are followed by an optional fact finding process at the discretion of the Mediation Board and the President,⁶⁹ followed frequently by an ad hoc Presidential or congressional intervention.⁷⁰ During this lengthy process, characterized by the Supreme Court as "virtually endless,"⁷¹ carriers are precluded from changing the status quo and employees are precluded from striking. Finally, the RLA provides for certification of employee representatives through election units defined by the NMB.⁷²

Apart from the RLA, there is a long history of governmentally imposed labor protection in both industries. While the RLA leaves the substantive terms and conditions of employment to be decided through private negotiation, labor protection requirements also impose certain terms of employment and freeze other collectively bargained for terms.⁷³

D. History of the RLA

Legislation dealing with railroad labor disputes was the first federal labor legislation to address collective bargaining.⁷⁴ The statutory

63. See *infra* notes 114-35 and accompanying text.

64. 45 U.S.C. §§ 153(i), 184-185 (1982). Rights or grievance disputes involve the application of existing agreements.

65. 45 U.S.C. § 153 (1982).

66. See *IAM v. Central Airlines, Inc.*, 372 U.S. 682, 686 (1963) (citing 45 U.S.C. § 184).

67. Interest disputes involve the establishment of new terms and conditions of employment.

68. 45 U.S.C. § 156 (1982).

69. *Id.* § 160.

70. See generally H. PERRITT, *LABOR INJUNCTIONS* § 13.9 (1986).

71. *Burlington N.R.R. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429 (1987).

72. 45 U.S.C. § 152(9) (1982).

73. See *infra* notes 315-81 and accompanying text for a discussion of labor protection issues.

74. The first federal labor legislation of any type was the statute regulating merchant seaman working conditions, enacted by the first Congress. See Act for the

evolution began in 1888, with legislation providing for federally funded arbitration of disputes if both parties consented.⁷⁵ The legislation also provided for temporary fact-finding commissions to examine "the causes of the controversy, the conditions accompanying [it], and the best means for adjusting it."⁷⁶ The theory of this legislation was to provide a mechanism for focusing public opinion on railroad labor disputes; compulsory settlement procedures were rejected.⁷⁷ The fact-finding provisions of the 1888 legislation were used only once, whereas its arbitration provisions were never applied.⁷⁸ Its basic principles, however, have been retained in all subsequent railroad legislation.

The Erdman Act of 1898⁷⁹ replaced the 1888 Arbitration Act by adding mediation and conciliation to the fact-finding processes and voluntary arbitration to the settlement processes.⁸⁰ The Erdman Act expressly provided that an arbitration award was 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.⁸¹

The Newlands Act of 1913⁸² followed the same approach as the Erdman Act, adding a Board of Mediation and Conciliation to conduct the mediation and conciliation stages.⁸³ The Board's express mandate was to attempt inducing the parties to settle their disputes through arbitration if mediation proved unsuccessful.⁸⁴ The Newlands Act, however, unlike the Erdman Act,⁸⁵ contained no express provision limiting resort to economic action while the arbitration machinery was being engaged.

Government and Regulation of Seamen in the Merchants Service, ch. 29, 1 Stat. 131 (1790).

75. Arbitration Act, ch. 1063, § 5, 25 Stat. 502 (1888).

76. *Id.* § 6, 25 Stat. 503.

77. 19 CONG. REC. 3098 (1888).

78. See Rehms, *supra* note 44, at 4.

79. Ch. 370, 30 Stat. 424 (1898).

80. *Id.* §§ 2-3, 30 Stat. 425.

81. *Id.* § 7, 30 Stat. 427. In assessing the significance of the early legislation, it is important to understand that the distinction between interest arbitration and grievance arbitration emerged only later, after The Transportation Act of 1920 drew the distinction. Therefore, the type of arbitration envisioned by the 1888 and 1898 statutes encompassed both types of disputes.

82. Ch. 6, 38 Stat. 103-08 (1913).

83. *Id.* § 2, 38 Stat. 104 (1913).

84. *Id.*

85. Ch. 370, § 7, 30 Stat. 427 (1898).

The Transportation Act of 1920,⁸⁶ providing for a return to private control of the railroads after they were controlled by the federal government during World War I, contained comprehensive provisions dealing with labor disputes.⁸⁷ The Act departed from previous legislation in two important ways. First, it established a distinction between rights or grievance disputes (disputes over the application of existing agreements), and interest disputes (disputes over the establishment of new terms and conditions of employment).⁸⁸ This dichotomy continues to be reflected in modern legislation.⁸⁹ Second, it provided for compulsory determination of appropriate wage levels by the government.⁹⁰ This second difference, and the determination by the Supreme Court that the decisions of the Railroad Labor Board were not enforceable,⁹¹ led to a breakdown of the Act's machinery.

In 1926, Congress enacted the RLA with virtually no changes from a legislative proposal agreed upon between rail labor groups and rail management to replace the Transportation Act of 1920.⁹² The RLA amalgamated procedures originating in earlier statutes and continued the distinction between "major" and "minor" disputes.⁹³ Minor disputes were to be arbitrated by adjustment boards voluntarily established by the parties.⁹⁴ The Railroad Labor Board was abolished,⁹⁵ and the 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 "other dispute(s)."⁹⁶ The pattern established by the 1913 Act was followed, in that the Mediation Board was to attempt to induce the parties to submit disputes not resolved by mediation to arbitration.⁹⁷ The pattern of the 1888 Arbitration Act was followed by the RLA in that disputes not resolved by agreement or by mediation, and not submitted to arbitration, could be subjected to fact-finding processes of an emergency board created by the President of the United

86. Ch. 91, 41 Stat. 456-99 (1920) (current version codified as amended in scattered sections of 45 U.S.C. and 49 U.S.C.).

87. *Id.* §§ 303-307, 41 Stat. 469-71.

88. Compare ch. 91, § 303, 41 Stat. 469-70 with ch. 91, § 307(b), 41 Stat. 470-71.

89. See 29 U.S.C. §§ 153, 155-157 (1982); see also *Burlington N.R.R. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429 (1987).

90. Ch. 91, § 307(b), 41 Stat. 471.

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

92. Compare *Hearings on S. 2306 Before the Senate Comm. on Interstate Commerce*, 69th Cong., 1st Sess. 34 (1926) [hereinafter *Senate Hearings*] with *Railway Labor Act*, ch. 347, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151-188 (1982)).

93. The Supreme Court, not Congress, created the labels "major" and "minor," but the RLA created two distinct processes for the two different types of disputes. See *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 723-24 (1945).

94. Ch. 347, § 3, 44 Stat. 578 (1926).

95. *Id.* § 14, 44 Stat. 587.

96. *Id.* §§ 4-5, 44 Stat. 579-82.

97. *Id.* § 5(b), 44 Stat. 580.

States.⁹⁸ The tone of the hearings and the committee reports preceding the RLA's enactment make it clear that the purpose of the legislation was to end railroad strikes by providing a "safety valve" for employee discontent and thus reducing the perceived need to strike.⁹⁹

In 1934, Congress amended the RLA to protect employees' rights to organize and to strengthen the mechanisms for resolving minor disputes.¹⁰⁰ A National Railroad Adjustment Board was established to adjudicate minor disputes not determinable by adjustment boards voluntarily established by the parties.¹⁰¹ Congress left substantially unchanged the provisions of the RLA regarding mediation, voluntary arbitration, and emergency board fact-finding, except that the Board of Mediation was renamed the "National Mediation Board" and divested of jurisdiction over minor disputes.¹⁰²

The RLA was amended again in 1936¹⁰³ to include airlines within its coverage. The 1936 amendments made all of the RLA's basic provisions applicable to airlines, except for grievance arbitration provisions of the Act.¹⁰⁴ Airlines and employee representatives were obligated to establish adjustment boards to settle grievances and other contract interpretation questions.¹⁰⁵ The airline industry did not oppose the coverage of airlines under the RLA since it was hoped that collective bargaining could replace government mandated pay formulas.¹⁰⁶

Amendments to the RLA enacted in 1951 authorized union secur-

98. *Id.* § 10, 44 Stat. 586-87 (codified as amended at 45 U.S.C. § 160 (1982)).

99. *Senate Hearings*, *supra* note 92, at 9, 16-17, 35; *Hearings on H.R. Rep. No. 328 Before the House Comm. on Interstate and Foreign Commerce, Railway Labor Disputes*, 69th Cong., 1st Sess. (1926).

100. Railway Labor Act, ch. 691, 48 Stat. 1185 (1934) (codified as amended at 45 U.S.C. §§ 151-161 (1982)); see *Brotherhood of Locomotive Eng'rs v. St. Louis S.W. Ry.*, 757 F.2d 656, 659 (5th Cir. 1985) (characterizing nature of 1934 political compromise).

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

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

103. Act of Apr. 10, 1936, ch. 166, 49 Stat. 1189 (codified as amended at 45 U.S.C. § 181 (1982)).

104. See 45 U.S.C. § 181 (1982) (making all provisions of 45 U.S.C. §§ 151-152, 154-163 applicable to "common carriers by air engaged in interstate and foreign commerce"). The omitted section 153 of title 45 is section 3 of the RLA.

105. 45 U.S.C. § 184 (1982); see also *IAM v. Central Airlines, Inc.*, 372 U.S. 682 (1963). Section 205 of the 1936 Amendments, 45 U.S.C. § 185 (1982), authorizes the NMB to establish a National Air Transport Adjustment Board, but this authority has not been exercised.

106. Kahn, *Collective Bargaining on the Airline Flight Deck*, in *COLLECTIVE BARGAINING AND TECHNOLOGICAL CHANGE IN AMERICAN TRANSPORTATION* 421, 466 (1971) [hereinafter Kahn, *COLLECTIVE BARGAINING*]; see Kahn, *supra* note 47, at 102.

ity and dues checkoff agreements.¹⁰⁷ Further amendments in 1966 established government funded adjustment boards for the railroad industry colloquially called "public law boards."¹⁰⁸ The Northeast Rail Service Act of 1981¹⁰⁹ added a new section to the RLA¹¹⁰ establishing a special emergency board procedure for commuter rail disputes. During the early 1970s, the Nixon Administration tried unsuccessfully to persuade Congress to provide a single set of procedures for dealing with emergency disputes in the transportation industry.¹¹¹ However, the administration did implement policies reforming rail industry bargaining structure¹¹² which decreased the readiness of the President to appoint emergency boards, especially in single-carrier disputes.¹¹³

E. Differences Between the RLA and the NLRA

The RLA applies exclusively to the railroad and airline industries and represents a less detailed scheme of regulation than the NLRA. Although the RLA requires dispute resolution procedures which are only voluntary under the NLRA, the RLA leaves the details of the collective bargaining process and its results mostly to private decision makers, influenced only by historical customs and practices. The NLRA in contrast, seeks to define legal rights, obligations, and privileges in detail, both by statutory language and by detailed administrative agency adjudication.

The RLA, like the NLRA, provides for collective bargaining through exclusive employee representatives and authorizes a federal agency to designate exclusive representatives for employee election units.¹¹⁴ The RLA, however, does not describe in detail the rights

107. Act of Jan. 10, 1951, ch. 1220, 64 Stat. 1238 (adding paragraph eleven to section 2); see 45 U.S.C. § 152 (1982).

108. Act of June 20, 1966, Pub. L. No. 89-456, 80 Stat. 208 (amending 45 U.S.C. § 153 (1982)). The legislative history of the 1966 amendments is set forth in 1966 U.S. CODE CONG. & ADMIN. NEWS 2285.

109. 95 Stat. 681 (1981).

110. 5 U.S.C. § 159(a) (1982).

111. See S. 560, 92d Cong., 1st Sess. (1971); H.R. 3596, 92d Cong., 1st Sess. (1971).

112. Former Secretary of Labor W.J. Usery, Jr. generally is given credit for promoting needed reforms in bargaining structure through his extraordinary skills as a mediator. Cf. Cullen, *Emergency Boards Under the Railway Labor Act*, in *THE RLA AT FIFTY*, *supra* note 23, at 151, 174-76; see also Perritt, *supra* note 57, at 290-93 (describing bargaining structure problems and reforms).

113. This policy of less intervention is credited to then Secretary of Labor George P. Shultz. See Cullen, *supra* note 112, at 174.

114. The term "election unit" is used instead of the more common "bargaining unit" to reflect more accurately the function of such units. Bargaining may take place with respect to groups of employees broader or narrower than the unit through which the representative has been selected. See UNIVERSITY OF CHICAGO, *THE STRUCTURE OF COLLECTIVE BARGAINING* (A. Weber ed. 1961); T. KOCHAN, *supra* note 8, at 86-100 (distinguishing election units and negotiation units).

and obligations of the parties to collective bargaining, nor does it mention "unfair labor practices."¹¹⁵ Moreover, the RLA, unlike the NLRA, does not invest an administrative agency with general powers to interpret and to administer its provisions.¹¹⁶ Rather, the federal courts in private civil actions have responsibility to interpret the various obligations and rights specified in the RLA.¹¹⁷

The federal courts, therefore, have a much greater role in enforcing the provisions of the RLA rather than the NLRA, mainly through injunctive remedies. Injunctions against employer or employee conduct are available to private parties¹¹⁸ upon their showing that a duty imposed by the RLA has been violated or that the conduct in question interferes with one of its processes. Early in the history of the RLA, the courts determined that the duties imposed by the Act were judicially enforceable against employers.¹¹⁹ Beginning in 1957, the courts began holding that employee and union duties under the RLA could be enforced, and the jurisdiction of RLA dispute resolution processes could be protected¹²⁰ by injunctions against

115. For a comparison of the NLRA and the RLA, see generally Arouca & Perritt, *Transportation Labor Regulation: Is the Railway Labor Act or the National Labor Relations Act the Better Statutory Vehicle?*, 36 LAB. L.J. 145 (1985); Arouca & Perritt, *Transportation Labor Law and Policy for a Deregulated Industry*, 1 LAB. LAW. 617 (1985) [hereinafter Arouca & Perritt, *Transportation Labor Law*].

116. See *Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570 (1971). Judge Friendly has explained that the RLA, covering an industry in which "strong unions and management had become used to dealing with each other," naturally stresses mediation, while the NLRA stresses administrative adjudication because it covers businesses of "every size and description, many with a history of strong anti-union bias and with ample opportunity to [use] strong-arm tactics." *Ruby v. American Airlines, Inc.*, 323 F.2d 248, 256 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964).

117. Compare *Chicago & N.W. Ry.*, 402 U.S. at 581 (approving injunction against strike by union failing to pursue major dispute processes in good faith) with *Burlington N.R.R. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 448 (1987) (declining to imply authority to enjoin secondary picketing).

118. Under the NLRA, injunctions are available to private parties only to enforce collective bargaining agreements. *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702, 708 (1982). In other circumstances, the NLRB is authorized to obtain injunctions. See H. PERRITT, *supra* note 70, §§ 7.6 -9.

119. *Texas & N.O.R.R. v. Board of Ry. & S.S. Clerks*, 281 U.S. 548, 565-66 (1930) (RLA duties are judicially enforceable in suit to enjoin carrier interference with employee choice of representative); *Virginian Ry. v. System Fed'n*, 300 U.S. 515, 549-50 (1937) (injunction forcing employer to comply with RLA duty to bargain).

120. Judge Friendly has suggested that injunctions are permitted by the Norris-LaGuardia Act only when (1) the "unlawful acts" required by section 7 of the Norris-LaGuardia Act can be shown by violation of some express duty imposed by the RLA; or (2) when the injunction is necessary to protect RLA processes. See *Chicago, R.I. & Pac. R.R. v. Switchmen's Union*, 292 F.2d 61, 71 (2d Cir. 1961). See generally *Norris-LaGuardia Act*, 29 U.S.C. §§ 101-113 (1982); H. PERRITT, *supra* note 70, §§ 3.1 -20.

concerted employee action. Courts "enjoin virtually all concerted employee action over grievance (*minor*) disputes, and enjoin concerted action over interest (*major*) disputes unless the major dispute resolution processes of the RLA have been exhausted."¹²¹

The RLA is more specific than the NLRA regarding dispute resolution. The RLA requires submitting grievance disputes to arbitration rather than leaving them to labor and management parties to decide how to resolve such disputes.¹²² The grievance arbitration provisions of the Act require submitting grievances involving railroad employees to arbitration panels called adjustment boards,¹²³ as well as requiring airlines and their employees to establish adjustment boards to hear employee grievances.¹²⁴

The RLA also provides a more detailed system for handling interest disputes than does the NLRA. Such disputes are subject to a multiple phase process which the Supreme Court has labeled "almost interminable."¹²⁵ The parties are first required to negotiate over proposed changes in wages, rules, or working conditions.¹²⁶ If this negotiation fails to produce agreement, a process of compulsory mediation begins¹²⁷ and continues until the NMB, a federal agency, decides that mediation is no longer fruitful.¹²⁸ Finally, if the President determines that a strike will create an emergency situation, he can appoint an emergency board¹²⁹ which further postpones the date either party may take economic action.¹³⁰ Ad-hoc congressional intervention following the emergency board stage is common.¹³¹

During all of these stages of dispute resolution, courts may enjoin concerted employee action¹³² and certain types of employer action.¹³³ Control over the time period during which employee and employer economic action is prohibited is a particularly important difference between the statutes. Under the RLA, the NMB has virtually unre-

121. H. PERRITT, *supra* note 70, §§ 6.4 -.6 (emphasis in original).

122. Grievance arbitration under the NLRA, while common, is not required unless the parties have provided for such arbitration under a collective bargaining agreement. See *Nolde Bros., Inc. v. Local 358, Bakery & Confectionery Workers Union*, 430 U.S. 243, 250-51 (1977); *Smith v. Kerrville Bus Co., Inc.*, 709 F.2d 914, 917-20 (5th Cir. 1983) (judicial trial of breach-of-contract claim under collective bargaining agreement not providing for arbitration).

123. 45 U.S.C. § 153 (1982).

124. *Id.* § 184.

125. *Detroit & T.L.S.R.R. v. United Transp. Union*, 396 U.S. 142, 149 (1969).

126. 45 U.S.C. § 156 (1982).

127. *Id.* § 157.

128. See *IAM v. NMB*, 425 F.2d 527 (D.C. Cir. 1970).

129. 45 U.S.C. § 160 (1982).

130. *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1968).

131. See *infra* notes 216-87 and accompanying text.

132. See H. PERRITT, *supra* note 70, §§ 6.4 -.11 (1986 & Supp. 1987).

133. See *id.* §§ 6.12 -.18.

viewable discretion to decide how long the mandatory mediation phase lasts.¹³⁴ In contrast, the NLRA permits economic action as soon as an impasse occurs in the negotiations. The mediation stage is optional and does not suspend the right to engage in economic action, except in disputes between health care employees and employers.¹³⁵

F. Political Positions

Both management and union interest groups take inconsistent positions concerning airline and railroad labor law. Management spokespersons at times oppose government intervention into collective bargaining;¹³⁶ yet at other times seek government intervention to limit the right of employees to strike.¹³⁷ On the other hand, union representatives exalt free collective bargaining;¹³⁸ yet regularly seek legislative and executive intervention to restrict the ambit of collective bargaining in areas such as imposing labor protection¹³⁹ and minimum crew size standards.¹⁴⁰

When collective bargaining power depends on ever changing economic forces as its source, a certain ebb and flow of that power is inevitable. In both the railroad and airline industries, economic conditions and regulatory environments favored union collective bargaining power during the 1960s and 1970s.¹⁴¹ During much of the 1980s, economic and regulatory changes shifted the balance of power

134. See *Maine Central R.R. v. Brotherhood of Maintenance of Way Employees*, 813 F.2d 484, 493 (1st Cir. 1987) (upholding constitutionality of legislation requiring employers to reinstate status quo for 60 days); *IAM v. NMB*, 425 F.2d 527, 537 (D.C. Cir. 1970); *Lan Chile Airlines v. NMB*, 115 L.R.R.M. (BNA) 3655, 3556 (S.D. Fla. 1984).

135. See generally *International Bhd. of Elec. Workers v. NLRB*, 814 F.2d 697, 701 & n.12 (D.C. Cir. 1987) (summarizing mediation and strike notice requirements for health care industry).

136. See, e.g., *DEMPSEY & THOMS*, *supra* note 30, at 303. "Anticipating that the ICC would prescribe . . . conditions, some railroads entered into voluntary labor-protection agreements . . ." *Id.*

137. See, e.g., *Airline Labor Dispute: Hearings on S.J. Res. 186 Before the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. 41, 171 (1966) (statement of William J. Curtin, airline spokesperson).

138. See, e.g., *id.* at 97-98 (statement of P.L. Siemiller, International President of the International Association of Machinists and Aerospace Workers).

139. *DEMPSEY & THOMS*, *supra* note 30, at 301-08 (1986); see L. LECHT, *EXPERIENCES UNDER RAILWAY LABOR LEGISLATION* 103 (1955).

140. See generally L. LECHT, *supra* note 139. Arkansas enacted the first full-crew law in 1907. See *ARK. STAT. ANN.* §§ 3-720 - to 729 (repealed 1972). In 1911, and again in 1931, the Arkansas statute was upheld as constitutional. *Missouri Pac. R.R. v. Norwood*, 283 U.S. 249 (1931); *Chicago, R.I. & Pac. Ry. v. Arkansas*, 219 U.S. 453 (1911). By 1937, 20 states had full-crew laws. By 1940, four states had train-length laws.

141. See *LIPSKY & DONN*, *supra* note 37, at 139-40; Comment, *supra* note 59, at 1003.

in management's favor.¹⁴² Regardless of whether management or unions currently enjoy favorable economic and regulatory conditions, the legal arrangements for collective bargaining are not necessarily inappropriate, nor do they undercut long run labor-management cooperation such that they need be amended.

G. History of Labor-Management Cooperation

A long history of labor-management cooperation exists in both the railroad and airline industries, pre-dating—in the case of the railroad industry—the RLA. Both industries are distinguished by more government intervention than is characteristic of most other private sector industries in the United States. This tradition of government intervention, combined with the political power of the railroad and airline unions, has encouraged much labor-management cooperation in conjunction with the development of regulatory policies affecting industry structure, pricing, levels of service, and labor relations. The RLA was drafted by management and union representatives and enacted by Congress virtually without change.¹⁴³ A few years later, the original policies concerning the regulation of airlines were developed in response to both union pressure for federal regulation of airline labor relations and the evolution of a subsidy program for airline service in the 1930s.¹⁴⁴

After World War II, major capital investment in railroad technology had an enormous impact on the industry. Examples of such investment include the installation of automatic car retarders, centralization of train classification work, introduction of the diesel locomotive, and automation of track work.¹⁴⁵ In addition, centralized traffic control reduced the need for train dispatchers, telegraphers, and tower operators, as well as permitting higher train speeds, reducing the need for train crews.¹⁴⁶ These changes (except for introduction of the diesel locomotive) were accomplished without any labor-management strife which often harms the economy. In the airline industry, the jet airplane and the wide-bodied jet substantially in-

142. See DEMPSEY & THOMS, *supra* note 30, at 301; LIPSKY & DONN, *supra* note 37, at 174-76; Comment, *supra* note 59, at 1003-04.

143. *Burlington N.R.R. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 447, n.13 (1987). This occurred at the same time that basic governmental policies respecting the regulation of railroads were being developed in the context of considerable political pressure for nationalization. See Perritt, *supra* note 57, at 274-82 (explaining emergence of railroad economic regulation).

144. See Kahn, *Collective Bargaining*, *supra* note 106, 428-34, 461-79 (1971) (discussing relation between economic regulation and collective bargaining in early years of airline industry).

145. Rehms, *Collective Bargaining*, *supra* note 18, at 85, 89.

146. *Id.* at 85, 108.

creased total factor productivity.¹⁴⁷ Despite the commuter airline phenomenon¹⁴⁸ and deregulation,¹⁴⁹ all these changes have been accommodated without major harm to the economy from labor unrest.

By these measures, collective bargaining and labor-management cooperation have good records. However, the record does not look so good in light of the fact that disruption due to strikes has been avoided largely by postponing technological change for years or even decades. Perhaps the strongest example of the failure of this strategy in the railroad industry is the collapse of Penn Central and the near collapse of its successor, Conrail. One of numerous causes of the Penn Central collapse was that labor costs were higher for Penn Central than for its market competitors.¹⁵⁰ Nonetheless, organized labor steadfastly refused to adjust crew size restrictions¹⁵¹ through collective bargaining and concentrated its efforts on ensuring that legislation transferring rail operations from the Penn Central and other bankrupt carriers to Conrail be accompanied by lifetime labor-protective arrangements and the perpetuation of fragmented collective bargaining structures which became serious impediments to labor-management cooperation once Conrail was formed.¹⁵² For the most part, these impediments to Conrail's success were removed only when Conrail itself was about to collapse in 1981.¹⁵³

The record of adaptation in the railroad industry is largely illusory.¹⁵⁴ The apparent success of collective bargaining represented by the 1964 shopcraft agreement¹⁵⁵ is also illusory because management

147. See Kahn, *Collective Bargaining*, *supra* note 106, at 444-51.

148. See Dempsey, *Collision Course*, *supra* note 30, at 361.

149. Airline Deregulation Act of 1978, Pub. L. No. 90-504, 92 Stat. 1705.

150. *Railway Labor Executives' Ass'n v. United States*, 575 F. Supp. 1554, 1558 (Regional Rail Reorg. Ct. 1983), *cert. denied*, 465 U.S. 1101 (1984).

151. Labeled as "crew consist" in railroad industry terminology.

152. *Railway Labor Executives' Ass'n*, 575 F. Supp. at 1558-59.

153. See Perritt, *supra* note 57.

154. For example, Congress was forced to intervene and impose a settlement of diesel firemen and crew consist issues in 1963. See Pub. L. No. 88-108, 77 Stat. 132 (1963) (terminated 180 days after August 28, 1963); S. Rep. No. 459, 88th Cong., 1st Sess. (1963), *reprinted in* 1963 U.S. CODE CONG. & ADMIN. NEWS 833. This intervention was a last ditch effort to solve the disputes and followed four years of debate before a special Presidential commission and an emergency board. See Exec. Order No. 10,891, 25 Fed. Reg. 10,525 (1960). After the congressional action, railroad labor groups succeeded in re-establishing the 1959 status quo and the crew consist issue has not yet been resolved to this day. See Perritt, *supra* note 57, at 288-90; see also Report and Recommendations of the BLE Study Commission Established by the Signatory Parties to the September 28, 1982 Agreement Implementing Public Law 97-262, 168-69 (Dec. 8, 1983) [hereinafter BLE Study Commission].

155. See Rehmus, *Collective Bargaining*, *supra* note 18, at 160-64 (describing settle-

received little in exchange for revolutionary labor protections. The only real adaptation to changing railroad market conditions and technologies has been achieved in the face of profound threats to an enterprise's own viability, and even then, only after government intervention. Railroad industry attitudes have become more flexible only in light of the collapse of the Rock Island and Milwaukee Railroads.¹⁵⁶ These occurrences have undermined the myth that the government would never allow a railroad to cease operation, no matter how inefficient.

Collective bargaining in the airline industry has a better record of adapting to industry structural changes. Tough problems have been handled with less government intervention, most likely because the possibility of an air carrier ceasing operation is more readily apparent and expanding markets during most of the industry's history have cushioned the effect of employee dislocation.¹⁵⁷ In addition, there are fewer restrictions on unilateral carrier action in the airline industry because there is less of a tendency automatically to appoint emergency boards or to enact ad hoc legislation. Government intervention in emergency disputes and collateral economic regulatory and labor protection legislation have affected many cooperative efforts as much as the RLA itself.

III. BASIC POLICY OPTIONS

Deciding what particular provisions of the RLA or other statutes promote or hinder labor-management cooperation is a difficult task because there is no consensus on the appropriate role of law in promoting sound labor-management relations.

It is too often forgotten that real-world collective bargaining is not primarily a creature of law.¹⁵⁸ The law may shape collective bargaining by encouraging some institutional arrangements and discouraging others, or encouraging some types of substantive employment terms and discouraging others. It may also grant legal rights to engage in certain conduct and establish obligations not to engage in other types of conduct. However, the initiative comes from the parties themselves in that management and trade unions may either cooperate

ment providing labor protection to shopcraft employees suffering compensation loss due to technological improvements, reorganization, or transfer of work).

156. See 45 U.S.C. § 908 (1982) (mandating Milwaukee Railroad and its labor organizations enter into a labor protective agreement); 45 U.S.C. § 1005 (1982) (mandating labor protection agreement between Secretary of Transportation and Rock Island Railroad).

157. Dempsey, *Collision Course*, *supra* note 30, at 343-44.

158. "Collective bargaining was not invented, nor its fundamental features shaped by legislation, administrative tribunals or the courts in this country" Address by John T. Dunlop, Southern Methodist University School of Law conference entitled *The Labor Board at Mid-Century*, held in Washington, D.C. (Oct. 2, 1985).

and engage in mutual creativity or focus their energies on ways to injure and deprive the other of power. Law, therefore, plays only a limited role in promoting labor-management cooperation. Historically, railroad and airline labor law's purpose has been constraining economic disruption by promoting collective bargaining; labor-management cooperation has not been an explicit statutory goal.

In evaluating the law's limited role, it is helpful to identify basic policy alternatives for labor law to pursue. One possibility is that the law should preserve the right to exert economic pressure in the belief that private resolution of labor-management disputes is best assured by the free interplay of economic forces. Another possibility is that labor law should encourage the private establishment of institutional arrangements to channel economic pressure in constructive directions or otherwise promote desirable labor-management relations. An example of this is the controversial preference for broader representation units in the health care industry—an initiative which has engendered more conflict than stability in collective bargaining.¹⁵⁹

Yet another option is to create governmental institutions for resolving certain kinds of disputes, thereby permitting labor and management to use these forums to resolve disputes without economic conflict. Examples of such arrangements are the unfair labor practice adjudication machinery under the NLRA Act, representation certification under both the RLA and NLRA, grievance arbitration machinery under the RLA, and a variety of economic regulatory forums.¹⁶⁰

When labor-management disputes ultimately threaten the national health or safety, Congress may be called upon to enact special legislation to curtail the dispute directly, remedy the underlying causes of the dispute, or both. Both of the major federal labor statutes implicitly contemplate this ultimate possibility through the emergency dispute procedures of the Taft Hartley Act,¹⁶¹ and the emergency board

159. *Compare* International Bhd. of Elec. Workers v. NLRB, 814 F.2d 697 (D.C. Cir. 1987) (rejecting NLRB's conclusion that health care amendments to NLRA obligate it to certify only two units in health care institutions) *with* St. Vincent's Hosp. v. NLRB, 567 F.2d 588, 590 (3d Cir. 1977) (overturning NLRB unit determination because it failed to comport with congressional committee report language urging "due consideration . . . to preventing proliferation of bargaining units in the health care industry"); *see also* 52 Fed. Reg. 25,142 (1987) (proposed NLRB rule to define collective bargaining units in the health care industry).

160. *See* Grebey, *Deregulation: Home Run or Strike Out for Labor Relations*, 9 INDUS. REL. L.J. 57, 60-61 (1987) (economic regulatory agencies acted in unions' traditional role of regulating labor markets).

161. 29 U.S.C. §§ 176-180 (1982).

procedures of the RLA.¹⁶²

A final policy option favors the law restricting the economic weapons available to the more powerful side in a labor-management dispute, thereby equalizing the economic power of both sides. Possible examples of this are the restriction on secondary pressure contained in the NLRA¹⁶³ which disadvantages unions, and the RLA restrictions on employers changing the status quo which disadvantages them.

The most popular statutory scheme to promote labor-management cooperation—or at least labor-management agreement—is the establishment of interest dispute mediation machinery¹⁶⁴ to be used by the parties either on an optional basis as under the NLRA,¹⁶⁵ or on a mandatory basis as under the RLA.¹⁶⁶ This kind of statutory arrangement provides the parties with expert mediators encouraging them to resolve their disputes peacefully and creatively. The RLA's success record is mixed at best.¹⁶⁷ Conventional wisdom supports the conclusion that mandatory mediation has been a failure,¹⁶⁸ although some data suggests it has been more successful than most realize.¹⁶⁹ In any event, Presidential inattention to the quality of NMB appointments has probably reduced the utility of mandatory mediation under the RLA.

Probably the best role for labor law is to minimize government intervention in labor disputes except in the area of certifying majority representatives. Government intervention often represents a way for one side in a labor dispute to improve its position instead of engaging the other side in resolving the dispute. Labor-management cooperation inherently calls for direct engagement by labor and management

162. 45 U.S.C. § 160 (1982).

163. 29 U.S.C. § 158(b)(4) (1982).

164. Interest disputes are disputes over the negotiation of a new collective bargaining agreement. Interest disputes are distinguished from grievance disputes, which involve the interpretation or application of an existing collective bargaining agreement. See INTERNATIONAL LABOR OFFICE, CONCILIATION AND ARBITRATION PROCEDURES IN LABOR DISPUTES 5 (1980). Interest disputes under the RLA are referred to as "major disputes." See Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 722-23 (1945) (defining the distinction between "minor disputes" and "major disputes").

165. See 29 U.S.C. § 158(d) (1982) (requiring notification of the Federal Mediation and Conciliation Service, but not prohibiting strikes or changes in the status quo until mediation is completed).

166. See 45 U.S.C. § 156 (1982) (prohibiting changes in the status quo and, by judicial interpretation, strikes until the NMB has completed mediation).

167. One reason for the mixed record is disagreement over the appropriate criteria for judging the process. If one believes that an objective of government mediation is to discourage its use, a decline in mediation cases might be an indicator of success.

168. See Kaufman, *Emergency Boards Under the RLA*, 9 LAB. L.J. 910 (1958) (false, popular notion that emergency board procedures have been successful).

169. See W. Curtin, *Airline Labor Mediation Since Deregulation: A Continuing Role* (unpublished report presented to the Air Transport Labor Relations Conference (June 18, 1987)).

to resolve disputes and reach agreement on issues of mutual interest. When the government becomes involved, albeit at the invitation of one of the parties, this sort of direct engagement is discouraged. The exception for representation certification is necessary because election units must be defined if exclusive representatives are to be selected.¹⁷⁰ Furthermore, both sides may need some degree of legal protection from competing demands for recognition.¹⁷¹

The RLA arguably restricts opportunities for government intervention in interest disputes because it does not provide the administrative machinery necessary for resolving unfair labor practices. In practice, however, the Act encourages government intervention through the often overused emergency board procedures. While some fact-finding and other preparation for ultimate congressional intervention may be an appropriate part of permanent statutory law, it is important that Presidential administrations exercise restraint in using this machinery¹⁷² and not use it routinely as did administrations of twenty to thirty years ago.¹⁷³

IV. CRITICISMS OF THE RLA AND ITS COLLECTIVE BARGAINING TRADITIONS

This article now considers specific areas of criticism levied upon the RLA as expressed by both labor and management representatives familiar with the Act.¹⁷⁴

A. Union Concession Agreements

Concessionary bargaining asks employees to give up something in order to enhance the competitive position and financial welfare of the enterprise for which they work. Employee representatives

170. The position expressed in the text begs the question of whether exclusive representation is desirable, but no contemporary American interest group credibly argues against exclusive representation.

171. See *Lullo v. Fire Fighters Int'l Ass'n Local 1066*, 55 N.J. 409, 262 A.2d 681 (1970) (rejecting constitutional challenge to exclusive representation of public employees and discussing the advantages of exclusive representation according to the will of the majority of employees in a defined unit).

172. See T. KOCHAN, *supra* note 8, at 292-93 (empirical evidence suggesting that fact finding process is effective only when used relatively infrequently).

173. See H. PERRITT, *supra* note 70, § 13.9.

174. Many of these criticisms were explored in a symposium held at the Villanova Law School Center for Continuing Legal Education. The symposium was held May 17-18, 1982, and was entitled *Transportation Labor Issues for the 1980s*. Other criticisms have become more prominent in recent years due to recent mergers and labor unrest in the airline and railroad industries.

presented with a management proposal for employee concessions naturally seek something in return. In recent years, many employee groups have sought to obtain commitments from management to restore the conceded wage levels, benefits, or working conditions; assurances related to capital investment; employee participation in enterprise ownership;¹⁷⁵ shares of enterprise income;¹⁷⁶ or employee representatives on corporate boards of directors—the ultimate authority for managing the enterprise.¹⁷⁷ Many such concessions are explored with persons not yet owning or managing the enterprise. Sometimes employee groups discuss, and wish to make deals with, persons contemplating obtaining control of an enterprise, but are willing to do so only if the terms of the labor agreement are changed.¹⁷⁸

The practical desire to make such arrangements presents a number of novel labor law issues such as the enforceability of specific types of bargains under the RLA and bargains struck between employee representatives and those other than the present employer. Questions also exist regarding whether employer compensation of an employee representative serving on a board of directors or in some other management capacity offends section 2 of the RLA,¹⁷⁹ prohibiting employers from paying employee representatives.¹⁸⁰

Employer promises to issue stock to employees, give income-con-

175. Usually through stock ownership. See Moberly, *supra* note 9, at 767-69 (discussing employee ownership, quality circles, and employees on boards of directors). See generally SIEGEL & WEINBERG, *supra* note 4.

176. Income can be shared through stock ownership or through bonuses contingent on an enterprise's income.

177. See, e.g., *IAM Stock Ownership Inv. Trust Fund v. Eastern Air Lines, Inc.*, 639 F. Supp. 1027 (D. Del. 1986) (dispute over carrier payment of certain expenses related to administration of trust holding employee stock in carrier).

178. Examples include negotiations for the purchase of strike-bound Eastern Air Lines, Carl Icahn's acquisition of control of Trans World Airlines, Delta Air Line's acquisition of Western Air Lines, negotiations over the sale of Northwest Airlines, and the prospect, ultimately unrealized, of Conrail's sale to Norfolk Southern or other investors in 1985 and 1986. See Bernstein, *Move Over Boone, Carl, and Irv—Here Comes Labor*, BUS. WEEK, Dec. 14, 1987, at 124 (describing Pan American World Airways union negotiations with two different investors seeking control of airline); *Dispute Slows Deal at Eastern*, N.Y. Times, Apr. 12, 1989, at D1; *The Fight for Northwest Heats Up*, N.Y. Times, Apr. 12, 1989, at D1 (reporting suit by existing management claiming interference with RLA representations); *3 Eastern Unions Are Said to Back Concession Pact*, N.Y. Times, Apr. 11, 1989, at D1; *Pact With Pan Am Reported by Pilots*, N.Y. Times, Dec. 2, 1987, at D1, col. 4 (concessions in exchange for stock ownership); *Pritzkers in Talks On Pan Am Unit*, N.Y. Times, Nov. 25, 1987, at D3, col. 1 (describing discussions between potential purchaser and unions); *Labor Pact Could Foil United Bids*, N.Y. Times, Nov. 24, 1987, at D1, col. 6 (describing collective bargaining agreement giving unions right to match purchase offers for airline).

179. 45 U.S.C. § 152 (1982).

180. See generally *Anchorage Community Hosp.*, 225 N.L.R.B. 575 (1976) (finding no violation of Section 8(a)(2) of NLRA for hospital union to control seven of fifteen seats on board of directors or to have loaned hospital money).

tingent bonuses, make capital investment decisions in particular ways, and place employee representatives on boards of directors raise additional questions about the scope of "mandatory" subjects of bargaining under the RLA.¹⁸¹ If both parties agree to a nonmandatory bargaining subject, their deal may be enforceable, but neither party can use economic pressure to force an agreement on such a subject. By implication, lack of agreement on a nonmandatory subject cannot result in a refusal to agree on a mandatory subject either. Under this interpretation, a union is not entitled to insist, to the point of striking, on a capital investment commitment (assuming such a subject is classified as nonmandatory) in exchange for wage concessions desired by the employer.

Even enforceability may be a problem. The RLA contains no equivalent of section 301 of the NLRA¹⁸² which makes collective bargaining agreements enforceable. Enforcement of RLA collective bargaining agreements depends on judicial enforcement of the status quo¹⁸³ and rights dispute arbitration provisions of the RLA.¹⁸⁴ Non-mandatory subjects of bargaining may be outside the coverage of one or both of these statutory provisions and agreements addressing such subjects may be unenforceable.¹⁸⁵

To the extent that subjects of interest to employees involved in concessionary bargaining are, in some sense, off limits under the RLA, concessionary bargaining cannot proceed equitably without some sort of subterfuge. It is not at all apparent why the law should discriminate among subject matter; it may well be that the judicially created distinction between mandatory and permissive subjects of bargaining under the RLA should be abandoned.¹⁸⁶

Further questions arise when parallel representation institutions

181. See H. PERRITT, *supra* note 70, §§ 6.8, 6.17 (1986 & Supp. 1987) (explaining acceptance by federal courts of the distinction between mandatory and permissive subjects of bargaining under the RLA); see also *Railway Labor Executives' Ass'n v. Pittsburgh & L.E.R.R.*, 845 F.2d 420 (3d Cir. 1988).

182. 29 U.S.C. § 185 (1982).

183. 45 U.S.C. § 156 (1982).

184. *Id.* §§ 153, 183.

185. It is conceivable that some labor-management agreements could be enforced in state court as common law contracts. See *Garner v. Teamsters, Chauffeurs & Helpers Local 776*, 346 U.S. 485 (1953). See generally H. PERRITT, *supra* note 70, § 4.4 (state courts are courts of general jurisdiction and therefore are competent to hear common law actions for breach of contract). However, preemption by federal law is very likely.

186. See *ALPA v. United Air Lines, Inc.*, 802 F.2d 886, 902-03 (7th Cir. 1986) (adopting mandatory-permissive distinction to construe union's good faith obligation in connection with alleged refusal to settle strike until another union's rights were protected).

are established to implement employee ownership, income, or management participation schemes and the representative for these purposes is someone other than the collective bargaining representative. These queries relate to whether employer involvement with the new type of employee representative on subjects touching on employment relationships offends the RLA prohibition against company unions, or the more general prohibition against employer bargaining with anyone other than the collective bargaining representative under the RLA.¹⁸⁷ Unions holding certification as the majority representative can delegate their representational authority to virtually anyone.¹⁸⁸ The problem manifests itself when a union or individual employees seek to enforce or block an employer's obligation to deal with an employee representative other than the union for certain purposes.

It is also possible to insulate employer discussions with employee representatives over enterprise management subjects from discussions over wages, rules, and working conditions. Such isolation is artificial, however, particularly when the genesis of the employee participation in ownership, income, or management was an exchange for changes in wages, rules, or working conditions. The law should permit integration between the institution's need to effect employee participation in ownership, income, and management with the institution's need to effect collective bargaining.¹⁸⁹

It may be necessary to amend paragraph four of section 2¹⁹⁰ to permit carefully circumscribed management-participation arrangements embodied in a collective bargaining agreement.¹⁹¹ There is, however, a policy argument that the purposes of section 2 are satisfied if a collectively bargained-for arrangement involving a literal violation is ratified by the employees covered by the agreement.¹⁹²

187. *Cf. Southern Pac. Transp. Co. v. Brotherhood of Ry., Airline & S.S. Clerks*, 636 F. Supp. 57 (D. Utah 1986) (granting preliminary injunction against carrier dealing directly with individual employees in connection with lump-sum separation payments). There is a factual difference, of course, between a carrier dealing directly with individual employees instead of through the representative and one dealing with a representative other than the certified one. Both situations, however, raise legal problems because they evade the employer's responsibility to deal only with the exclusive representative. The analogous problem under the NLRA is considered in 1986 LABOR LAW REPORT, *supra* note 1, at 20-25.

188. *See, e.g., General Elec. Co. v. NLRB*, 412 F.2d 512 (2d Cir. 1969); *Standard Oil Co. v. NLRB*, 322 F.2d 40 (6th Cir. 1963); *NLRB v. Roscoe Skipper, Inc.*, 213 F.2d 793 (5th Cir. 1954).

189. The desirable integration itself can be achieved through private agreement.

190. 45 U.S.C. § 152 (1982).

191. *Cf. 29 U.S.C. § 158(a)* (1982) (providing that employer's establishment of credit union is not an unfair labor practice).

192. For example, such an arrangement could be the payment of regular board member compensation to a union officer who sits on an employer board of directors. *See generally* 1987 LABOR LAW REPORT, *supra* note 6, at 42-65, 69 (analyzing the kinds of entities covered by NLRA and the legal treatment of directors fees paid to union representatives).

B. Carrier Reorganization Employee Protection Agreements Under the RLA

The RLA inhibits labor-management cooperation by making it difficult for employees to enforce privately negotiated employee protection agreements. In addition, the Act makes it difficult for employee representatives to negotiate with a person acquiring a carrier. Such negotiations are important because of the frequency with which mergers and reorganizations are the vehicles for improving the efficiency of rail and air carriers, thereby ultimately enhancing employment opportunities.

The difficulty arises because the potential purchaser of a transportation enterprise frequently has not been previously associated with the industry. Furthermore, under the RLA, the employees of an acquired enterprise certainly are not the employees of the potential purchaser before it actually takes control.¹⁹³ Accordingly, a union representing the employees of the enterprise to be acquired must operate outside the RLA in exploring terms of the purchase arrangement with the potential purchaser. This has two significant implications. First, the potential purchaser risks violating section 2 of the RLA if it agrees to recognize the union as the representative of its workforce once the acquisition is consummated.¹⁹⁴ Second, any agreement made between the union and the potential purchaser before the acquisition is consummated may not be enforceable as a collective bargaining agreement under sections 3 or 6 of the RLA which are the only provisions that permit legal action to enforce a collective bargaining agreement.¹⁹⁵ In terms of simple statutory construction, it is unclear as to whether such preacquisition agreements enjoy any legitimacy under sections 3 or 6 of the Act.¹⁹⁶

The potential section 2, fourth, violation arises because that section of the RLA, like section 8 of the NLRA,¹⁹⁷ prohibits employers from interfering with employee choice of bargaining representatives.

193. 45 U.S.C. § 151 (1982) (section titled "First" defining carrier and section titled "Fifth" defining employee). See generally H. PERRITT, *supra* note 70, § 6.27 (bargaining before transfer is a difficult question because potential transferee may not be a carrier and the labor organization may lack the status of an RLA representative before such transfer).

194. 45 U.S.C. § 152 (1984) (see sub section titled "Fourth"); see *Northwest Air Bidder Blocked*, N.Y. Times, Apr. 14, 1989, at D4 (TRO against discussions between unions and purchaser).

195. *Id.* §§ 153, 156.

196. See *IAM v. Northwest Airlines, Inc.*, 843 F.2d 1119, 1122 n.3 (8th Cir. 1988).

197. 29 U.S.C. § 158(a) (1982).

Before the acquisition goes forward, the potential purchaser has no work force. Therefore, it cannot be ascertained what representative those undefined employees prefer. If the potential purchaser agrees ahead of time to recognize a union to represent the work force before it is selected, the potential purchaser in effect is imposing its choice of employee representative on the new work force. This is essentially the same problem presented by any pre-hire agreement, a subject much litigated under the NLRA.¹⁹⁸

The difficulty with enforcing pre-hire labor protection agreements is not unique to the RLA. The same uncertainty regarding representation status that may impair enforceability of labor protection agreements under the RLA may also impair enforceability of agreements under section 301 of the NLRA.¹⁹⁹ The critics of the RLA must identify more specifically the unique characteristics making it more vulnerable to criticism on this point than the NLRA or explain why pre-hire labor protective arrangements are especially necessary for industries covered by the RLA.

There are some practical ways around the problem, however. The most straightforward way of avoiding the problem is for the potential purchaser of the enterprise to agree in advance to hire all of the employees of the acquired carrier and to apply any collectively bargained terms and conditions of employment pertaining to the acquired carrier. This makes the purchaser both a "recognition" and "contract compliance" successor,²⁰⁰ which means it would be obligated by law to recognize and bargain with the union representing the acquired carriers' employees. Purchasers may make such agreements because they want to avoid labor trouble or because of business decisions to maintain workforce continuity. This strategy, however, cannot work when the potential purchaser is already a carrier with its own work force. In these circumstances, the employees of the purchaser may well have their own collective bargaining

198. Pre-hire agreements are collective bargaining agreements negotiated before an employer has a workforce. When the NLRB first asserted jurisdiction over the construction industry, it held pre-hire agreements, common in that industry, unlawful along with other referral, hiring, and employment practices. Recognizing that the construction industry is significantly different from other industries, Congress enacted section 8(f) specifically to authorize pre-hire agreements. *See id.* § 158(f). For many years, the NLRB nevertheless found that such agreements were not enforceable under section 8(a)(5), and the courts limited their enforceability under section 301 of the Labor-Management Relations Act. *See John Deklewa & Sons*, 282 N.L.R.B. 184 (1987) (overruling prior cases and holding that construction industry pre-hire agreements are enforceable under section 8(a)(5)); *see also John S. Griffith Constr. Co. v. United Bd. of Carpenters*, 785 F.2d 706, 712 (9th Cir. 1986) (addressing the validity of an employer's repudiation of pre-hire agreement in which both section 301 and section 8(f) were analyzed).

199. 29 U.S.C. § 185 (1982).

200. *See H. PERRITT, supra* note 70, §§ 5.17 -19.

agreements and representation arrangements. If the purchaser makes agreements with the employees of the acquired carrier inconsistent with its obligations to its own present employees, it risks conflicting obligations under the RLA.²⁰¹

Moreover, the problem of contract enforceability may persist. A pre-hire agreement might be enforceable as a common law contract even if it is not enforceable under sections 3 and 6 of the RLA. However, the common law contract enforcement issue raises all of the difficulties which confronted courts presented with claims of breach of collective bargaining agreements before enactment of the major labor laws. These difficulties include standing to sue as well as the nature of the collective bargaining agreement as a contract.²⁰² These difficulties are substantial impediments to the use of collective bargaining to address labor protection issues instead of relying upon regulatory prescription of labor conditions. Also, they make it difficult for creative employment concessions to be exchanged for capital or income participation in a restructured enterprise.

Simply amending the Act or interpreting it judicially to enforce pre-hire agreements presents difficulties. The most obvious difficulty is the potential interference with free employee choice. Another difficulty is that making it easy for a predecessor union to impose its collective arrangements on a purchaser could reduce the flexibility needed to restructure a failing enterprise.²⁰³ Anyone who has participated in restructuring or concessionary bargaining knows that an essential ingredient of such bargaining is the possibility that, absent agreement, the enterprise will be restructured in a way that the employees do not like. If existing arrangements can be perpetuated under the Act, the incentive for labor-management cooperation is eliminated. A clear example of this is the long period during which the Interstate Commerce Act was interpreted to perpetuate existing

201. See *IBTCWHA Local 2707 v. Western Air Lines, Inc.*, 813 F.2d 1359, 1364 (9th Cir. 1987) *see also* (granting an injunction against merger until both successor and predecessor corporations agreed to accept arbitration of obligations to protect employees affected by merger), *vacated & remanded*, 108 S. Ct. 53 (1987); *see also* 45 U.S.C. § 152 (1982) (subsections titled "Second" and "Ninth" which address representation of the parties designated without interference, influence, or coercion by either party, and if placing questions of representation under the exclusive jurisdiction of the NMB); 29 C.F.R. § 1202.3 (1988) (setting forth the NMB duties concerning the mediation of representation disputes).

202. See H. PERRITT, *supra* note 70, § 1.12.

203. See *In re Chicago, M., St. P. & Pac. R.R.*, 658 F.2d 1149, 1173-75 (7th Cir. 1981), *cert. denied sub nom. Railway Labor Executives' Ass'n v. Ogilvie*, 455 U.S. 1000 (1982).

employee arrangements regardless of enterprise restructuring,²⁰⁴ resulting in unacceptably high labor costs in the railroad industry.

While there is no direct evidence that these theoretical difficulties have inhibited creative labor-management cooperation in the industries covered by the RLA,²⁰⁵ it is always hard to measure the effect of legal uncertainties which may discourage entering into certain types of transactions. The RLA should be amended to permit labor protection arrangements negotiated in contemplation of a merger or acquisition to be enforced. When such enforcement conflicts with representation arrangements of the surviving carrier, money damages should be available if appropriate.

A legitimate policy distinction exists between enforcing labor protection arrangements against the transferor carrier and enforcing them against a nonconsenting transferee carrier. If such agreements were to be enforceable against a nonconsenting transferee, they would have the greatest potential of interfering with representation arrangements and would present the greatest burdens to enterprise restructuring. The best solution is to ensure that such agreements are enforceable against transferor carriers, both by injunctive relief and damages.

C. Fragmentation of Representation

Representation under the RLA is fragmented to a greater degree than it is under the NLRA.²⁰⁶ This fragmentation results from a narrow definition of the permissible election units for selection of collective bargaining representatives.²⁰⁷ The NMB has historically taken the position that the RLA's definition of craft or class, which in turn determines permissible election units, is fixed by statute and reinforced by actual historic practices in the railroad and airline industries. Therefore, the Board lacks discretion to redefine election units in order to serve broader policy goals.²⁰⁸

There are two problems with narrowly defined election units. First, a proliferation of election units makes it likely that bargaining

204. See *New York Dock Ry. v. United States*, 609 F.2d 83, 86-90 (2d Cir. 1979).

205. But see *Railway Labor Executives' Ass'n v. Pittsburgh & L.E.R.R.*, 845 F.2d 420 (3d Cir. 1987) (declining to exempt carrier from its duty under the RLA to bargain in good faith with its union despite the fact a sale of all its assets was pending, and even though ICC declined to impose labor protection), *cert. denied*, 105 S. Ct. 2013 (1988).

206. Some of the fragmentation also results from traditional bargaining structures in the airline and railroad industries, in which craft unions negotiate separately. The point made in the text is that election unit definition influences bargaining unit practices.

207. See *Chicago, A. & E. Ry.*, 1 N.M.B. 229, 238-40 (1942) (case nos. R-864, R-865).

208. Such conformity between election unit and bargaining unit boundaries is not legally required but is likely to occur. See T. KOCHAN, *supra* note 8, at 93 (explaining how negotiation units may or may not be the same as election units).

will be fragmented along election unit boundaries.²⁰⁹ This considerably increases the number of collective bargaining negotiations and the number of separate collective bargaining agreements. Each separate negotiation presents the potential for a work stoppage or for unilateral employer action. Each separate collective bargaining agreement presents the potential for dissimilarities of wages, rules, or working conditions which has a destabilizing effect. Second, the trend toward labor-management cooperation implies in many cases a job redefinition. When bargaining units are narrow, the likelihood is greater that job redefinition will raise serious work jurisdiction issues, requiring the involvement of more than one collective bargaining representative and modifications in more than one collective bargaining agreement. This complicates the ability of the collective bargaining process to accommodate labor-management cooperation in the form of job enlargement.

In making the argument for broader election units, it is important to acknowledge the argument for smaller geographic units. The NMB, while perpetuating craft or class fragmentation, has historically insisted that representatives be certified only on a carrier wide basis, as opposed to a facility-by-facility basis.²¹⁰ Obviously, this raises the costs and logistical difficulties of organizing labor groups. The Teamsters Union has pressed vigorously for narrower geographic units without success. Management's position on this issue is that the integrated nature of railroad and airline operations means that a strike against one facility would shut down the entire carrier. Therefore, the system-wide unit policy is appropriate to minimize disruptions in commerce.

While the historic position of the NMB suggests an amendment of the RLA is necessary to enlarge craft or class definition, the Board actually has substantial discretion to act on its own under the existing statute. In fact, in a few instances, the Board has changed historically established craft or class boundaries using various

209. See *infra* note 210. In another respect, representation under the RLA is less fragmented than under the NLRA. Employees covered by the NLRA can be represented by different representatives at different plants or facilities. Under the RLA, the NMB generally requires that representation be system wide. Compare *Air Florida, Inc.*, 7 N.M.B. 162, 164-65 (1979) (case no. R-4766) (contrasting NMB and NLRB policy on geographic fragmentation of units) with *National R.R. Passenger Corp.*, 13 N.M.B. 128, 133-34 (1986) (case no. R-5605) (finding Amtrak's Washington Terminal operation to contain separate crafts or classes).

210. See, e.g., *Guyana Airways*, 11 N.M.B. 11 (1983) (case nos. R-5406 to -5408); *Air France Cargo Agents*, 5 N.M.B. 223 (1976) (case no. R-4492).

rationalizations.²¹¹

If collective bargaining representatives are to be effective, they must maintain their institutional strength. The narrower the institution's constituency, however, the more vigilant the representatives need to be to resist any change in collectively bargained arrangements which would reduce its membership over time. Lower membership results in less dues income which in turn causes a weakening in the strength of the collective bargaining representative. Accordingly, it is not unexpected or unreasonable for a trade union representing a narrowly defined group of employees to resist significant changes in the jurisdiction of that unit. Conversely, if a trade union represents a broader unit of employees, the union has more flexibility to consider realigning job definitions without jeopardizing its institutional strength.

Although substantial union consolidation has reduced the fragmentation problem, at least partially,²¹² the NMB should broaden craft or class definitions as a matter of policy to further combat fragmentation. Failing that, the RLA should be amended to require the NMB to minimize fragmentation in defining election units for representation purposes.

D. Impact of Union Institutional Adjustment

Restrictions on carrier payments to unions foreclose potentially desirable agreements that cushion the institutional impact of change. Section 2 of the RLA prohibits carriers from supporting collective bargaining representatives.²¹³ Motivated by the desire to eliminate the corrupting influence of "company unions,"²¹⁴ this broad prohibi-

211. *Compare Switchmen's Union of N. Am. v. NMB*, 320 U.S. 297, 309 (1940) (Reed, J., dissenting) (quoting the Board's holding that the RLA does not vest it with discretion to split a single carrier for the purpose determining of who is eligible to vote for a representative) and *KLM Royal Dutch Airlines*, 3 N.M.B. 1, 4-5 (1953) (case no. C-2098) (expressing danger of dividing traditional crafts or classes) and *Pend Oreille Valley R.R.*, 10 N.M.B. 402, 407 (1983) (case nos. R-5392 to -5397) (historical craft or class boundaries must be honored even if it means one-person units) with *National R.R. Passenger Corp.*, 13 N.M.B. 128, 133-34 (1986) (case no R-5605) (finding Amtrak's Washington Terminal operation to contain separate craft or class).

212. In 1966, the previously separate Brotherhood of Locomotive Firemen and Enginemen (BLF&E), Brotherhood of Railroad Trainmen (BRT), Switchmen's Union of North America (SUNA), and Order of Railway Conductors (ORC), merged to become the United Transportation Union (UTU). In the 1970s and 1980s, some merger movements occurred among the railroad nonoperating crafts, with the American Railway and Airline Supervisor's Association (ARSA) and the Brotherhood of Railway Carmen (BRC) merging into the the Transportation Communications International Union (formerly Brotherhood of Railway and Airline Clerks or BRAC), and the Railroad Yard Masters of America (RYA) merging into the UTU.

213. 45 U.S.C. § 152 (1982) (see subsection titled "Fourth" placing various restrictions on employers with respect to labor unions and collective bargaining).

214. L. LECHT, *supra* note 139, at 78 (providing background to the 1934 amendments).

tion can discourage voluntary arrangements permitting a carrier to reduce unneeded positions while cushioning an employee representative against potentially destructive effects of lost dues as membership is reduced. These provisions of section 2 should be amended to permit certain kinds of carrier support payments when they are part of a bona fide collective bargaining agreement.

E. Excessive or Prolonged Government Intervention

In the RLA and the NLRA, Congress created permanent statutory mechanisms to reduce economic conflict and to control the use of economic weapons between labor and management in labor-management conflict situations. The emergency dispute provisions of the Taft-Hartley Act and the RLA envision executive and legislative intervention as a last resort.²¹⁵ Congress has employed ad hoc legislation frequently in railroad industry disputes, and to a lesser degree in the airline industry, because of the perceived importance of these industries to the national economy.

American labor policy relies on market forces supplemented by collective bargaining to determine wage levels. Such reliance implies tolerance of a certain amount of economic conflict as the necessary price of collective bargaining. A threshold exists, however, above which the conflict threatens national security, the long-term health of the economy, and the health and safety of the public. Above this threshold, strikes are considered to be "emergency strikes." Both the RLA and the NLRA contain procedures for handling emergency strikes.²¹⁶ This threshold is not determined objectively, rather, it is defined through an interplay of political sentiment at a particular time in the context of a particular dispute.²¹⁷ Today, government intervention in interest disputes through fact-finding and arbitration is much more common in the public sector than in the private sector. Indeed, both procedures have become standard features of state public employee bargaining statutes.²¹⁸

Section 10 of the RLA²¹⁹ provides emergency dispute procedures

215. See 29 U.S.C. § 176 (1982); 45 U.S.C. § 160 (1982).

216. See generally H. PERRITT, *supra* note 70, §§ 13.4 -9, (discussing the Taft-Hartley Act and the RLA provisions for emergency dispute procedures).

217. See generally *id.* §§ 10.1 -21.

218. See T. KOCHAN, *supra* note 8, at 292-93 (empirical evidence from public sector suggests that fact finding process is effective only when it is used relatively infrequently); *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1702-04 (1984) (discussing patterns of state law).

219. 45 U.S.C. § 160 (1982).

for settling disputes in the railroad and airline industries.²²⁰ If the disputants cannot settle through negotiation,²²¹ mediation,²²² or voluntary interest arbitration,²²³ then section 10 authorizes the NMB to decide whether the dispute "threaten[s] substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service."²²⁴ If the NMB decides that the criterion is met, it notifies the President, who has discretion to "create a[n] [emergency] board to investigate and report respecting such dispute."²²⁵ Section 10 requires emergency boards to report their findings to the President within thirty days after their appointment, and prohibits the parties to the dispute from changing the status quo (except by agreement) during the board's deliberations and for thirty days thereafter.²²⁶

The emergency procedures of the RLA have been used almost routinely in railroad disputes,²²⁷ and either the President or Congress have repeatedly taken extraordinary action after the emergency board procedures of the RLA failed to settle major transportation disputes.²²⁸ From 1935 to 1975, 198 emergency boards were appointed,²²⁹ leading commentators and policy makers to judge section 10 of the RLA as a "disappointment by the particular measure of

220. Section 201 of the RLA makes interstate air carriers subject to all the provisions of the Act except for the procedures contained in section 3 regarding grievance disputes. *See id.* § 181. Sections 204 and 205 require airlines and labor organizations representing their employees to establish adjustment boards to resolve grievance disputes. *See id.* §§ 184-185.

221. *See id.* § 156 (imposing a status quo obligation on labor and management until negotiations occur over proposed changes).

222. *See id.* § 155 (authorizing the NMB to mediate disputes upon its own motion or upon the request of either party, and prohibiting changes in the status quo during mediation).

223. Section 5 of the NRLA also requires the NMB to "endeavor . . . to induce the parties to submit their controversy to arbitration," which is provided for in sections 7, 8, and 9. *See id.* §§ 155, 157-159.

224. *Id.* § 160.

225. *Id.*

226. *See Locomotive Eng'rs v. Baltimore & O.R.R.*, 372 U.S. 284 (1963) (per curiam) (after the parties have exhausted the procedures provided by the Act, they are relegated to self-help in adjusting the dispute, subject only to the invocation of section 10). Until the procedures are exhausted, the courts have construed the statutory status quo language to prohibit strikes. *See Detroit & T.L.S.R.R. v. United Transp. Union*, 396 U.S. 142, 150 (1969) (RLA status quo provisions all preclude strikes as well as employer change in working conditions); *Alton & So. Ry. v. Brotherhood of Ry. & Airline Clerks*, 481 F. Supp. 130, 131 (D.D.C. 1978) (enjoining strike after appointment of emergency board). It also appears that the appointment of an emergency board after a strike has continued for some time permits the strike to be enjoined, and the carrier to be ordered to restore the prestrike status quo. *Id.* at 131.

227. The record of governmental restraint in airline disputes has been much better in recent years than in the railroad industry.

228. Cullen, *supra* note 112, at 154-55.

229. *Id.*; Kaufman, *supra* note 168, at 910.

gross frequency of use."²³⁰ By the early 1960s, the section 10 procedures became almost completely ineffective.²³¹ Because the section 10 procedures were not settling strikes, the President and Congress became involved in a series of difficult disputes.²³² In other words, the moral suasion supposedly resulting from fact-finding,²³³ was insufficient to resolve disputes short of Presidential or congressional action.²³⁴

In 1971, the Nixon Administration implemented policies reforming rail industry bargaining structure,²³⁵ and decreasing the readiness of the President to appoint emergency boards, especially in single-carrier disputes.²³⁶

Twenty-five emergency boards were appointed during the ten-year period ending in 1988.²³⁷ This is well below the fifty-year average of four per year. Only one board involved an airline dispute, and its appointment was mandated by statute.²³⁸ Five boards involved national railroad disputes which supposedly posed a threat to the national economy.²³⁹

230. Cullen, *supra* note 112, at 170 (characterizing the decade of the 1970s as "disastrous" for the emergency dispute provisions of the RLA).

231. See H. PERRITT, *supra* note 70, § 13.11.

232. Cullen, *supra* note 112, at 173-74. Also during this period, the railroad industry embarked on a major public relations campaign against "featherbedding." See Perritt, *supra* note 57, at 288 (describing campaign and giving some examples of campaign advertisements).

233. H. PERRITT, *supra* note 70, § 13.16 (discussing how fact finding is supposed to work).

234. THE NMB AT 50, *supra* note 23, at 63.

235. The main improvements in bargaining structure involved encouragement of common expiration dates and comprehensive moratoria provisions in rail industry agreements. Cf. Cullen, *supra* note 112, at 174-76; see also Perritt, *supra* note 57, at 290-93.

236. This policy of less intervention is credited to then Secretary of Labor George P. Shultz. See Cullen, *supra* note 112, at 174.

237. THE NMB AT 50, *supra* note 23 (available from the NMB, Washington, D.C.). For a list of emergency boards appointed during this period, see H. PERRITT, *supra* note 70, § 13.9 & n.54. In addition to those listed in H. PERRITT, *supra* note 70, Emergency Board 209 was appointed on May 16, 1986, to investigate the Maine Central-BMWE dispute. Exec. Order No. 12,557 (1986). Emergency Board 210 was appointed on May 6, 1986, to investigate a dispute between the Long Island Rail Road and various other organizations, Exec. Order 12,558 (1986). Emergency Board 211 was appointed on July 15, 1986, to investigate a national railroad dispute with nonoperating crafts. Exec. Order 12,562 (1986). Emergency Board 212 was appointed on September 12, 1986, to investigate a dispute between the Long Island Rail Road and most of its labor organizations. Exec. Order No. 12,563 (1986).

238. *Id.* at 51 (describing political compromise which led to appointment of emergency board and enactment of the Airline Deregulation Act).

239. Emergency Boards 190, 194, 208, 209, and 211. Emergency Board 209 dealt only

Eighteen boards appointed during this most recent period, however, suggest that the temptation to use the emergency dispute procedures to deal with relatively minor, or localized strikes, is real still. Two boards involved disputes on a single freight railroad.²⁴⁰ Sixteen involved commuter railroad disputes where use of the procedure is mandatory.²⁴¹ While the number of boards appointed has declined, the limited geographic and market share impact of the disputes leading to their appointment suggests caution in concluding that the President is limiting the emergency board procedure to strikes of truly emergency proportions.²⁴²

Ad hoc congressional intervention into railroad and airline disputes became commonplace during the decade of the 1960s. In 1963, Congress enacted legislation requiring compulsory arbitration to solve a dispute over elimination of firemen from diesel locomotives.²⁴³ In 1966, Congress legislated to help settle an airline industry dispute. The 1966 intervention occurred after negotiations failed between the International Association of Machinists (IAM) and five major airlines.²⁴⁴ A strike ensued, and while the strike progressed, Senator Morris introduced legislation which would have permitted the President to make a determination that would lead to federal district court establishment of a receivership over the properties of the struck carriers.²⁴⁵ Earlier, Senator Lausche had introduced legislation providing for compulsory arbitration.²⁴⁶ Neither proposal was enacted.²⁴⁷ After the Senate passed a bill extending the basic strike prohibition contained in the RLA for an additional thirty days and permitting further extensions by the President, the strike was settled

with a dispute on the Maine Central, but was appointed after secondary picketing spread across the country.

240. Emergency Boards 191 and 200.

241. Emergency Boards 192, 193, 195, 196, 197, 198, 199, 201, 202, 203, 204, 205, 206, 207, 210, 212.

242. See Arouca & Perritt, *Transportation Labor Law*, *supra* note 115, at 659-71 (recommending "neoabstentionist" approach to labor policy in transportation).

243. See *Brotherhood of Locomotive, Firemen & Enginemen v. Chicago B. & Q.R.R.*, 225 F. Supp. 11 (D.D.C. 1964), *aff'd*, 331 F.2d 1020 (D.C. Cir. 1964). See generally *Akron & Barberton Belt R.R. v. Brotherhood of R.R. Trainmen*, 385 F.2d 581 (D.C. Cir. 1967) (dispute over the elimination of diesel firemen and a reduction in the number of train crew members); Act of Aug. 28, 1963, Pub. L. No. 88-108, 77 Stat. 132.

244. On August 9, 1965, Eastern Airlines, National Airlines, Northwest Airlines, Trans World Airlines, and United Airlines had agreed with the IAM to a procedure for joint negotiations of pay and work rule issues. When no settlement was forthcoming, President Johnson appointed Emergency Board 166 under the RLA on April 21, 1966. On July 8, the IAM called a strike and on July 29, the President met with the parties.

245. S.J. Res. 180, 89th Cong., 2d Sess., 112 CONG. REC. 16775-76 (1966).

246. Amendment No. 721 to S.J. Res. 186, 89th Cong., 2d Sess., 112 CONG. REC. 18058 (1966).

247. Arguably, because legislation was not enacted, this is not an instance of congressional intervention. Nevertheless, active consideration of legislation undoubtedly is a strong inducement for the parties to modify their positions.

without legislation.²⁴⁸

Congress subsequently intervened in several railroad disputes. In 1967, Congress dealt with a shopcraft dispute by extending the no-strike provisions of the RLA for twenty days,²⁴⁹ then for an additional forty-five days,²⁵⁰ and finally by providing a special board to recommend a settlement which would become binding in the absence of agreement between the parties.²⁵¹ In 1970, Congress delayed another shopcraft strike,²⁵² and subsequently imposed a wage increase with respect to certain operating and clerical employees, leaving it to the parties to resolve other parts of their dispute.²⁵³ In the 1971 signalmen dispute, Congress again extended the no-strike provisions of the RLA and imposed a pay increase.²⁵⁴ In 1973, Congress intervened in the Penn Central crew consist dispute, delaying economic action while the Secretary of Transportation developed a plan for reorganization of the northeast railroads.²⁵⁵ Similar intervention continued into the 1980s.²⁵⁶ In the 1986 Maine Central dispute, Congress enacted legislation imposing certain terms of employment on a rail carrier which apparently was winning a bitter strike.²⁵⁷ In 1988, Congress enacted legislation extending the status quo period in the crew consist dispute between the UTU and the Chicago and

248. S.J. Res. 186, 89th Cong., 2d Sess., 112 CONG. REC. 18,322 (1966).

249. Act of Apr. 12, 1967, Pub. L. No. 90-10, 81 Stat. 12.

250. Act of May 2, 1967, Pub. L. No. 90-13, 81 Stat. 13.

251. Act of July 17, 1967, Pub. L. No. 90-54, 81 Stat. 122.

252. Act of Mar. 4, 1970, Pub. L. No. 91-203, 84 Stat. 22 (delaying strike); Act of Apr. 9, 1970, Pub. L. No. 91-226, 84 Stat. 118 (imposing settlement).

253. Act of Dec. 10, 1970, Pub. L. No. 91-541, 84 Stat. 1407.

254. Act of May 18, 1971, Pub. L. No. 92-17, 85 Stat. 39.

255. Act of Feb. 9, 1973, Pub. L. No. 93-5, 87 Stat. 5; S. REP. NO. 18, 93d Cong., 1st Sess., reprinted in 1973 U.S. CODE CONG. & ADMIN. NEWS 1217, 1222 (restoring the status quo and prohibiting strike in connection with Penn Central work rule dispute).

256. See generally S.J. Res. 250, 97th Cong., 2d Sess. (1982) (imposing the recommendations of Emergency Board 194, relating to pay differentials between locomotive firemen and trainmen); Milwaukee Railroad Restructuring Act, Pub. L. No. 96-101, § 11, 93 Stat. 736, 742 (1979) (codified at 45 U.S.C. §§ 901-922 (1982)); Rock Island Railroad Transition and Employee Assistance Act, Pub. L. No. 96-254, § 107, 94 Stat. 399, 402 (1980); Northeast Rail Service Act of 1981, Pub. L. No. 97-35, 95 Stat. 644-687; Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 44, 92 Stat. 1753 (codified as amended at 49 U.S.C. §§ 1301-1308 (1982)).

257. See *Maine Cent. R.R. v. Brotherhood of Maintenance of Way Employees*, 813 F.2d 484, 493 (1st Cir.) (finding that status quo legislation following the failure of emergency board procedures is constitutional), *cert. denied*, 108 S. Ct. 91 (1987); *Maine Cent. R.R. Co. v. Brotherhood of Maintenance of Way Employees*, 835 F.2d 368, 372 (1st Cir. 1987) (finding ultimate Congressional resolution of dispute constitutional), *cert. denied*, 108 S. Ct. 2034 (1988).

Northwestern.²⁵⁸

Frequently, congressional action in transportation labor disputes such as that described in the preceding paragraphs has been preceded by direct Presidential mediation efforts.²⁵⁹ Since the Korean War, three major instances of ad hoc Presidential intervention in railroad and airline labor disputes have occurred. These instances involved an airline flight engineers dispute in the late 1950s and early 1960s,²⁶⁰ a railroad work rules dispute during the same period,²⁶¹ and a crew size dispute on new wide-bodied jet aircraft in 1980.²⁶²

Presidential involvement can improve the quality of the dialogue in disputes, but the historical record does not support any conclusion that such Presidential intervention avoids strike activity, strike threats, or lessens the perceived need for subsequent Presidential or congressional involvement.

Presidential involvement may be warranted in truly exceptional cases posing a real threat to the nation's security or economy. In such cases, Presidential intervention can influence the course of the dispute in much the same way as fact-finding. Hasty intervention, however, in railroad or airline disputes only diminishes the power of the President to influence events when real emergencies threaten because it tends to make such intervention seem routine, less newsworthy, and less worthy of public attention.²⁶³

258. S.J. Res. 374, 100th Cong., 2d Sess. (1988).

259. See H. PERRITT, *supra* note 70, § 13.17.

260. See Exec. Order No. 10,921, 26 Fed. Reg. 1553 (1961) (appointing a special commission to investigate the flight engineer dispute, after a national strike).

261. In February of 1959, the railroad industry proposed the creation of a Presidential commission to investigate and report on the possibility of a major overhaul in railroad work rules. Initially, President Eisenhower refused in the face of opposition by rail labor. After the carriers served section 6 notices proposing changes in work rules, however, the carriers and labor organizations agreed to the appointment of a Presidential Railroad Commission, which was created by Executive Order 10,891 in November, 1960. See Exec. Order No. 10,891, 25 Fed. Reg. 10,525 (1960). The Commission's report, submitted to the President on February 28, 1962, represented the most comprehensive analysis of railroad industrial relations that had ever been made. Nevertheless, disputes relating to the diesel firemen and crew consist were not settled on terms recommended by the Commission. This led to the enactment of the aforementioned compulsory arbitration legislation by the Congress.

262. In late 1980, the ALPA, building on its successful political protests against airline hijacking in 1972, denominated a "suspension of service," threatened another in order to force the FAA to require three pilots on new wide-bodied aircraft then being designed by airframe manufacturers. To forestall the work stoppage, President Reagan appointed a Presidential Task force on Aircraft Crew Complement, which held hearings in April, 1981. See 46 Fed. Reg. 10,645 (1981) (announcement of public hearings).

263. Appointment of Presidential emergency boards in local commuter rail disputes seems particularly ludicrous. This course of action is contemplated by amendments to the RLA that were made by the Northeast Rail Services Act of 1981, Pub. L. No. 97-35, § 1157, 95 Stat. 643, 681 (adding section 9A to the RLA, codified at 45 U.S.C. § 159a (1982)).

In reaction to the frequent ad hoc congressional intervention of the 1960s, the Nixon Administration proposed legislation intended to reduce the role of Congress as the ultimate arbiter in emergency disputes between transportation labor and management.²⁶⁴ The administration's proposal applied the traditional Taft-Hartley procedures to the transportation industries, and added three new options which the President could exercise in the event that no settlement was reached during the eighty-day injunction.²⁶⁵ The first option permitted the President to invoke an additional cooling-off period of up to thirty days during which collective bargaining continued with the aid of the Federal Mediation and Conciliation Service.²⁶⁶ The second option established a procedure whereby a special impartial board, appointed by the President, would order partial operation while permitting a partial strike if the partial operation could occur without imperiling the "national health and safety."²⁶⁷ The goal of the partial operation was to permit sufficient economic impact to encourage settlement while reducing public disruption.²⁶⁸ The final option which the President could choose was a procedure for "final offer selection." Under this final option, the President would direct each party to submit final offers to the Secretary of Labor within three days. The Secretary would then transmit the offers to the other party and collective bargaining would continue for five days. If the additional collective bargaining failed to produce an agreement, the parties could select a three member panel to act as "final-offer selector."²⁶⁹ The panel would hold hearings within thirty days and select the most "reasonable" offer as the basis for a new contract.²⁷⁰

None of the proposals for emergency dispute legislation were enacted. A serious national debate over emergency strike procedures has not occurred since the early 1970s, largely because there have been fewer instances of strikes leading to special legislation on labor disputes since the hearings on those bills.²⁷¹ While the 1970 propos-

264. See S. 560, 92d Cong., 1st Sess. (1971); H.R. 3396, 92d Cong., 1st Sess. (1971).

265. See S. 560, 92d Cong., 1st Sess. §§ 217-219 (1971).

266. *Id.* § 217. The proposal centralized emergency dispute mediation in a single agency rather than continuing a special mediation agency for railroad and airline disputes.

267. *Id.* § 218.

268. This idea is embodied in the Hawaii public employee labor relations act.

269. See S. 560, 92d Cong., 1st Sess. § 219 (1971).

270. *Id.*

271. Special procedures enacted as part of the Northeast Rail Services Act of 1981 for commuter rail labor negotiations do not qualify as emergency dispute procedures of general applicability. They were intended solely to facilitate a one-time transition. See

als illustrate various combinations of emergency dispute procedures, they included no new types of procedure, except possibly the "statutory strike" idea.²⁷²

Past and proposed emergency dispute procedures depend primarily on fact-finding. Fact-finding can influence interest dispute settlement in three basic ways:

- (1) It can affect the willingness of employer and employee groups to cooperate with the struck employer or the strikers, thus changing the balance of economic power in the dispute and forcing a settlement through that means.
- (2) It can influence the legislature, or rarely, other political institutions, to impose a particular settlement on the disputing employer and employees.
- (3) It can serve to predict the outcome of other, more compulsory, dispute resolution procedures, thereby encouraging settlement by deflating unrealistic party expectations.

The popular notion that a fact-finding report mobilizes public opinion, thereby putting pressure on the parties to settle, almost surely is misplaced. One author has commented:

Every study of factfinding in the public sector has concluded . . . that it has not had this result [of mobilizing public pressure sufficient to force a settlement]. In most cases the interest and concern of the public is not aroused sufficiently to activate the pressure needed to produce a settlement. Public interest is apparently aroused only when a strike threatens or actually imposes direct hardship.²⁷³

The emergency fact-finding procedures of the RLA and Taft-Hartley Act are generally regarded as failures in promoting settlement, though there is some dissent from this conclusion.²⁷⁴ Public employee fact-finding procedures have been effective however, at least when they have been used sparingly.²⁷⁵

Mediation is the most commonly used form of government intervention in emergency disputes, primarily because it is authorized for labor disputes not reaching the level of an emergency.²⁷⁶ It is diffi-

Northeast Rail Services Act of 1981, § 1145, Pub. L. No. 97-35, 95 Stat. 643, 669 (codified at 45 U.S.C. § 588 (1982)). The strike between Eastern Air Lines and the IAM, which began on March 4, 1989, continues as of this writing and may produce legislation. See *Eastern's Route to the Brink*, Philadelphia Inquirer, Mar. 13, 1989, at C1.

272. A statutory strike is a strike that occurs within particular limits defined by statute, aimed at limiting the public impact of a strike, while ensuring that economic pressure is brought to bear on both sides of the dispute.

273. T. KOCHAN, *supra* note 8, at 293.

274. See Cullen, *supra* note 112, at 185.

275. See H. NORTHRUP, *COMPULSORY ARBITRATION AND GOVERNMENT INTERVENTION IN LABOR DISPUTES* 290-91 (1966); Hoh, *infra* note 278; Stern, *infra* note 281; see also *infra* note 282.

276. See Labor-Management Relations Act, §§ 203-204, 29 U.S.C. §§ 173-174 (1982) (authorizing the Federal Mediation and Conciliation Service to proffer services in any labor dispute affecting interstate commerce, and requiring parties to dispute to participate in mediation thus proffered); Railway Labor Act, § 5, 45 U.S.C. § 155 (1982) (au-

cult to evaluate the effectiveness of emergency dispute mediation because emergency dispute is ill-defined and so is mediation. One can draw some tentative conclusions from the mediation record in general under the RLA and from state experience with mediation of public employee disputes.

Several commentators assert that the availability of mediation or other dispute resolution procedures in every case retards bargaining, because the parties save concessions for post-negotiation stages in the dispute resolution process.²⁷⁷ Compulsory or "preventive" mediation is especially subject to this criticism.²⁷⁸ The empirical evidence suggests that mediation is particularly effective in settling public sector labor disputes when unsuccessful mediation is followed by fact-finding or compulsory arbitration.²⁷⁹ Similarly, there is some evidence that allowing arbitrators to engage in mediation can produce voluntary settlements.²⁸⁰

Many decades of experience with peacetime emergency dispute procedures under the Taft-Hartley Act and the RLA reveal that Professor Northrup was right when he said in 1946 that government intervention in private labor disputes tends to politicize labor disputes, to the detriment of the effectiveness of collective bargaining.

Government intervention in public sector labor disputes has more proponents than government intervention in private sector emergency disputes. Nevertheless, many of the criticisms leveled at the fact-finding and interest arbitration provisions of the RLA also have been directed at similar procedures in the public sector.²⁸¹

thorizing NMB to proffer mediation services); *Id.* § 6, 45 U.S.C. § 156 (precluding changes in the status quo until mediation has been completed). In addition, Presidents have engaged personally in various forms of mediation. See H. PERRITT, *supra* note 70, §§ 13.3, 13.17.

277. Hoh, *The Effectiveness of Mediation in Public Sector Arbitration Systems: The Iowa Experience*, 39 ARB. J. 30, 31-32 (June 1984) (reporting mediation success rates as high as 70%, although earlier experience yielded a success rate of only 50%).

278. See H. NORTHRUP, *supra* note 276, at 159-61.

279. Compare Hoh, *supra* note 278, at 33-34 (successful mediation) with *id.* at 37 (mediation less successful in Massachusetts after arbitration added as terminal step after fact-finding). See Newman, *Interest Arbitration—Practice and Procedures*, in LABOR RELATIONS LAW IN THE PUBLIC SECTOR 44, 47 (1977) (report that mediation reduces arbitration requests by 50% in Pennsylvania).

280. See Stern, *The Mediation of Interest Disputes by Arbitrators under the Wisconsin Med-Arb Law for Local Government Employees*, 39 ARB. J. 41, 43 (June 1984) (reporting mediation success rate as high as 70%, though earlier experience yielded a success rate of only 50%).

281. See *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1709-12 ("chilling effect" and "narcotic effect" of fact finding and arbitration); Hogler & Kriksciun, *Impasse Resolution in Public Sector Collective Negotiations: A Proposed*

Government intervention succeeds only by forcing one party or the other to make concessions the party was unwilling to make voluntarily. Thus, the politics of intervention is driven by the desire of one side to promote political intervention as a way of forcing the other side to make concessions that are not obtainable at the bargaining table.²⁸² There are no objective standards for determining when the economic cost of a labor dispute crosses the threshold justifying emergency intervention, nor is there any continuing mechanism for measuring economic impact.

Political intervention in railroad and airline labor disputes is not without a plausible justification, however. If the nature of railroad and airline businesses is such that a strike cannot be tolerated by management, use of the strike weapon always will result in a union victory. Under this assumption, political intervention at least gives management a chance to balance what otherwise would be overwhelming union power. Depending on the relative political strength of management and labor, political intervention conceivably can result in a settlement that management can live with.

Before accepting this justification for political intervention, however, one should scrutinize both the underlying assumption that a strike presumes a union victory and the record of political intervention. The assumption has little empirical support. Indeed, Norfolk and Western survived the 1978 strike reasonably well,²⁸³ and so did the Maine Central in 1988.²⁸⁴ United Airlines,²⁸⁵ Trans World Airlines,²⁸⁶ and Eastern Airlines have taken strikes in the 1980s without capitulating. Moreover, the record of political intervention suggests that labor more often prevails in the political arena than does management.²⁸⁷

In any event, it is simply illogical to suppose that additional cooling-off periods make any contribution to satisfactory resolution of interest disputes. Government intervention to suspend economic action

Procedure, 6 INDUS. REL. L.J. 481 (1984) (permitting third-party intervention impedes party resolution of dispute).

282. From 1976 to 1981, the author was the general counsel-labor for Conrail. During a number of Conrail labor disputes and national rail disputes not directly involving Conrail, the author saw evidence of conscious efforts by rail management and shippers to exaggerate the economic effects of rail strikes, in the hope that the President and Congress would intervene, and force a settlement more favorable to management than labor. The point is not to suggest that these political initiatives were not legitimate exercises of self-interest; the point is that the threshold for government intervention is more likely to be politically determined than shaped by economic reality.

283. *Southern Ry. v. Brotherhood of Ry., Airline & S.S. Clerks*, 458 F. Supp 1189 (D.S.C. 1978).

284. *Burlington N.R.R. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429 (1987).

285. *ALPA v. United Airlines, Inc.*, 802 F.2d 886 (7th Cir. 1986).

286. *IAM v. Trans World Airlines, Inc.*, 839 F.2d 809 (D.C. Cir. 1988).

287. See H. PERRITT, *supra* note 70, §§ 2.1 -25.

is justifiable logically only if its proponents can articulate how the dispute will ultimately be resolved after the suspension ends and economic action legally can resume. Government intervention also weakens collective bargaining and leads to even more intervention. Opposing parties are more likely to reassess their positions and to compromise when the threat of economic pressure is imminent, than when each thinks the government may impose a political settlement. The executive and legislative branches of government should restrain themselves and reserve emergency dispute intervention for true emergencies.

F. *Adjudicatory Administrative Forums*

The RLA allows a greater degree of government intervention than the NLRA in interest disputes. As to other types of disputes, however, the RLA is strongly abstentionist.²⁸⁸ Unlike the NLRA, the RLA authorizes no federal administrative agency to interpret the statute or to decide claims of unfair labor practices.²⁸⁹ In many ways, interpretations of the RLA and the NLRA have converged, as courts presented with RLA cases have looked to NLRA precedent to interpret them.²⁹⁰ Nevertheless, the body of authoritative precedent for interpreting the RLA is vastly smaller than the body of precedent for interpreting the NLRA.²⁹¹

The absence of an administrative adjudicatory forum promotes labor-management cooperation by making the outcome of litigation less predictable and more expensive. Dispute resolution theory holds that parties are more likely to resolve their disputes voluntarily when they are risk averse, face major uncertainty as to the resolution obtainable from a forum authorized to decide the dispute, and face high transaction costs in obtaining a resolution from the forum.²⁹²

288. For a related discussion regarding transportation disputes, see Arouca & Perritt, *Transportation Labor Law*, *supra* note 115, at 661-71.

289. *Id.*

290. See *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969) (RLA precludes state injunction against secondary pressure). See generally *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) (NLRA prevented a state court from awarding picketing related damages).

291. Arouca & Perritt, *Transportation Labor Law*, *supra* note 115, at 628 n.73 (litigation incidence data under the two statutes).

292. See G. TULLOCK, *TRIALS ON TRIAL* 26 (1980); Cooter & Marks, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982); Lundes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971); Perritt, "And the Whole Earth Was of One Language: A Broad View of Dispute Resolution," 29 VILL. L. REV. 1221, 1256 (1984).

Most union and management decision makers are risk averse. Theory suggests that because the outcome of RLA disputes is less predictable, and because private court litigation is more expensive to parties than NLRB adjudication (the General Counsel's office bears the cost of prosecuting unfair labor practice charges), employers and unions are encouraged to resolve their disputes voluntarily.

In addition, the availability of a forum encourages parties to use that forum to put pressure on opposing parties. It is not uncommon for employers or labor organizations to file unfair labor practice charges under the NLRA in order to create the risk of substantial back-pay liability for an employer or to delay the outcome of representation disputes. The absence of an adjudicatory forum under the RLA removes this source of economic leverage.

While there has been some advocacy for a more adjudicatory approach under the RLA,²⁹³ it is likely that the absence of an adjudicatory forum promotes voluntary labor-management resolution of disputes.

G. Effects of Secondary Pressure

After nearly a decade of uncertainty, the Supreme Court, in *Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employees*,²⁹⁴ held that secondary pressure growing out of RLA major disputes cannot be enjoined. The prospect of secondary pressure under the RLA arguably both promotes and discourages labor-management cooperation.

Those who argue that the potential for secondary pressure promotes labor-management cooperation assert that it is likely to be used by a union only when the union's primary strike and picketing weapons are ineffective in pressuring an employer to make concessions.²⁹⁵ Accordingly, secondary pressure is a way of empowering a union that otherwise lacks the power to exert meaningful pressure. The most fundamental precept of American labor policy is that the prospect of economic pressure induces creative problem solving. According to this logic, secondary pressure thus promotes labor-management cooperation.

Union strategists observe that secondary pressure is likely to be used only in a limited set of circumstances in which other carrier groups within the same labor organization and other crafts of employees can be induced to honor secondary picket lines. Further-

293. See *Andrews v. Louisville & N.R.R.*, 406 U.S. 320, 326-36 (1972) (Douglas, J., dissenting).

294. 481 U.S. 429 (1987).

295. *Burlington N.R.R. v. Brotherhood of Maintenance of Way Employees*, 793 F.2d 995, 797 (7th Cir. 1986), *aff'd*, 481 U.S. 429 (1987).

more, only in situations where the union engaging in secondary pressure wishes to induce the government to appoint an emergency board will secondary pressure be used. The second circumstance is explained by the difficulty employees face in exerting effective pressure directly on the primary target.

The emergency board motivation for secondary pressure also depends upon the perception that an emergency board report would be more favorable to the union's position than a negotiated settlement and also would result in legislation imposing substantial portions of the emergency board's recommendation. Of course, this perception does not exist in all cases, and depends upon the appeal of the union's position in the dispute.

According to the union view, secondary pressure will rarely be used. Frequent use would encourage Congress to amend the RLA to bar such pressure. To the extent that a particular carrier is the frequent target of secondary pressure, union rank and file will become more inclined to cross secondary picket lines. To the extent that the availability of secondary pressure influences bargaining at all, it will promote labor-management cooperation for the same reasons that uncertainty of any kind encourages a negotiated agreement. The 1989 Eastern Air Lines strike supports this view. Secondary pressure was threatened repeatedly but not, as of six weeks into the strike, actually used.

Those arguing that secondary pressure discourages labor-management cooperation assert that allowing such pressure under the RLA exposes employers to a virtually unlimited universe of strikes and picketing which adversely effect their service levels and profitability. Such exposure potentially can deplete carrier resources, making it more difficult to finance labor-management cooperative arrangements and frustrating any kind of stable collective bargaining atmosphere developed by a carrier with its own unions. In addition, the prospect of repeated application of secondary pressure encourages carriers to become aggressive in their litigation postures in order to control the impact of secondary pressure. Such an aggressive legal stance can spill over and poison any spirit of resolving disputes through labor-management accommodation.

Virtually no dispute giving rise to secondary pressure can be resolved through the intervention of the secondary employer because, by definition, the target employer lacks the power to resolve the un-

derlying dispute.²⁹⁶ The union's goal is political—to raise the level of the dispute so as to trigger government intervention.

Finally, carriers may be encouraged to seek nonunion workforces since they are more likely to cross secondary picket lines. Discouraging union representation obviously threatens union institutional interests and makes labor-management cooperation more difficult.

H. The Status Quo Requirement

The status quo requirement of section 6²⁹⁷ of the RLA effectively freezes the terms and conditions of employment, whether explicitly covered by a collective bargaining agreement or simply established by practice, until labor and management agree to change them. The status quo remains in effect until all of the major dispute resolution provisions of the RLA have been exhausted. In other words, management is relieved of the status quo obligation at the same time that the union earns the right to strike. Some management representatives believe that the status quo obligation inhibits labor-management cooperation because it reduces pressure on the union to consider management proposals seriously.²⁹⁸

According to this view, the status quo obligation inhibits labor-management cooperation because unions are political organizations. It is extremely difficult for a union negotiator to agree to permit management to change a term or condition of employment favorable to rank and file employees. If, however, management can make the change with or without union agreement, the political character of a union supports serious and creative negotiation so that the new term or condition of employment is one in which the employees participated in creating instead of having it imposed unilaterally by management.

Simply eliminating the status quo requirement to put more pressure on union negotiators, however, is of questionable merit. Both the NLRA and RLA obligate employers to maintain the status quo because collective bargaining does not really exist unless employers are obligated to talk to employee representatives about terms and conditions of employment as opposed to setting them unilaterally.²⁹⁹

296. See *NLRB v. Enterprise Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine & General Pipefitters Local 638*, 429 U.S. 507 (1977) (articulating right-to-control test for section 8(b)(4) secondary pressure analysis).

297. 45 U.S.C. § 156 (1982).

298. This section addresses the statutory status quo obligation, which governs after expiration of any contractual status quo obligation, not contractual moratoria and no-strike clauses which also are relatively common. However, because they are consensual, they have no adverse affect on relative bargaining power.

299. *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 496 n.28 (1960) (discussion of rationale for section 8(a)(5) status quo obligation); see H. PERRITT, *supra* note 70, § 7.13.

Moreover, the policy of the RLA is to minimize disruption of carriers. The status quo provisions of section 6 are thought to serve this purpose because they prevent unilateral employer action possibly leading to strikes.³⁰⁰

Unless there is something special about railroad and airline enterprises or unions relating to their ability to exert and withstand economic pressure, criticism of the RLA status quo obligation is basically criticism of a long-accepted American labor policy: the requirement that employers maintain the status quo until a bargaining duty is exhausted.

Assuming that employer and union status quo obligations remain symmetrical,³⁰¹ there still is room for criticism of the essentially indeterminate length of the RLA status quo period caused by the virtually unbridled discretion of the NMB to prolong that period.³⁰² The efficacy of collective bargaining necessitates that employers engage in bargaining before implementing changes in terms and conditions of employment. However, real bargaining also depends on the existence of deadlines.³⁰³ NMB discretion to postpone application of economic pressure makes the deadline prospect remote and relieves pressure on both employers and unions to bargain diligently. The pace of negotiations could be substantially increased by setting time limits on the duration of NMB mediation, freeing the employer of its status quo obligation and freeing the union to strike at an earlier stage in the bargaining process. Such a change in the RLA would be a major step in making it more similar to the NLRA. In recent years, the NMB became more flexible in releasing parties from mediation quickly.³⁰⁴

300. See *Detroit & T.S.L.R.R. v. United Transp. Union*, 396 U.S. 142 (1969); *Brotherhood of Ry. & S.S. Clerks v. Florida E.C. Ry.*, 384 U.S. 238 (1966); *Ruby v. TACA Int'l Airlines, Inc.*, 439 F.2d 1359 (5th Cir. 1971).

301. The obligations are not symmetrical in all cases. For example, if the subject matter of a dispute is nonmandatory, the union may be obligated not to strike, but the employer is free to change the status quo at any time. See *Japan Air Lines Co. v. IAM*, 538 F.2d 46, 52-53 (2d Cir. 1976). Furthermore, strikes over minor disputes are enjoined, whereas employer changes in the status quo in minor disputes usually are not enjoinable. See H. PERRITT, *supra* note 70, §§ 6.5, 6.13; see also *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 496-97 & n.28 (1960) (explaining difference between a strike and employer unilateral action in terms of effect on status quo).

302. *IAM v. Trans World Airlines, Inc.*, 839 F.2d 809, 811 (D.C. Cir. 1988).

303. "A deadline serves a vital function in negotiations. It compels each side to reach decisions and establish priorities that would not otherwise occur, at least not so rapidly." Dunlop, *The Negotiations Alternative in Dispute Resolution*, 29 VILL. L. REV. 1421, 1436 (1984).

304. NATIONAL MEDIATION BD., 1983 ANNUAL REPORT 31-33 (number of mediation

One of the major difficulties with railroad and airline collective bargaining is that the combination of legislative success by the rail and airline labor organizations and carriers' fear of strikes tends to imbalance their relationship and thereby reduce the incentives for meaningful collective bargaining. Carriers are induced to modify their bargaining positions by the threat of union economic action. In theory, unions are subject to similar incentives by threats of unilateral carrier changes in the terms of employment. Too often, unilateral change by carriers has been blocked by collateral legislation at the state level³⁰⁵ or labor-protective conditions³⁰⁶ while labor organizations retain the eventual right to exert their own form of economic pressure under the RLA, uninhibited by other collateral legislation.

The combination of labor-protective legislation or administrative orders and ad hoc government intervention served, at least until the late 1970s, to reduce the credibility of carrier action in labor disputes. Accordingly, labor organizations, particularly in the railroad industry, were willing to modify bargaining positions only when carriers were threatened with extinction, as in the case of Conrail,³⁰⁷ the Milwaukee Railroad,³⁰⁸ Chicago and North Western,³⁰⁹ and Rock Island.³¹⁰ Any changes in statutory law or in governmental attitudes under discretionary powers delegated by present law should be accompanied by an appreciation of the need for incentives on both sides, not just incentives that operate to modify employer positions.

I. Local Commuter Operations

The Northeast Rail Services Act of 1981³¹¹ transferred most commuter rail operations to local and regional commuter authorities, yet

cases closed was at a 10-year high, especially notable due to numerous difficult and complex rail and airline bargaining issues).

305. For example, full-crew laws, state statutes regulating the size of train crews. See *Brotherhood of Locomotive Eng'rs v. Chicago, R.I. & Pac. R.R.*, 382 U.S. 423 (1966) (in absence of clearly expressed purpose, Congress does not prevent exercise of state police power to regulate crew size); *Missouri Pac. R.R. v. Norwood*, 283 U.S. 249 (1931) (intent to prevent the exercise of state's police power to regulate crew sizes will not be attributed to Congress unless clearly expressed).

306. See, e.g., Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, §§ 501-509, 87 Stat. 985, 1012-20 (1974) (repealed 1981).

307. 45 U.S.C. § 771 (1976) (repealed 1981).

308. *Id.* § 908 (mandating Milwaukee Railroad and its labor organizations enter into protective labor agreement).

309. *In re Chicago, M., St. P. & Pac. R.R.*, 713 F.2d 274 (7th Cir. 1983) (upholding the constitutionality of statutory labor protection).

310. 45 U.S.C. § 1005 (1982) (mandating labor protection agreements between Secretary of Transportation and Rock Island labor organizations and limiting benefits to any individual employee to \$20,000).

311. The Northeast Rail Service Act of 1981, found in the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (codified as amended in scattered sections of 45 U.S.C.).

retained RLA coverage of employment relations in those operations.³¹² Increased state and municipal responsibility for running commuter operations should be accompanied by the authority to regulate labor relations according to policy developed at the state level. Some of management's desire to subject commuter railroad collective bargaining to state law arises from a desire for management to enjoy the strike prohibition contained in New York's Taylor Law.³¹³ This motivation, of course, is biased in favor of a substantial shift in the balance of economic power. Apart from this, however, it is easier to mold state law than federal law to meet the particular circumstances of politically sensitive commuter transportation systems in metropolitan regions.

J. Appointments to the NMB

The RLA, by relying on mediation to resolve both representation disputes and interest disputes and opting not to encourage protracted administrative litigation over its statutory rights, inherently permits a much wider variety of labor-management cooperation than the NLRA. Unfortunately, this potential has not been fully realized because a series of Presidential administrations of both parties have not given proper attention to the quality of persons appointed to the NMB. Too frequently, NMB appointees have not been persons of true distinction or extensive experience in developing creative labor-management solutions. This is not to say that many members of the Board did not develop a substantial degree of expertise and creativity once on the job, but the appointment process has left too much to on the job training for NMB members.³¹⁴

V. GOVERNMENTALLY IMPOSED V. VOLUNTARILY NEGOTIATED LABOR PROTECTION

A. Overview

Labor protection is a concept that both promotes and retards labor-management cooperation. It has been embraced at various times by both the railroad and airline industries, sometimes negotiated under

312. See *United Transp. Union v. Long Island R.R.*, 455 U.S. 678 (1982) (private railroad acquired by state subject to RLA).

313. N.Y. CIV. SERV. LAW § 210 (McKinney 1983 & Supp. 1989).

314. This conclusion is not intended as a criticism of the qualifications of present Board members; rather it is a criticism of the relative priority the White House staff and interested union and management constituencies have given to the role of the NMB.

the RLA, and sometimes imposed under the authority of the economic regulatory statutes applicable to the two industries. Labor protection is addressed here because when it is governmentally imposed, it removes an important issue from the bargaining table and reduces the discretion of the parties to reach their own resolution of the issues concerning them.

Labor protection is a collectively bargained or governmentally imposed employer obligation³¹⁵ to pay employees who have been laid off or who have suffered reduction in their compensation. Labor protective arrangements vary considerably, but the most common types of arrangements afford protection only for loss of compensation or employment attributable to particular enterprise events, such as mergers or rearrangements of work assignments. The common arrangements define the class of protected employees so as to exclude employees who begin service after the program is effective, and they typically limit the total period of protection.

Many labor protective arrangements require employees to accept reassignment to comparable positions in order to remain eligible for protection.³¹⁶ Mandatory reassignment increases the likelihood that employees can be productively employed rather than simply remaining idle and receiving protective payments because their previous job was eliminated. Mandatory reassignment requirements raise a host of implementation questions, however, such as how far an employee is required to relocate,³¹⁷ who bears the cost of relocation expenses, how dramatic a change in duties and responsibilities an employee must accept, and who bears the cost of training or other steps necessary to qualify an employee for the reassignment.

Labor protection can be an integral part of productivity bargaining wherein an employer obtains relief from collectively bargained obligations that limit its ability to restructure operations in exchange for ameliorating the human cost of such restructuring. Labor protection is not, however, coextensive with the employee side of productivity bargains. Labor protection focuses on cushioning the employee costs of enterprise change. Other productivity bargains can focus on sharing the benefits of enterprise change with employees.³¹⁸

B. Legal Alternatives for Labor Protection

The policy justification for labor protection is that employees alone

315. As explained in the following paragraphs, the government could bear the cost of labor protection. But in most instances, railroad and airline employers have borne the cost of both contractual and statutory labor protection.

316. See *New York Dock Ry. v. United States*, 609 F.2d 83, 88, 91 (2d Cir. 1979); see also 49 U.S.C. § 11347 (1982).

317. See generally *New York Dock Ry.*, 609 F.2d at 86-101.

318. See *supra* notes 175-92 and accompanying text.

should not bear the costs of economic changes which benefit shareholders, managers, and consumers. The legal environment for labor protection can be represented by a continuum, ranging from mandatory labor protection at one end, to privately negotiated and unenforceable labor protective agreements at the other.

Governmentally mandated labor protection has two potential justifications. It can be justified simply as a matter of social policy, or more narrowly as an appropriate allocation of the costs of governmentally mandated or permitted change. For example, if the government mandates enterprise or industry structure changes that extinguish contractual employee rights, it seems appropriate or fair that the government ensure that the employees suffering from the extinction of preexisting rights be compensated.³¹⁹ Similarly, if the government requires firms to merge or to otherwise take steps that reduce employment and earnings opportunities, it may not be appropriate that the employees should bear the costs of these mandated changes.³²⁰ Though such mandates have been rare in the history of the railroad and airline industries, they nevertheless represent a potential justification for governmentally mandated labor protection. Governmentally mandated protection, of course, can be paid for by the public treasury or by private firms. With the exception of Title V and the Milwaukee Railroad and Rock Island labor protective arrangements,³²¹ labor protective payments in the railroad and airline industries have almost always been paid for by railroad and airline employers.

Just as labor protection can be justified when the government mandates change, it can also be justified, though less convincingly, when the government allows change that it otherwise might prohibit. This has been essentially the dominant justification for governmentally imposed labor protection in the railroad and airline industries. When these industries were heavily regulated, governmental permission was necessary before a railroad or airline could merge or abandon an unprofitable operation.³²² The price of such governmental

319. An example is Title V of the Regional Rail Reorganization Act of 1973, which expressly extinguished preexisting collectively bargained labor protection rights. Pub. L. No. 93-236, §§ 501-509, 87 Stat. 985, 1012-20 (1974) (repealed 1981).

320. S. ROSENFELD, LABOR PROTECTIVE PROVISIONS IN AIRLINE MERGERS 12 (1981) (charting the history and development of airline merger policies).

321. See *supra* notes 307-11 which outline the provisions Congress used to authorize funding to pay for labor protection.

322. DEMPSEY & THOMS, *supra* note 30, at 230, 244 (1986); Thoms, *Clear Track For Deregulation of American Railroads, 1970-1980*, 12 TRANS. P. L.J. 183, 192-93 (1982).

approval was "fair and equitable" arrangements to protect employees. Inevitably this requirement translated into the imposition of standard employee protective arrangements.

Further along the continuum is labor protection not mandated by the government but consensually negotiated between labor and management. Typically, such protective arrangements are agreed to by management in exchange for employee representatives relinquishing a previously negotiated right, such as a work rule, or employee representatives relinquishing their right to strike.³²³

When such labor protective arrangements are negotiated privately, without the government insisting on them, the law still has a role to play. The law can promote such arrangements by making them legally enforceable through forums provided for, and perhaps paid for, by the state. Alternatively, the government could be hostile to such arrangements by making them unenforceable in public forums, or even by erecting special impediments to the economic pressures often used to induce agreement on labor protection, for example, by classifying them as nonmandatory subjects of bargaining.

A major change has occurred in the law's stance regarding labor protection. Until deregulation, the government position was near the extreme of pro-employee possibilities on the continuum—governmentally imposed protection justified by the government allowing carrier change. After deregulation, the government's position is closer to the promanagement extreme—neither prohibiting nor completely enforcing labor protective agreements.³²⁴

C. History of Labor Protection

1. Private Agreements

The Baltimore and Ohio Railroad negotiated the first labor protection agreement in the 1920s. The machinists union agreed to take a positive approach to improve efficiency in production, in exchange for a company promise of steady employment and productivity sharing.³²⁵

The Washington Job Protection Agreement of 1936 was the culmination of another major effort to provide for adjustment to change in

323. Of course, many protective arrangements were negotiated simply because of a perception that the government would impose them if they were not agreed to by management.

324. See *Railway Labor Executives' Ass'n v. Pittsburgh & L.E.R.R.*, 831 F.2d 1231 (3d Cir. 1987) (declining to exempt carrier from RLA duty to bargain over effects on employees of selling all its assets, even though ICC declined to impose labor protection).

325. See Rehms, *Collective Bargaining*, *supra* note 18, at 88.

the railroad industry.³²⁶ Section 7(b) of the Emergency Railroad Transportation Act of 1933,³²⁷ which remained in effect until 1936, provided that no railroad employees were to be laid off and that relocation expenses were to be provided by the carrier involved.³²⁸ This statutory freeze on employment termination was eliminated in exchange for the Washington Job Protection Agreement of 1936. Under the Agreement, an employee deprived of employment because of a "coordination" receives sixty percent of his prior earnings for up to five years, depending on his length of service with the carrier.³²⁹ An employee still employed but at lower compensation draws an allowance for the difference between his precoordination earnings and postcoordination earnings.³³⁰

For the three decades after the 1936 agreement, most major labor protective developments involved the evolution of governmental requirements. Purely voluntary labor protection advanced in the mid-1960s with respect to railroad shopcraft employment. In 1962, after experiencing shopcraft employment reductions, the six labor organizations represented by the Railway Employee's Department of the AFL-CIO proposed limitations on the contracting out of work and otherwise limiting the adverse consequences of job losses. Specifically, they proposed application of the Washington Job Protection Agreement to any employee displaced or deprived of employment as a result of changes in the operation of an individual carrier, including transfers, contracting out of work, installation of labor saving equipment and machinery, and technological changes.³³¹ The carriers responded with proposals to eliminate any agreements limiting carrier implementation of technological changes, and merging the jurisdiction of five of the six shopcraft unions into three work classifications. These disputes came before Emergency Board 160 in 1964. The eventual settlement, on September 25, 1964, basically followed the Board's recommendations.³³² By 1970, more than half of railroad employees

326. The Washington Job Protection Agreement is reproduced in the appendix to *Chesapeake & Ohio Ry. v. United States*, 571 F.2d 1190, 1206-12 (D.C. Cir. 1977).

327. Emergency Railroad Transportation Act of 1933, Pub. L. No. 73-68, § 7(b), 48 Stat. 211, 212 (repealed 1978).

328. See *United States v. Lowden*, 308 U.S. 225 (1939) (approving the ICC interpretation of section 5 of the Interstate Commerce Act empowering the commission to impose employee protective conditions in merger approvals.)

329. See *id.*

330. *Chesapeake & Ohio Ry.*, 571 F.2d at 1208-09 (text of The Washington Job Protection Agreement of 1936).

331. See Rehms, *Collective Bargaining*, *supra* note 18, at 157.

332. *Id.* at 160.

were covered by employment stabilization agreements reached in the 1960s.³³³

The peak of purely private labor protective arrangements occurred with the 1964 Penn Central merger agreement,³³⁴ covering more than 100,000 employees with an estimated cost of \$78,000,000.³³⁵ This agreement provided essentially lifetime protection and guaranteed an attrition rate not to exceed five percent annually for each employee craft or class.³³⁶ Similarly, a 1965 agreement, covering BRAC, the Telegraphers, the Maintenance of Way Employees, the Signalmen, and the Dining Car Employees, provided attrition-based protection to the constituents of these unions in exchange for a carrier right to transfer work and employees from one seniority district or roster to another, but not across union jurisdictional lines. The agreement followed in material part recommendations made by Emergency Boards 161, 162, and 163.³³⁷

In 1987, Delta Air Lines promised employees of Western Airlines that their compensation and job security would not be jeopardized by the proposed merger of the two companies.³³⁸ This promise is noteworthy because employees in many of the Delta occupations covered by the commitment were not represented at the collective bargaining.

2. Government Mandated Labor Protection

Government mandated labor protection derives from the government's authority to approve industry structure changes, such as mergers, route acquisitions, and a carrier's entry and exit into a market. In 1920, Congress prohibited railroad acquisitions and abandonments without prior Interstate Commerce Commission (ICC) approval.³³⁹ By the early 1940s, the Supreme Court determined that the ICC had implied authority to condition approvals of acquisitions³⁴⁰ and abandonments³⁴¹ on carrier agreements to provide labor

333. *Id.* at 89.

334. Arguably, the Penn Central would have been required to afford labor protection as a condition of ICC approval of the Pennsylvania-New York Central merger. Nevertheless, the extensive nature of the Penn Central job stabilization agreement is attributable, at least in part, to management's desire to obtain labor-union cooperation in seeking ICC approval.

335. See Rehms, *supra* note 18, at 121.

336. *Id.*

337. See *id.* at 165-86.

338. See *generally* International Bhd. of Teamsters Local 2707 v. Western Air Lines, Inc., 813 F.2d 1359, 1364 (9th Cir. 1987) (denial of an injunction against merger if both successor and predecessor corporations agree to accept arbitration of obligation to protect employees affected by merger), *vacated & remanded sub nom.* Delta Airlines, Inc. v. International Bhd. of Teamsters, 108 S. Ct. 53 (1987).

339. Transportation Act of 1920, Pub. L. No. 67-152, § 402(18), 41 Stat. 456, 477-78.

340. United States v. Lowden, 308 U.S. 225, 240 (1939).

protection to employees affected by the transactions.

In the Transportation Act of 1940, Congress made explicit the ICC's obligation to require employee protection as a condition of its approving proposed railway mergers.³⁴² The high points of government mandated railroad labor protection were section 405 of the Rail Passenger Service Act³⁴³ and Title V of the Regional Rail Reorganization Act of 1973 (3R Act).³⁴⁴ Until Title V, the mandatory government protection generally followed the pattern set in the 1936 Washington Job Protection Agreement, with certain additions.³⁴⁵

Title V of the 3R Act afforded lifetime guarantees of 100% of average base-period compensation to all employees with more than five years service on railroads merged into Conrail by the legislation.³⁴⁶ No relationship between diminution in compensation and the Conrail reorganization needed to be shown to receive such benefits. By 1980, the original fund of \$250 million had been exhausted by the Title V labor protection program and political patience had worn thin. The Staggers Rail Act of 1980³⁴⁷ substantially curtailed the Title V benefits and this curtailment was sustained by the special railroad court.³⁴⁸ By the time the Northeast Rail Services Act of 1981³⁴⁹ was enacted, the governmentally funded labor protection program was eliminated altogether, and replaced by a more limited severance program with modest government funding.³⁵⁰ When Conrail stock was sold by the federal government to the public, the Title V labor protection had been replaced by a supplemental unemployment benefits program.³⁵¹

341. *ICC v. Railway Labor Executives' Ass'n*, 315 U.S. 373, 380 (1942).

342. Transportation Act of 1940, Pub. L. No. 76-785, § 7, 54 Stat. 898, 906-07 (repealed 1978).

343. 45 U.S.C. § 565 (1982).

344. Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, §§ 501-509, 87 Stat. 985, 1012-20 (1974) (repealed 1981).

345. See *New York Dock Ry. v. United States*, 609 F.2d 83, 86-90 (2d Cir. 1979).

346. Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, §§ 501-09, 87 Stat. 985, 1016-1017 (1974) (repealed 1981). However, employees with less than five years of service were protected only for as long after the commencement of Conrail as the total of their pre-Conrail service. *Id.*

347. Pub. L. No. 96-448, 94 Stat. 1985 (1980) (codified in scattered sections of 49 U.S.C.).

348. See *Railway Labor Executives' Ass'n v. United States*, 575 F. Supp. 1554 (Regional Rail Reorg. Ct. 1983) (upholding constitutionality of restrictions on Conrail labor protection), *cert. denied*, 465 U.S. 1101 (1984).

349. 45 U.S.C. § 797 (1982).

350. *Id.* § 797(d)(1) (limiting total payments to any employee to \$20,000).

351. See Conrail Privatization Act, Pub. L. No. 99-509, §§ 4024(c)-(f), 100 Stat. 1908 (1985).

Meanwhile, Congress reformed economic regulation of the railroad industry, primarily through the Staggers Act, recodifying the authority for governmentally imposed railroad labor protection at the same time.³⁵² Subsequently, the ICC announced a policy of not imposing labor protection in acquisition cases. The ICC was primarily motivated by the tendency of labor protective obligations to discourage transactions that could maintain rail service which otherwise would be discontinued.

Airline labor protection routinely was imposed by the Civil Aeronautics Board (CAB) as a condition of its approving mergers, acquisitions, or route transfers.³⁵³ In many cases, the terms of labor protection were agreed to by the parties as part of their submission to the CAB.³⁵⁴ Protective arrangements typically include integration of seniority lists, mandatory arbitration of disputes, and up to four years compensation for adverse affects on earnings or jobs due to the approved transaction.³⁵⁵ No statute ever has required imposition of labor protection in the airline industry. Rather, the CAB acted under its discretionary authority to approve transactions such as mergers, acquisitions, and consolidations.³⁵⁶

The Airline Deregulation Act of 1978³⁵⁷ established an employee protection program for airline employees whose employment had been adversely affected by deregulation.³⁵⁸ After its enactment, the CAB advised airline industry management not to expect routine imposition of labor protection, but rather to rely on the collective bargaining process.³⁵⁹ Deferral to collective bargaining was justified by the characteristics of a deregulated environment in which new entrants would be free to serve markets jeopardized by labor strife flowing from structural changes.³⁶⁰

352. See 49 U.S.C. § 10901(e) (1982) (granting the ICC discretionary authority to require sufficient employee protection provided by railway operators); *id.* § 10903(b)(2) (requiring labor protection in abandonments); *id.* § 10901(e) (requiring labor protection for employees affected by newly constructed lines); *id.* § 11347 (requiring labor protection in mergers and other acquisitions of control); see also *Railway Labor Executives' Ass'n v. ICC*, 784 F.2d 959 (9th Cir. 1986) (considering the effect of the Regional Rail Reorganization Act and Staggers Act changes).

353. *ALPA v. Department of Transp.*, 791 F.2d 172, 174 (D.C. Cir. 1986); *Braniff Master Executive Council v. CAB*, 693 F.2d 220, 222-23 (D.C. Cir. 1983).

354. *Braniff*, 693 F.2d at 228.

355. *Id.* at 222 & n.2 (summarizing "standard" Allegheny-Mohawk conditions).

356. 49 U.S.C. § 1378(b)(1) (1982). This section provides that "unless . . . the Board finds that the transaction will not be consistent with the public interest . . . it shall, by order, approve such transaction, *upon such terms and conditions as it shall find to be just and reasonable* and with such modifications as it may prescribe." *Braniff*, 693 F.2d at 227 (rejecting union claim that CAB was obligated to impose protective conditions).

357. 49 U.S.C. §§ 1301-08 (1982).

358. *Id.* § 1552; see also *Braniff*, 693 F.2d at 228.

359. *Braniff*, 693 F.2d at 229.

360. *ALPA v. Department of Transp.*, 791 F.2d 172, 175-76 (1986).

D. The Exchange Nature of Labor Protection

Labor protection can simply be a social benefit to employees, or it can represent the employees' part of an exchange with an employer.³⁶¹ Originally, railroad labor protection represented an exchange of employee economic security for greater employer flexibility in order to make operations more efficient through consolidations. As the concept evolved through the 1940s, the concept expanded to include abandonments of unprofitable operations. Although labor protection expanded, there was no corresponding expansion of employer rights. Employers already had the right to abandon operations with ICC approval. What happened in the mid-1940s was that the ICC approval of abandonments came to be conditioned upon affording labor protection to adversely effected employees.

The Penn Central agreement also can be characterized as an exchange, albeit a political one, by its protecting the economic security of all employees of the affected railroads in exchange for allowing the merger of the New York Central and Pennsylvania Railroads.³⁶² Similarly, the Conrail protection can be characterized as a kind of political exchange in which the constituents of rail labor organizations were afforded economic security in exchange for consenting to the legislatively imposed restructuring of the Northeast railroads.

Similarly, the more modest Milwaukee Railroad³⁶³ and Rock Island Railroad³⁶⁴ conditions represent an exchange. Congress granted public funding and took other actions to prevent the complete shut-down of the Milwaukee and Rock Island systems in exchange for labor's acceptance of modest labor protection. Apparently, Congress had become impatient with labor's seemingly unlimited appetite for lifetime protection.

E. Productivity Bargaining

Productivity bargaining involves an exchange of employee benefits for employer flexibility similar in some ways to labor protection, yet

361. *Railway Labor Executives' Ass'n v. United States*, 575 F. Supp. 1554, 1558 (Regional Rail Reorg. Ct. 1983) (labor protection provisions constituted social welfare legislation rather than contractual benefits), *cert. denied*, 465 U.S. 1101 (1984).

362. See J. HARR, *THE GREATEST RAILWAY CRISIS: AN ADMINISTRATIVE HISTORY OF THE UNITED STATES RAILWAY ASSOCIATION* 200 (1978); R. SAUNDERS, *THE RAILROAD MERGERS AND THE COMING OF CONRAIL* 195-96 (1978).

363. 45 U.S.C. § 908 (1982); *In re Chicago, M., St. P. & Pac. R.R.*, 713 F.2d 274 (7th Cir. 1983) (upholding constitutionality of statutory labor protection).

364. 45 U.S.C. § 1005 (1982).

different in other ways.³⁶⁵ The specific work rule issues which pre-occupied management and labor through the 1960s and into the 1970s regarding the operating crafts, diesel firemen, and crew consist were resolved through productivity bargaining rather than the kind of general labor protection discussed in the preceding sections. Operating craft employees already had lifetime labor protection in many cases and wanted something more in exchange for conceding crew reductions on locomotives and freight trains.³⁶⁶ The outline of a productivity agreement in both the fireman and crew consist areas began to emerge with the "lonesome pay" concept for engineers as a part of the eventual resolution of the diesel fireman dispute.³⁶⁷ The lonesome pay notion stresses that remaining crew members should receive a share of productivity gains resulting from the elimination of certain crew positions. The Chicago and Northwestern Railway proposed the idea be used to reduce train crews. The UTU initially resisted, but then accepted that remaining members of a smaller train crew should receive extra payments for working without one of the brakemen.³⁶⁸

This concept was formalized to a greater extent in Conrail's 1978 crew consist agreement. In that agreement, the employer agreed to pay a fixed dollar amount into a productivity savings sharing trust fund each time a crew was operated without a second brakeman. Under the collective bargaining agreement and the accompanying trust agreement, all employees in service when the agreement was signed were entitled to shares from the trust fund in proportion to the number of times they worked on smaller crews.³⁶⁹

This agreement compensated employees for lost job opportunities and also arguably compensated them for extra work or vigilance required on smaller crews.³⁷⁰ Congress supplemented the Conrail crew consist agreement in the 1981 Northeast Rail Services Act by providing for mandatory elimination of certain positions, in exchange for publicly funded payments.³⁷¹

The viability of the Conrail crew consist productivity bargaining ar-

365. It is the author's contention that labor protection focuses on cushioning the employee costs of enterprise change whereas productivity bargaining focuses on sharing the benefits of enterprise change with employees.

366. See REPORT OF THE PRESIDENTIAL RAILROAD COMMISSION 46 (1962) [hereinafter PRESIDENTIAL REPORT] (traditional labor protection insufficient for firemen because they are impacted more directly by elimination of diesel fireman positions).

367. BLE Study Commission, *supra* note 154, at 168-70.

368. *Chicago & N.W. Ry. v. United Transp. Union*, 336 F. Supp. 1149, 1159-61 (N.D. Ill. 1971), *rev'd & remanded*, 471 F.2d 366 (7th Cir. 1972), *cert. denied*, 410 U.S. 917 (1973).

369. CONSOLIDATED RAIL CORP., 1979 ANNUAL REPORT 8-9 (1980).

370. Only those employees who were employed at the time the agreement was signed were eligible for these benefits. *Id.*

371. 45 U.S.C. § 797(a) (1982); *United Transp. Union v. Consolidated Rail Corp.*, 535

rangement was attacked from two camps. First, subordinate union officials brought a suit claiming that the agreement had been reached without their consent as required under the union constitution. A federal magistrate invalidated the agreement as it applied to them, but Congress subsequently repudiated the magistrate's decision.³⁷² Second, the Brotherhood of Locomotive Engineers (BLE) sought to maintain a pay differential measured from enhanced crew earnings including trust fund payments without giving anything in return. Congress passed a joint resolution³⁷³ temporarily resolving this dispute without entirely vitiating the integrity of the concept that productivity gains should be shared only with those employees sacrificing employment opportunities represented by a work rule.³⁷⁴ In the airline industry, labor protection has been used less explicitly as a means of productivity bargaining.

F. Impact of Labor Protection on Labor-Management Cooperation

Collectively bargained labor protection can promote labor-management cooperation by providing a means to protect employees from economic loss associated with changes in a collective bargaining agreement.³⁷⁵ Particularly when work rules are changed which in turn reduce employment opportunities, labor protection providing for maintenance of compensation levels can be a useful way of sharing the gains from productivity bargaining. It is important to note, however, that some of the most prominent lifetime protection arrangements resulted from poor management judgment rather than a

F. Supp. 697 (Regional Rail Reorg. Ct. 1982) (dispute over various aspects of the 3R Act), *cert. denied*, 457 U.S. 1133 (1982).

372. H.R. CONF. REP. NO. 1430, 96th Cong., 2d Sess. 134-35, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 4166-67. An element of the magistrate's decision was that section 504(d) of the Regional Rail Reorganization Act did not require a single agreement for each craft or class on Conrail. The House Committee, referring to the opinion, reiterated congressional intent that a single agreement was required. *Id.*

373. Railway Labor-Management Dispute Resolution Act, Pub. L. No. 97-262, 96 Stat. 1130-31 (1982) (National Carriers' Conference Committee and certain employees represented by Brotherhood of Locomotive Engineers, which were in dispute, were instructed to take all necessary steps to restore service and maintain the status quo).

374. BLE Study Commission, *supra* note 154, at 178-84 (restating arguments of both sides without resolving the matter).

375. See PRESIDENTIAL REPORT, *supra* note 367, at 75 (recommending extension of employee protection to those affected by technological change); see also Rehms, *Collective Bargaining*, *supra* note 18, at 224-25 (explaining how labor protection enables railroad craft unions to accommodate profound technological change).

government mandate.³⁷⁶ Once labor protection exists, it operates as a disincentive for certain types of labor-management cooperation. Employers obligated to pay employees regardless of whether they work have no short-term incentive to improve efficiency through measures that will reduce labor costs for productive work. Union constituents assured of compensation regardless of whether they have jobs or not have no incentive to negotiate changes in collective bargaining agreements that will permit long-run improvements in employment through greater enterprise success.

Government imposed labor protection can be a serious impediment to healthy bargaining. Requiring employers to afford lifetime guarantees of current compensation levels can eliminate any employer incentive to become more efficient. The employer must pay the employees whether they work or not. Railroad labor protection schemes imposed by the government typically require maintenance of collectively bargained terms and conditions of employment in the course of carrier reorganizations. Contravening general concepts of change in ownership embodied in American labor policy,³⁷⁷ these types of labor protective provisions, superimposed on the status quo provisions of the RLA, further reduce or eliminate incentives for either labor or management to cooperate in making the enterprise more efficient.

A legitimate distinction exists between labor protection limited to the effects of a particular transaction and that which is unconditional. The former type prevails in the airline industry; the latter type is more common in the railroad industry. Protection limited to the provable effects of a particular transaction is easier to justify as a means of cushioning the human impact of a government-approved restructuring. A distinction also can be drawn between protective arrangements that freeze collectively bargained job assignments and work rules and arrangements that provide compensation for economic injury resulting from more efficient operations. The latter type provides more flexibility to employers while still protecting employee interests. Therefore, it is more consistent with an exchange approach to labor-management cooperation. The trend in recent years to eliminate government imposed labor protection³⁷⁸ is desira-

376. See Perritt, *supra* note 57, at 285-89 (discussing the conditions surrounding the Penn Central bankruptcy and subsequent merger).

377. See *John Wiley & Sons v. Livingston*, 376 U.S. 543, 549-51 (1964); see also *Howard Johnson Co., Inc. v. Hotel & Restaurant Employees & Bartenders Int'l Union*, 417 U.S. 249, 262-65 (1974).

378. See *Winter v. ICC*, 828 F.2d 1320 (8th Cir. 1987) (describing the ICC's policy on labor protection); *ALPA v. Department of Transp.*, 791 F.2d 172, 174-75 (D.C. Cir. 1986) (discussion of the CAB's policy change to discontinue requiring labor protective provisions before approval of an airline acquisition); Braniff Master Executive Council

ble and should be continued.³⁷⁹

The legitimate interests of employees in economic security should be addressed through collective bargaining. The law ought to ensure that collectively bargained labor protective arrangements are enforceable³⁸⁰ and that both labor and management are allowed to exert economic pressure to promote timely resolution of disagreements about labor protective arrangements.³⁸¹

VI. THE RELATIONSHIP BETWEEN DEREGULATION AND COLLECTIVE BARGAINING

Deregulation of the railroad and airline industries has increased the importance of collective bargaining because it redresses the imbalance of economic power which existed for many years in the industrial relations systems of both industries. Economic regulation benefits unions because it restricts product market competition which can put pressure on both employment and wage and benefit levels. Also, the existence of comprehensive regulation provides numerous opportunities for political intervention by trade unions to change the balance of power in collective bargaining, or to pursue objectives through regulation not obtainable through collective bargaining.

Deregulation has affected collective bargaining in the railroad and airlines industries through three basic mechanisms. First, deregulation of rates and fares affects collective bargaining because it facilitates price competition in the product markets. Price competition encourages employers to bargain harder in order to reduce labor costs, thereby improving their ability to compete based on price. Second, deregulation of market entry makes it easier for new carriers with lower labor costs to steal market share from more mature organized carriers. This phenomenon has been more important in the airline industry which enjoys stable or growing demand, than in the railroad industry which faces declining demand. In the railroad in-

v. CAB, 693 F.2d 220, 222-23 (D.C. Cir. 1982) (describing genesis of labor challenge to new DOT policy on airline labor protection).

379. *But see* R. Crandall, Chairman and President, American Airlines, Inc., Remarks Before the Airline Industrial Relations Conference 11-16 (June 17, 1987) (proposing that government set a floor for medical insurance, pension benefits, and other issues affecting airline labor costs).

380. See *supra* notes 175-227 for a discussion of enforceability.

381. This relates directly to the characterization of labor protection as a mandatory subject of bargaining under the RLA, as discussed *supra* notes 194-206 and accompanying text.

dustry, freer market entry has permitted long standing carriers to exit certain markets and be replaced by short line carriers.³⁸² Freedom of short line carriers to enter the market reduces shipper and community political pressure that would otherwise inhibit a trunk line carrier from exiting a market. Third, deregulation of market exit means that carriers can retreat from markets in which they are not competitive. This creates a direct and short-run threat to employment opportunities if employee representatives resist reducing labor costs to meet competitive pressures.

The combination of all three mechanisms pressures union parties to address enterprise efficiency concerns. It is possible for a deregulated air or rail carrier to develop a collective bargaining strategy in which the carrier threatens to exit a market and turn it over to a new entrant if its employee representatives do not agree to substantial concessions permitting the carrier to charge lower rates. Such a strategy depends upon all three mechanisms in order to be credible. Deregulation, therefore, has shifted the balance of power in collective bargaining in favor of employers.

Product market competition also invigorates collective bargaining. Collective bargaining, like any negotiation process, depends upon the parties' perceptions as to what the alternatives are to a negotiated agreement. Both labor and management experience important intraconstituency political pressures in translating these perceptions into collective bargaining positions. If rank and file union constituents believe that a carrier will survive in the marketplace no matter how high its labor costs, then the constituents will resist strongly any employer proposals to reduce labor costs. This phenomenon was prevalent for many years in the railroad industry when carriers continued to operate through bankruptcy and emerged without significant changes in employment terms. The threatened breakup of Conrail, the actual breakup of the Rock Island, and the shrinking of the Milwaukee Railroad, all of which occurred in the twilight years of detailed economic regulation, changed rank and file employee perceptions in a fundamental way and made railroad collective bargaining more effective.

Airline employees for many years perceived that airlines would not go out of business regardless of their level of efficiency. During the 1960s and 1970s, failing carriers typically were merged into healthier carriers as an exercise of regulatory policy.³⁸³ Deregulation has al-

382. Thoms, *supra* note 323, at 213 (Staggers Act has a relaxed standard of entry which facilitates the operation of short-line railroads carved from defunct railroads such as the Rock Island).

383. Trans Caribbean Airlines was merged into American Airlines and Allegheny Airlines acquired Mohawk Airlines. Rosenfield, *History and Development of Airline Merger Policies*, LABOR PROTECTIVE PROVISIONS IN AIRLINE MERGERS 31-32 (1981).

tered significantly the employees' perception that if their current employer goes under, they will be able to work for another healthier employer.

Employer postures at the bargaining table result from management's perception of industrial relations. Corporate decisions are made by accommodating various functional departments, such as financial, operating, strategic planning, and governmental relations, not unilaterally by labor relations executives who may have a more current and sophisticated perception of industrial relations. If significant parties within the decision making group of an air or rail carrier perceive that they can win any strikes and that their competitors will compete with lower labor costs, they will pursue an aggressive employer bargaining stance, even if these perceptions prove to be inaccurate.

Aggressive bargaining by employers results in more vigorous collective bargaining. Carried too far, however, aggressive employer practices can destabilize collective bargaining when employers ignore deeply held and legitimate employee interests that will surface one way or another.³⁸⁴ The problem with relying on economic forces to encourage labor-management cooperation is that a certain ebb and flow of power is inevitable. An obvious example is the airline industry, in which economic conditions favored union power during most of the decades of the 1960s and 1970s, but favored management power during much of the 1980s. Whenever either side transcends the other, the weaker factions can be expected to complain in political forums.

Political scientists know that intensity of interest in a particular issue is an important variable in determining how effective interest groups will be in influencing legislative action.³⁸⁵ Historical experience suggests that legislative intervention into railroad and airline disputes is an alternative always given serious consideration by legis-

384. It is notable that one commentator credits product market competition and associated wage cuts in the early years of the airline industry with the beginning of collective bargaining in the industry. See Kahn, *supra* note 48, at 100.

385. See J. HURST, *DEALING WITH STATUTES* 29 (1982) Professor Hurst discusses the limitations that resources, diffusion of interest, and other factors may present in obtaining legislative response. *Id.* He suggests that legislatures are fundamentally institutions that provide broad arenas for bargaining among diverse interests. *Id.* Most people interest themselves in the legislative process, but only when a matter under consideration has material importance for them. *Id.*; see also V.O. KEY, *POLITICS, PARTIES AND PRESSURE GROUPS* 7 (1942) (politics is a struggle among groups or interests). See generally Cass, *Models of Administrative Action*, 72 VA. L. REV. 363 (1986); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

lators. Such intervention may take the form of changes in the RLA, or more likely, in the form of reregulating product markets or imposing labor protections. If the collective bargaining system is not responsive to the deeply felt needs of rank and file employees, it is possible and even likely that these employees will actively encourage their representatives to promote legislative intervention of some sort.

To some extent, these employee concerns can be addressed through more progressive management techniques. This is especially true regarding employee desires to participate in enterprise management and receive fair treatment by employers. Similarly, voluntary employment security arrangements, whether unilaterally established by employers or established through collective bargaining, can reduce employee anxieties regarding job security and deteriorating employment conditions. Credible long-term accommodation of employee concerns, however, is likely only through collective bargaining.

Rank and file employee aspirations and grievances *will* be vented via some kind of political outlet. Collective bargaining represents an alternative channel through which these employees can communicate their desires. Absent such a channel, these feelings will be expressed to government institutions. It is naive to suppose that employees deprived of the collective bargaining channel will not contact their elected representatives in Congress or in state legislatures and recommend regulation of carrier employment policies. If collective bargaining is responsive to employee concerns, there is a reasonable basis for the government to keep its hands off.

Despite deregulation and the resulting revitalization of competitive forces which have strengthened collective bargaining, a number of threats to deregulation nevertheless exist, such as the previously discussed frustration of strongly felt employee aspirations. Other threats, both economic and political, also exist. Historically, air and rail transportation systems in western industrialized countries have been subsidized, either directly or indirectly, through economic regulation.³⁸⁶ It is far too soon to tell how the railroad short line, railroad rate competition, and low cost airline phenomena will evolve. It may be that the possible economic collapse of major carriers and resulting threat to essential transportation services, poor carrier service, or widespread safety problems³⁸⁷ will motivate a reregulation of the railroad and airline industries.

386. Economic regulation can serve as an indirect subsidy by keeping rates artificially high, or by limiting new entrants.

387. Dempsey, *Collision Course*, *supra* note 30, at 352-55. For an illustration of significant safety violations by domestic carriers, N.Y. Times, Apr. 14, 1988, § A, at 7, col. 6; N.Y. Times, Apr. 15, 1988, § A, at 34, col. 1; L.A. Times, Oct. 24, 1988, § 4 (Business), at 2, col. 6.

VII. CONCLUSION

Plausible arguments can be made that certain features of the RLA and other industry bargaining customs inhibit labor-management cooperation. Yet, as one union practitioner put it:

I . . . [am] convinced that, as in general life situations, we always seek a perfect society—one without problems—and, in attempting to fine tune it, end up creating a system that is less perfect or, at least, has as many problems, though of a different variety. In short, the RLA generally has accomplished the purposes that it was set out to perform. There has been a relatively high degree of labor stability in comparison to rail workers in other countries and in other industries within the [United] [S]tates.³⁸⁸

It would be wrong to conclude that the RLA has prevented adaptation to change in railroad and airline industries. It may have slowed it down, but it did not prevent it. As Professor Rehmus pointed out, collective bargaining in the railroad industry has adapted to enormous employment declines and changes in technology.³⁸⁹ It may be that the degree of resistance and the degree of governmental intervention was necessary, given the magnitude of the changes and their adverse impact on legitimate employee and union institutional interests.³⁹⁰

Similarly, collective bargaining in the airline industry has adapted to the introduction of the jet airplane, to deregulation, and to the commuter airline phenomenon without a significant disruption of transportation services. Many criticisms of the RLA from both management and labor have been occasioned by the difficulties experienced during this adaptation by both industries. The RLA, after all, leaves more discretion to the collective bargaining parties than do other prominent American collective bargaining statutes. Shortcomings in labor-management relations in the railroad and airline industries are more attributable to failures of imagination or courage than to failures of the law. It is appropriate to change anachronistic governmental policies and management or union behavior, but it may not be appropriate to change the Act itself, especially by making it more detailed or rigid in its terms.

Earlier, this article observed that labor-management cooperation is more a function of party attitudes than of law. The same observation holds true when applied to collective bargaining in the railroad and airline industries. Because of the broad discretion allowed to the

388. Letter from Harold A. Ross to Henry H. Perritt, Jr. (Sept. 4, 1987) (discussing various facets of labor-management relations).

389. See Rehmus, *Collective Bargaining*, *supra* note 18, at 223-27.

390. *Id.* at 134-37.

NMB and to the President by the RLA, the way in which the Act channels labor-management conduct is very much a function of the prevailing attitudes of the Board, Presidential administrations, and emergency boards. Therefore, many criticisms of the Act addressed herein can be resolved by appropriate governmental attitudes without amending the RLA.

The courts have important roles in interpreting and enforcing RLA duties. However, they have been willing in numerous cases of first impression to defer to the practical realities of collective bargaining history,³⁹¹ and sometimes were influenced by views expressed by agencies charged with administering major portions of the Act.³⁹² There is no reason why future administrations should not express their views through amicus curiae briefs if judicial interpretation threatens to frustrate important objectives of the RLA as understood by that administration. The greatest opportunities for improving government attitudes toward influencing labor-management cooperation relate to the control of strike timing, the use of emergency dispute resolution processes, and the fragmentation of collective bargaining.

The RLA is virtually unique in American collective bargaining law in the degree of discretion it delegates to the NMB to control the timing of economic pressure. The Supreme Court has observed that the timing of economic pressure can mean everything in terms of the balance of power between labor and management.³⁹³ There is a tendency for the availability of extended interest dispute resolution processes under the RLA to chill effective bargaining. Parties wishing to delay the timing of economic pressure can pursue these avenues of bargaining and stretch out the mediation process. Far more frequently, however, parties simply fail—with no actual intent to delay—to confront the real need to change their positions until either a strike threat or unilateral promulgation threat looms. Skilled mediators, with appropriate general policy direction from the NMB itself, can use their virtually unreviewable discretion to control the timing of economic pressure and reduce these harmful tendencies. Additionally, when unions or carriers seek to act in a way that disrupts a desirable bargaining structure, the mediation process can limit the effectiveness of these acts by controlling the timing of eco-

391. *Brotherhood of R.R. Trainmen v. Atlantic C.L.R.R.*, 383 F.2d 225, 229 (D.C. Cir. 1967) (good faith bargaining obligation determined by past bargaining practices), *cert. denied*, 389 U.S. 1047 (1968).

392. *See Pan American World Airways v. Flight Eng'rs Int'l Ass'n*, 306 F.2d 840, 848 (2d Cir. 1962) (citing NMB's amicus brief in support of conclusion that second round of mediation does not reinstate RLA status quo obligation).

393. *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 496 n.27 (1960) (quoting Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1440-41 (1958)).

conomic pressure so that it coincides with mediation releases in other cases then pending before the NMB.

As to the fragmentation of collective bargaining among many different units, the Board has almost absolute discretion to define election units, though it has not acknowledged this discretion officially. The NMB should use this discretion to ensure that representation units reflect appropriate changes in technology and the reality of industrial relations. In some cases, of course, dramatic change in election units is not appropriate. Nevertheless, the Board can encourage coordinated bargaining among groups with similar concerns who tend to follow similar patterns by creatively controlling the timing of economic pressure.

Another opportunity for improvement involves the tendency of some emergency boards to undercut desirable forms of productivity bargaining. The clearest example is Emergency Board 200. This Board created disincentives for carriers and labor organizations to engage in productivity bargaining by declining to reject a pay differential claim based on a productivity bargain negotiated by another union. The BLE Study Commission resulting from the emergency board declined to reject the idea that the engineers should receive a differential restoring payment even without productivity bargaining.³⁹⁴

As a matter of policy, it is difficult to control the substantive conclusions of fact finding panels since they are, by statute, intended to be independent and ad hoc in nature. Nevertheless, it is desirable that emergency boards, the NMB, and future Presidential administrations administer the Act and perform their functions with an appropriate view toward labor-management cooperation. These groups must also ensure that their actions do not undercut the incentives for creativity in private agreements.

Appropriate restraint in using emergency dispute processes already has been demonstrated by four different Presidential administrations, both Republican and Democrat. If collective bargaining is to flourish as an instrument of labor-management cooperation, it is essential that this restraint continue. No statutory change was necessary for the level of intervention to diminish in the early 1970s and none is necessary now to continue this aversion to intervention.

Eventually, it may be desirable to combine the RLA with the

394. BLE Study Commission, *supra* note 154, at 178-84. The dispute is described more fully *supra* notes 366-75 and accompanying text.

NLRA, but this is not an important issue at the present time. First, merging the two acts does not seem high on the agenda of any group interested in labor-management cooperation. Second, as this article suggests, greater discretion for private parties and less detailed RLA statutory obligations and privileges provide room for more creative and effective leadership by the parties and the government. This in turn helps the parties to channel their energies in constructive ways; merging the two acts would reduce this desirable flexibility. Furthermore, such a merger would incite unnecessary political warfare over the interpretation of novel statutory arrangements. Therefore, it may not be appropriate to change the RLA at all,³⁹⁵ but only change the attitudes of those administering it.

395. Section 2 of the RLA is susceptible of interpretations prohibiting employer-employee committees and carrier funding of union institutional adjustment. Amending only section 2 to prevent such an interpretation would be appropriate. *See supra* notes 175-92, 214-15 and accompanying text.