

THE RIGHT TO STRIKE IN ESSENTIAL SERVICES  
UNDER UNITED STATES LABOR LAW<sup>1</sup>

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SUMMARY: I. Introduction. II. A Brief History of U.S. Collective Labor Relations Laws. III. The Structure of Labor-Management Relations in The U.S. IV. The Right to Strike. V. Private Sector "Essential Services" Provisions: LMRA National. VI. Conclusion.

I. INTRODUCTION

This paper will focus on the right to strike under the collective labor relations laws of the United States. It will particularly address strikes in the types of services regarded as public or "essential" services in many other countries, although not necessarily in the U.S.

While I will discuss public sector law, the main focus will be on the two major federal laws governing collective labor relations in the private sector: the National Labor Relations Act (or NLRA)<sup>3</sup> and the Railway Labor Act (or RLA).<sup>4</sup> The industrial relations models of the Railway Labor Act and of the National Labor Relations Act are in general similar. However, there are some important differences, particularly in the area of collectively bargaining to impasse and the right to strike. Both of these laws guarantee employees the right to strike, but under different conditions. In addition, this paper will discuss the Norris-LaGuardia Act,<sup>5</sup> which limits the ability of federal judiciary to issue court orders enjoining strikes.

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<sup>3</sup>29 U.S.C. 151-169.

<sup>4</sup>45 id. 151-188.

<sup>5</sup>29 id. 101-115.

“Essential services” is not a category defined under most labor legislation in the U.S. Little distinction is made in U.S. law between strikes in these kinds of jobs and in those with much less dramatic impact upon the public. Although several state level public sector labor relations laws recognize such a category, it is unnecessary under most state laws, because they flatly prohibit strikes by public employees. There is some recognition of a similar-sounding category, the “national emergency dispute”, under the 1947 Labor Management Relations Act amendments to the NLRA,<sup>6</sup> but the prerequisites to its applicability are stringent. There was considerable history of its invocation in the first thirty years after the national emergency disputes provision was enacted,<sup>7</sup> and it was subjected to heavy criticism.<sup>8</sup> Today, however, it is a dead letter: for the past twenty years, the LMRA national emergency dispute provision has remained unused.<sup>9</sup>

There is broader language under the RLA which is still used occasionally. The generally-applicable RLA provision permits appointment of an emergency board when a labor dispute “threaten[s] to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation services...”<sup>10</sup> This provision too, however, has been utilized much less frequently in recent years, compared to the period before 1980. The one exception to this trend is a 1981 amendment to the RLA,<sup>11</sup> pertaining to governmentally-owned, local commuter railroads, which has been invoked relatively frequently since its inception.

<sup>6</sup> Sections 206-210 of the LMRA, 29 id. 176-180.  
 See generally, e.g., Donald E. Cullen, *National Emergency Strikes (1969)*; Charles M. Rehms, *The Operation of the National Emergency Provisions, 1947-1954, in Emergency Disputes and National Policy 261* (Irving Bernstein, et al., eds. 1955).  
 See generally, e.g., Cullen, *supra* note 7.<sup>8</sup>  
 See Barbara Yuill, *Labor Law: Taft-Hartley's National Emergency Provision Has 50-Year History, Is Seldom Used Today*, 1997 Daily Lab. Rep. (BNA) No. 157, at D8 (August 14, 1997).  
<sup>10</sup> Section 10 of the Railway Labor Act (RLA), 45 U.S.C. 160.  
<sup>11</sup> Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, tit. XI, 1157, 95 Stat. 357, 681-82 (1981) (codified at 45 U.S.C. 159a).

## A. Disputes Over Interests v. Disputes Over Rights

This paper will be confined to the right to strike in disputes over interests, that is, for a new or modified collective bargaining agreement.<sup>12</sup>

The RLA, unlike the NLRA, uses special terminology, in which these are called “major disputes”.<sup>13</sup> Disputes over interpretation and application of an existing, in force collective bargaining agreement are called “minor disputes”.<sup>14</sup> Minor disputes are subject to a special grievance procedure culminating in arbitration before a quasi-administrative tribunal, a “board of adjustment”, composed of equal numbers of representatives of labor and management, with appointment of a neutral in the event of deadlock.<sup>15</sup> Under the RLA, strikes are prohibited over “minor disputes”, and may be enjoined by a federal court as the behest of the employer.<sup>16</sup>

<sup>12</sup> This paper also will not separately address strikes aimed at compelling a non-union employer to recognize and bargain with the union. Under the RLA, there is no distinction between such strikes and strikes to win a new or amended collective bargaining agreement. Under the NLRA, Section 8(b)(7)(C), 29 U.S.C. 158(b)(7)(C), limits organizational and recognitional strikes and picketing to a maximum of 30 days unless an NLRB election petition is filed within that time period. Once an election petition has been filed, however, for most purposes the NLRA, too, treats the use of economic pressure tactics in recognition disputes similarly to their use in disputes over bargaining a new labor contract.

<sup>13</sup> Sections 2, Seventh; 6 of the RLA, 45 U.S.C. 152, Seventh; 156 create this category, but the label “major disputes”, was originated by the Supreme Court in *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 723-24, 739 (1945). For the distinction between major and minor disputes, see also, e.g., *Brotherhood of RR Trainmen v. Chicago R. & I. R. Co.*, 353 U.S. 30, 33 (1957); *Consolidated Rail Corp. v. Railway Lab. Execs.' Ass'n*, 491 U.S. 299 (1989).

<sup>14</sup> Sections 2, Sixth; 3, First (i) of the RLA, 45 U.S.C. 152, Sixth; 153, First (i), create the category of disputes, to which *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. at 723, first attached the label “minor dispute”. See also, e.g., *Brotherhood of Railroad Trainmen v. Chicago R. & I. R. Co.*, 353 U.S. 30, 33 (1957); *Consolidated Rail Corp. v. Railway Lab. Execs.' Ass'n*, 491 U.S. 299, 303-04 (1989).

<sup>15</sup> Provisions establishing the National Railroad Adjustment Board in the railroad industry and outlining adjustment board procedures are contained in Section 3 of the RLA, 45 U.S.C. 153. Section 204 of the RLA provides for similar boards of adjustment to be established either at carrier level or multi-carrier level by air carriers and the unions representing their employees. *Id.* 184. Differences in procedures for minor as opposed to major disputes are detailed in *Burley*, 325 U.S. at 724-28. In *Trainmen v. Chicago R. & I. R. Co.*, 353 U.S. at 34-36, 39, the Supreme Court held that all minor disputes were subject to mandatory, final and binding arbitration through the board of adjustment procedures, which could be invoked by either party.

<sup>16</sup> Sections 2, Sixth; 3, First; 201-202 of the RLA, *id.* 152, Sixth; 153, First; 181-182. See, e.g., *Trainmen v. Chicago R. & I.R.*, 353 U.S. 30, 39, 42 (1957). See also *Brotherhood of Locomotive Engineers v. Louisville & N.R. Co.*, 373 U.S. 33 (1963) (union prohibited from striking to enforce monetary award rendered on grievance by adjustment board; judicial enforcement procedures of

Under the NLRA, the statute itself does not prohibit strikes during the term of the agreement. The employees, Section 7 right to strike applies, whether or not a collective bargaining agreement is in effect.<sup>17</sup> However, most collective bargaining agreements contain an express or implied no-strike clause which is deemed sufficient waiver of these Section 7 rights. A no-strike clause will be implied from the existence in the agreement of a grievance procedure culminating in binding arbitration.<sup>18</sup> The courts will enforce a contractual no-strike clause to prevent a strike as to matters resolvable by arbitration under the labor contract, until after expiration of the agreement.<sup>19</sup> Sympathy strikes and other disputes not subject to the arbitration process, however, may fall outside the scope of the no-strike clause. Depending on the wording of the no-strike clause, honoring the picket line of another union may be neither a breach of contract, nor an unfair labor practice, nor otherwise subject to judicial intervention.<sup>20</sup> This area has many complexities beyond the scope of the current topic.

This introductory section will next review the sources of U.S. law pertaining to the right to strike, then it will outline the scope of coverage of the various statutes pertaining to collective bargaining and the right to strike.

Section 3, First (p) of RLA provide exclusive remedy). The employer may not unilaterally change rates of pay, rules, or working conditions absent compliance with the "major dispute" strike prerequisites of notice, negotiation, and exhaustion of the NMB mediation processes. See, e.g., *Brotherhood of Locomotive Engineers v. M-K-T R. Co.*, 363 U.S. 528 (1960).

<sup>17</sup> Section 7 provides that employees have "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities..."

Section 13 provides that "[n]othing in this Act... shall be construed so as either to interfere with or impede or diminish in any way the right to strike". In *UAW v. O'Brien*, 329 U.S. 454, 457 (1950), the Supreme Court construed this language as "expressly recogniz[ing] the right to strike".

<sup>18</sup> See, e.g., *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962) (permitting an award of damages to the employer against the union for the breach of the agreement).

<sup>19</sup> See *Boys' Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

<sup>20</sup> See *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976).

## B. Sources of Law

Freedom of association, both positive and negative, has been held to have a constitutional basis in the United States, and to be applicable to public as well as private sector employees. The courts have considered it to be a part of the broader right to political and social freedom of speech, assembly and association provided by the First Amendment to the Constitution.<sup>21</sup>

On the other hand, the right to bargain collectively and to strike in the private sector has a checkered history. Some courts have found either constitutional or common law support for such workers' rights, while others have held them to be wholly dependent on statutory provisions.<sup>22</sup> The judicial suggestions of a common law or less clearly, a constitutional basis for a right to strike occur only in the context of construction of legislation establishing or curtailing the right to strike, and until a handful of relatively recent state court cases, only as to private sector employees.<sup>23</sup> Flat bans on striking by public employees have been upheld against a variety of constitutional challenges in several cases.<sup>24</sup>

<sup>21</sup> See, e.g., *United Fed'n of Postal Clerks v. Blount*, 325 F.Supp. 879 (D.D.C.), *aff'd mem.*, 404 U.S. 802 (1971). See also *Smith v. Arkansas State H'way Employees, Local 1315*, 441 U.S. 463, 465 (1979); *Allee v. Medrano*, 416 U.S. 802, 814-15, 819 n. 13 (1974).

<sup>22</sup> Compare, e.g., *International Ass'n of Machinists v. NMB*, 425 F.2d 527, 536 (D.C. Cir. 1970) ("constitutional as well as common law underpinnings of the rights of employees to strike" bear on construction of the RLA) with, e.g., *Arkansas State H'way Employees*, 441 U.S. at 465-66 (public employer does not violate constitution by refusing to entertain employee grievances presented by union and by insisting that employees file on their own behalf); *Blount*, 325 F. Supp. at 882 (neither common law nor constitutional right to strike). The history is reviewed in James Gray Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 *Tex. L. Rev.* 1071, 1071-72, 1083-96 (1987).

<sup>23</sup> See, e.g., *Machinists v. NMB*, 425 F.2d at 536 (relying on constitutional and common law rights to construe RLA). Modern state court decisions include *Los Angeles County Sanitation Dist. No. 2 v. Los Angeles County Employees Ass'n Local 660*, 38 *Cal. 3d* 564, 577-78, 699 *P.2d* 835, 844, 214 *Cal. Rptr.* 424, 433 (1985) (abrogating common law rule prohibiting public employee strikes, except as to essential public services), *cert. denied*, 474 U.S. 995 (1985); *Davis v. Henry*, 555 *So. 2d* 457 (La. 1990) (construing Louisiana Little Norris-LaGuardia Act in light of possible common law right to strike to preclude state court injunctions against striking public employees unless they perform essential public services); *Local 1494, Firefighters v. City of Coeur d'Alene*, 99 *Idaho* 630, 586 *P.2d* 1346 (1978). See generally Ricky L. Babin, Note: *Davis v. Henry: One More Piece to the Public Employee Strike Rights Puzzle*, 51 *La. L. Rev.* 1271 (1991).

<sup>24</sup> See, e.g., *United States v. Greene*, 697 F.2d 1229, 1233-34 (5 Cir.) (void for vagueness), *cert. denied*, 463 U.S. 1210 (1983); *Blount*, 325 F. Supp. at 883 (equal protection); *United Steelworkers v. University of Alabama*, 430 F.Supp. 996, 1001-02 (N.D. Ala.) (First Amendment), *aff'd*,

Consequently, employees who are excluded from coverage under the National Labor Relations Act and the Railway Labor Act, particularly public sector employees at all levels of government, are generally regarded as having no constitutional right to collective bargaining or to strike, although their right to form or join a union is protected by the federal constitution. The right to collective bargaining and the right to strike in the public sector is dependent upon the existence and nature of separate public sector collective bargaining laws, which vary greatly in their coverage and exclusions, and in several, mainly less populous states, do not exist at all.

The right to strike, that is, to collectively, temporarily, withhold one's labor, should not be confused with the individual's right to quit working for the employer, that is, to permanently, individually, withhold one's labor.<sup>25</sup> The Thirteenth Amendment to the Constitution of the United States, which ended slavery and "involuntary servitude", consistently has been interpreted to prohibit courts from ordering unwilling employees to continue their employment relationship with a particular employer.<sup>26</sup> Common law doctrines even before the Civil War were customarily construed to similar effect. The Norris-LaGuardia Act, the RLA, and the Labor Management Relations Act (LMRA) each contain separate provisions confirming this principle.<sup>27</sup>

599 F.2d 56, 61-62 (5th Cir. 1979); *Pinellas County Classroom Teacher' Ass'n v. Board of Pub. Instruction*, 214 So. 2d 34, 37 (Fla. 1968) (involuntary servitude). See generally *Developments in the Law Public Employment*, 97 Harv. L. Rev. 1676 (1984) [hereinafter "Developments"]; Bernhard D. Meltzer & Cass R. Sunstein, *Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers*, 50 U. Chi. L. Rev. 731, 734-35, 778-81 (1983). The arguments for holding labor strikes, picketing, boycotts, and other expressive activities to be protected by the First Amendment are marshaled in Pope, *supra* note 22.

<sup>25</sup> See, e.g., *Texas & N.O. R. Co. v. Brotherhood of Railway Clerks*, 281 U.S. 548, 566-67 (1930).

<sup>26</sup> See, e.g., *Pollack v. Williams*, 322 U.S. 4 (1944) (Thirteenth Amendment guarantees individual worker's right to quit in response to unacceptable working conditions). For historical cases construing the Thirteenth Amendment to guarantee workers the right to strike, see Pope, *supra* note 22, at 1083-84 & n. 93, 1088-89, 1090 & n. 136, 1096, 1097. Pope argues for a modern Thirteenth Amendment-based "constitutional theory of labor liberty" encompassing the right to strike, picket and boycott. *Id.* at 1096-1112.

<sup>27</sup> Section 4 of the Norris LaGuardia Act, 29 U.S.C. 104 (precluding federal courts from exercising jurisdiction to enjoin any person from "whether singly or in concert ... (a) ... ceasing or refusing ... to remain in any relation of employment..."). RLA Section 2, Tenth, 45 id. 152, Tenth ("[N]othing in this Act shall be construed to require an individual employee to render labor or

### C. Scope of Coverage of the Collective Labor Laws

It is useful to start by outlining what types of activities fall within the jurisdiction of which body of labor law. The RLA covers the rail and air transportation sectors, both freight and passenger transport, and applies to rail carriers regardless of whether they are public or private.<sup>28</sup> Certain aspects of the RLA—determination of appropriate units for collective bargaining, mediation of collective interest disputes, and recognition of impasse—are administered by a federal agency, the National Mediation Board (NMB).<sup>29</sup> Once the NMB is involved in mediating a labor dispute, the union may not strike, and the employer may not make changes in rates of pay, rules, and working conditions until a lengthy series of steps has taken place. The status quo is frozen throughout negotiations and mediation, until the NMB deems its efforts to mediate a settlement fruitless, and, after an unsuccessful proffer of voluntary interest arbitration, releases the parties, as well as for a thirty-day cooling-off period thereafter.<sup>30</sup>

The NLRA covers virtually everything else in the private sector, with the main sectoral exclusions being agricultural labor and domestic household labor.<sup>31</sup> The National Labor Relations Board, or NLRB, administers

service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel performance by an individual employee of such labor or service, without his consent”.); Section 502 of the LMRA, 29 *id.* 143 (including nearly identical language to the RLA, plus a provision excluding from the definition of a strike, an employee work stoppage triggered by “abnormally dangerous conditions for work”). Boilerplate language also may be found in many of the injunctions issued under the national emergency dispute provisions of the NLRA, stating: “provided, however, that nothing in this [order] shall be construed to require an individual employee to render labor or services without his consent nor to make the quitting of his labor or service by an individual employee an illegal act”. See, e.g., *United States v. United Steelworkers*, 202 F.2d 132, 135 (2d Cir.), *cert. denied*, 344 U.S. 915 (1953); *United States v. Boeing Co.*, 215 F. Supp. 821, 827 (W.D. Wa.), *vacated on other grounds sub nom. International Ass’n of Machinists v. Boeing Co.*, 315 F.2d 359 (9th Cir. 1963) (*per curiam*).

<sup>28</sup> Sections 1, First; 201-202 of the RLA, 45 U.S.C. 151, First; 181-182.

<sup>29</sup> Sections 2, Ninth; 4 of the RLA; *id.* 152, Ninth; 154. See, e.g., *Switchmen’s Union v. NMB*, 320 U.S. 297, 301, 303, 305 (1943) (NMB has unreviewable authority of designation of appropriate craft or class for bargaining as well as over conducting representation elections).

<sup>30</sup> Section 2, Seventh, Section 5, First, Section 6 of the RLA, 45 U.S.C. 152, Seventh, 155, First, 156.

<sup>31</sup> Section 2(3) of the NLRA, 29 *id.* 152(3) excludes workers in these two industries from the definition of covered employees.

many aspects of this law, including determination of appropriate bargaining units and enforcement of the rights created by the law against unfair labor practices by employers or unions.<sup>32</sup> The NLRB does not, however, play the same role as the NMB in mediation; the Federal Mediation and Conciliation Service is available to the parties for that purpose.<sup>33</sup> The NLRB has no role akin to the NMB in declaring an impasse to have been reached in bargaining. Under the NLRA, the parties may exercise their rights to use economic weapons against each other without any advance ruling by the agency, although if they act in violation of the NLRA, the agency may afterwards find a violation and impose a suitable remedy, or the other side may be free to resort to otherwise unavailable self-help measures.

If either the NLRA or the RLA is applicable to an employer, that statute applies to the exclusion of any state regulation of the right to organize and bargain collectively, including to a very great extent the right to strike, lockout, boycott, and engage in other non-violent, economic pressure tactics.<sup>34</sup> One limited exception has to do with the location of picket lines and other union activities when they entail trespassing on the employer's property.<sup>35</sup> Violent or coercive strike-related misconduct remains subject to state as well as federal intervention.<sup>36</sup>

Public sector labor law is addressed separately, with legislation at the federal level regarding federal employees, and at the state level regarding state and local government employees.<sup>37</sup> The Federal Service Labor-Man-

<sup>32</sup> See Sections 3-6, 9-12, 14 of the NLRA; *id.* 153-156, 159-162, 164.

<sup>33</sup> See Sections 201-205 of the LMRA, *id.* 171-175.

<sup>34</sup> Many cases hold that federal labor law preempts state regulation of economic weapons. See, e.g., *Lodge 76, Machinists v. Wisconsin Emp. Rel. Comm'n*, 427 U.S. 132 (1976) (NLRA); *Amalgamated Motor Coach Employees v. Wisconsin Emp. Rel. Bd.*, 340 U.S. 383, 391-92 (1951) (NLRA); *UAW v. O'Brien*, 339 U.S. 454, 451 (1950) (NLRA); *Brotherhood of Railroad Trainmen v. Jacksonville Terminal*, 394 U.S. 369, 380 (1969) (RLA); *California v. Taylor*, 353 U.S. 553, 560-61 (1957) (RLA). A separate line of NLRA preemption case law holds that if the matter is arguably protected or arguably prohibited under the NLRA, the NLRB has exclusive jurisdiction over the matter. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243-44 (1959).

<sup>35</sup> See *Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180 (1978).

<sup>36</sup> See, e.g., *Allen-Bradley Local No. 1111 v. Wisconsin Emp. Rel. Board*, 315 U.S. 740, 748-49 (1942); *Jacksonville Terminal*, 394 U.S. at 386; *United Automobile Workers v. Russell*, 356 U.S. 634 (1958); *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954).

<sup>37</sup> The exclusion of governmental employers from the definition of "employer" under the NLRA ensures exclusion of these employers from NLRA coverage. Section 2(2) of the NLRA, 29 U.S.C. 152(2). The same definition applies under the LMRA, which includes the national emergency dispute provisions. See Section 501(3) of the LMRA, *id.* 241(3). See, e.g., *Crilly v. Southeastern Pa. Transp. Auth.* 529 F.2d 1355, 1362-63 (3d Cir. 1976).

agement Relations Act (or FSLMRA), covers employees of the federal government.<sup>38</sup> Federal employees have the right to bargain collectively, but only over a limited range of topics, mainly concerned with working conditions, because the federal Congress has by statute set the rules governing most aspects of wages and benefits.<sup>39</sup> The exception here is the U.S. Postal Service, which under the Postal Reorganization Act, is partially subject to the NLRA, albeit without the right to strike or to engage in “ other concerted activities for mutual aid or protection.”<sup>40</sup>

Each state has authority over its own public sector collective labor relations, and the states have enacted a wide range of legislation. In the majority of states, collective bargaining legislation covers state employees; many states either include local government employees under the same state laws or include them under separate legislation. Some states instead delegate to the county or city the authority to legislate regarding the collective bargaining rights of their own employees. A few states have no public employee collective bargaining legislation whatsoever; others have none covering state employees, while several have none covering local government employees.<sup>41</sup>

A word is in order here about which activities are covered by public as opposed to private sector labor relations law. In the case of the railways, all railroads operating in interstate commerce or integrated into the interstate railroad system are covered by the RLA, even publicly-

<sup>38</sup> Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101-7135.

<sup>39</sup> See generally, e.g., Peter B. Broida, *A Guide to Federal Labor Relations Authority Law & Practice, 1979-1989* (3rd ed. 1989).

<sup>40</sup> The Postal Reorganization Act (PRA) makes the NLRA applicable to postal service workers to the extent it is not inconsistent with the PRA. 39 U.S.C. 1209. For the most part, the separate PRA provisions regarding protected “ employee” status and bargaining units are similar to the usual NLRA rules, and the provisions pertaining to grievance and arbitration procedures are similar to those applicable under Section 301 of the LMRA. See *id.* 1201-1209. However, *id.* 1209(c), provides postal workers with only a truncated version of the rights provided other workers by Section 7 of the NLRA. Postal employees have “ the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity” , but no mention is made of any right “ to engage in ... concerted activity for mutual aid or protection” . 5 *id.* 7311 applies to postal workers, depriving them of the right to strike. The PRA provides for factfinding, followed by interest arbitration in lieu of the right to strike in collective bargaining disputes. 39 *id.* 1207.

<sup>41</sup> See generally, e.g., Martin H. Malin, *Public Employees' Right to Strike: Law and Experience*, 26 *U. Mich. J. L. Ref.* 313 (1993); *Developments*, *supra* note 24; Benjamin Aaron, *Unfair Labor Practices and the Right to Strike in the Public Sector: Has the National Labor Relations Act Been a Good Model?* 38 *Stan. L. Rev.* 1097 (1986).

owned carriers.<sup>42</sup> The boundary between public and private does not affect coverage under the RLA. Under the NLRA, however, it is the crucial determinant of statutory coverage.

The public sector includes federal, state, and local government employees, both civil servants and employees of state-run institutions. In many fields, state or local government institutions compete with private non-profit organizations or with private for-profit businesses. Universities, hospitals, and electric utility companies are examples of fields in which the private sector predominates in many regions of the United States. Local mass transit, trash collection and other municipal sanitation services, and even prison management are handled by private enterprise in some places, although in many others, they are governmentally-provided services.

To determine whether an enterprise is public or private, and therefore whether it falls under public sector labor law or under the NLRA, one must determine who owns and manages the enterprise.<sup>43</sup> While there are some complicated borderline cases,<sup>44</sup> most of the time it is fairly clear that the university, hospital, electric power company, or bus company is privately or publicly owned and operated. The privately-owned entity may be heavily regulated, and its prices set by government authority,

<sup>42</sup> Sections 1, First; 201 of the RLA, 45 U.S.C. 151, First, 181. See *California v. Taylor*, 353 U.S. 553, 561-67 (1957). See also *United Transp. Union v. L.I.R.R. Co.*, 455 U.S. 678, 690 (1982) (upholding constitutionality). The proviso to Section 1 excludes certain electric railways, operating independently of the interstate railroad system, subject to a judicially unreviewable determination by the Surface Transportation Board (formerly Interstate Commerce Commission) as to whether an electric railway falls within the exclusion. See *Shannahan v. United States*, 303 U.S. 596 (1938). Section 1 also excludes coal companies which operate rail lines exclusively within coal mines, to bring the coal to the regular rail carrier.

<sup>43</sup> An entity is a political subdivision of a state, exempt from the NLRA, if it was "either (1) created directly by the state, so as to constitute [a] department or administrative arm of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate. *NLRB v. Natural Gas Utility Dist.*, 402 U.S. 600, 604-05 (1970).

<sup>44</sup> Compare, e.g., *United States v. United Mine Workers*, 330 U.S. 258, 284-89 (1947) (treating coal miners in mines seized by the federal government as government employees for purposes of Norris-LaGuardia Act); *id.* at 329 (same); and *Natural Gas Utility Dist.*, 402 U.S. 600 (1971) (holding public utility to be "political subdivision" of the state, exempt from NLRA, where utility was governed by board of commissioners appointed by a judge and responsible to state government officials, held governmental power of eminent domain, and was treated as exempt governmental unit for certain tax purposes) with, e.g., *United Mine Workers*, 330 U.S. at 319-21 (Frankfurter, J., concurring in the judgment) (arguing that miners working in federally-seized operation were properly treated as private employees, since under the statute authorizing seizure, the plant operated under same management and labor relations practices as had been the case before seizure).

as is the case with so-called “public utilities”, but the entity is still legally deemed a private enterprise, and subject to the private sector labor law, the NLRA.<sup>45</sup> Even a state governmental seizure of the business will not suffice to transform it into a public entity, exempt from the NLRA, at least unless the government rather than the private owners substantially controls operations.<sup>46</sup>

Once it has been determined that the employer is covered by the NLRA or the RLA, depending on the industry, these employees have the statutory right to strike, even if there are competing public sector institutions, where by federal, state or local government labor relations law, the employees lack the right to strike. The secretaries at a state university, for example, may be prohibited from striking, while the secretaries at the private university across the street have the right to do so under the NLRA.

U.S. Bureau of Labor Statistics 1999 data<sup>47</sup> indicate that the U.S. labor force total 128,450,000, of which 108,450,000 (84%) work in the private sector, and 20,160,000 (16%) work for a governmental employer. Within the public sector, 2,669,000 (2% of the total labor force) are federal employees; 4,695,000 (4% of the total labor force) are state employees, and 12,795,000 (10% of the total labor force) are local government employees. Within the private sector, 6,791,000 (5% of the total labor force) work in the transportation and public utility industries. This number provides some idea of how many private sector employees work in what might be regarded as “essential public services”, although the number is both over—and under—inclusive. It is overinclusive because many employees in these industries are only tangentially related to the delivery of service, and their participation in a work stoppage would have little

<sup>45</sup> See, e.g., *Amalgamated Motor Coach Employees v. Wisconsin Emp. Rel. Bd.*, 340 U.S. 383, 391-92 & nn. 13-15 (1951) (collecting cases and relevant legislative history); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 222, 224 (1938) (local public utility engages in interstate commerce and is subject to NLRA).

<sup>46</sup> Compare *Division 1287, Amalgamated Motor Coach Employees v. Missouri*, 374 U.S. 74, 82 (1963) (state seizure of public utility insufficient to render it a state enterprise exempt from NLRA) with *United Mine Workers*, 330 U.S. 258, 287-88 (1947) (federal government post-World War II seizure of coal mines sufficiently rendered the workers federal employees to permit federal court to enjoin miners' strike under implied exemption to Norris-LaGuardia Act for federal employment).

<sup>47</sup> All data in this paragraph are drawn from Bureau of Labor Statistics, *Current Labor Statistics*, 123 *Monthly Lab. Rev.* 53 (Feb. 2000).

effect on the public. The health care industry, on the other hand, is not included in this figure, and many of its workers provide equally vital services.

Another important point about the right to bargain collectively as well as the right to strike is that not all employees have these rights, even if they are employed by an employer covered by the NLRA or the RLA. Managerial and supervisory staff are excluded from the protections of these laws.<sup>48</sup> It is not illegal for them to bargain collectively or to strike, and in some industries, they do so; however, they have no protection under the law.<sup>49</sup> In a few industries, particularly construction, employers traditionally agree to include lower level supervisors within the coverage of collective bargaining agreements. This is a result of historical factors regarding the skilled construction trades, the structure of their benefits plans, and the need of lower level supervisors to maintain their union membership against the chance that they will later work in a non-supervisory position. The arrangement, however, produces some special problems when a strike occurs.<sup>50</sup>

There is a significant difference between private sector workers such as supervisors, managers, and agricultural laborers, who lack the right to strike because they fall outside the categories of employees covered by the NLRA, and public employees under most public sector labor laws. The private sector workers lack an affirmative right to strike, since the statutes do not cover them. If they strike, an employer is free to take

<sup>48</sup> Sections 2(3), 2(11) of the NLRA, 29 U.S.C. 152(3), 152(11), defining "supervisor" and excluding such workers from the definition of "employee" protected under the Act; Section 1, Fifth of the RLA, 45 id. 1, Fifth ("employee... includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission..."). See *NLRB v. Yeshiva University*, 444 U.S. 672 (1980) (excluding "managers" from "employee" status under the NLRA); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974) (same). Note that the Norris-LaGuardia Act contains no similar exclusions from its prohibition against federal courts enjoining the concerted activities of "employees".

<sup>49</sup> See Section 14(a), 29 U.S.C. 164(a). See also, e.g., *Florida Power & Light Co. v. International B'hd of Electrical Workers*, 417 U.S. 790, 812 (1974) (Congress solved the problem of conflicting loyalties of supervisors by giving employers the choice either to demand, under threat of discharge, that their supervisory personnel not participate in or retain membership in a union, or alternatively, to "permit [their] supervisors to join or retain their membership in labor unions, resolving such conflicts as arise through ... collective bargaining").

<sup>50</sup> See, e.g., *Florida Power & Light*, 417 U.S. at 805, 812; *American Broadcasting Cos. v. Writers Guild, West, Inc.*, 437 U.S. 411 (1978); *NLRB v. International B'hd of Elec. Workers*, 481 U.S. 573 (1987).

the self-help measure of firing them. However, the strike itself violates no law. The Norris-LaGuardia Act precludes federal courts from interfering in such a labor dispute.<sup>51</sup> State anti-injunction laws in many states will prevent the state courts, as well, from ordering a halt to the work stoppage. Modern application of nineteenth century state common law tort doctrines imposing damage liability on private sector strikers is unlikely, although this will vary from state to state.

In the public sector, on the other hand, either by statute or by judicial interpretation, many governments have adopted statutes which not only deny employees the right to strike, they affirmatively prohibit public workers from striking.<sup>52</sup> Not only can the employer fire the worker for striking, but depending on the law, the strike may be enjoined by a federal or state court, the worker may be subject to civil or criminal penalties, the union may be subject to civil or criminal penalties, and the union may lose its entitlement to represent the workers.

Federal employees may fare the worst: a union commits an unfair labor practice if it calls or fails to take action to stop a strike by its

<sup>51</sup> Section 4 of the Norris-LaGuardia Act, 29 U.S.C. 104, provides, in pertinent part: “ No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute ... from doing, whether singly or in concert, any of the following acts: (a) Ceasing or refusing to perform any work; ... (e) Giving publicity to the existence of, or the facts involved, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence; (f) assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute; (g) Advising or notifying any person of an intention to do any of the acts heretofore specified; (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified...” . Section 13(c), *id.* 113(c), defines “ labor dispute” in exceptionally broad terms, to include “ any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee” . Sections 13(a) and 13(b), *id.* 113(a), 113(b), in turn, in broadly inclusive terms define when a case is deemed to “ involve or grow out of a labor dispute” , and persons or associations deemed to be “ participating or interested in a labor dispute” .

<sup>52</sup> See, e.g., Aaron, *supra* note 41, at 1097-98. Aaron spells out at some length the range of penalties States impose on unlawful strikers, See *id.* at 1115-18. Malin also details the severe penalties imposed by a few states, especially New York State, and posits that only sanctions so draconian as to be fully effective have much effectiveness at all. See Malin, *supra* note 41, at 328-29. Based on his empirical research and a comparison of outcomes between States, Malin concludes that legalizing strikes in the public sector in the U.S. actually reduces, rather than increases the number of strikes which actually occur. See *id.* at 378.

members;<sup>53</sup> the Federal Labor Relations Authority is entitled to seek interim injunctive relief from a federal district court stopping the strike pending the outcome of the unfair labor practice proceedings,<sup>54</sup> at which point a permanent injunction will be entered enforcing the FLRA adjudication; a union may be decertified, meaning it loses its right to represent the workers, for participating in a strike;<sup>55</sup> the striking worker “may not hold or accept a position in the Government of the United States”<sup>56</sup> which by some has been construed not merely to permit but to require the firing of the striker, by some, to preclude subsequent rehiring of the striker at the same agency, and by a few, to preclude the striker’s rehiring ever, by any federal agency;<sup>57</sup> the striker may be criminally prosecuted for committing a felony by striking;<sup>58</sup> it is possible the union, too, may be subject to criminal prosecution for aiding and abetting the striker in committing a felony.<sup>59</sup> Another provision of the FSLMRA excludes strikers from the definition of “employee”<sup>60</sup> and labor unions which participate in a strike from the definition of “labor organization”<sup>61</sup> thereby excluding both from all rights under the statute. Federal employees are also required to take an oath including a commitment not to strike during the term of their employment.<sup>62</sup>

In 1981, President Reagan relied on these provisions to fire some 11,000 striking members of the Professional Air Traffic Controllers Organization (PATCO) who refused to return to work after a forty-eight hour warning, in a watershed event.<sup>63</sup> Few ever got their jobs back.<sup>64</sup> The union was decertified,<sup>65</sup> the strike enjoined,<sup>66</sup> strike leaders threatened with civil and criminal contempt citation and prosecution, as well as

<sup>53</sup> 5 U.S.C. 7116(b)(7)(A), 7116(b)(7)(B).

<sup>54</sup> *Id.* 7105(g)(3).

<sup>55</sup> *Id.* 7120(f).

<sup>56</sup> *Id.* 7311(3).

<sup>57</sup> See Meltzer & Sunstein, *supra* note 24, at 771-72, 781-94.

<sup>58</sup> 18 U.S.C. 1918.

<sup>59</sup> *Id.* 2.

<sup>60</sup> *Id.* 7103(a)(2)(B)(v).

<sup>61</sup> *Id.* 7103(a)(2)(D).

<sup>62</sup> *Id.* 3333.

<sup>63</sup> See Meltzer & Sunstein, *supra* note 24, at 761. The entire story is narrated in detail in *id.* at 746-72.

<sup>64</sup> See *id.* at 769 n. 174.

<sup>65</sup> See *id.* at 759-60.

<sup>66</sup> See *id.* at 758.

criminal prosecution,<sup>67</sup> the air traffic controllers replaced by members of supervision, non-strikers, returning strikers, military air traffic controllers, and permanent replacements as fast as they could be trained.<sup>68</sup> Air traffic kept flying, although at a somewhat reduced rate for quite a long time.<sup>69</sup> Many view this event as emboldening not only public sector employers to oppose strikes, but also private employers to use permanent replacement and other strategies to try to break unions (or more politely, to “deunionize”) and operate “union free”.

The vast majority of employees in the United States, however, are not employed in the public sector, and are not subject to statutory prohibitions against striking. Most workers are employed by businesses that fall under either the NLRA or the RLA. Both on that ground, and because, despite significant deviations, the private sector legislation has served as a template for most public sector legislation, the bulk of the attention in this work will be addressed to private sector labor relations law. Part II will briefly review the historical development of U.S. collective bargaining and strike legislation, along with the evolution of the U.S. trade union movement. Part III will summarize the basic features common to the NLRA, RLA, and most if not all public sector labor legislation in the U.S. Part IV will outline the contours of the right to strike under the NLRA and the RLA, including countervailing economic weapons available to the employer, as well as alternative economic pressures workers may bring to bear. Part V, after outlining earlier cases of government intervention into labor-related “emergencies”, will describe the special procedures available under the NLRA for “national emergency disputes”, and the RLA for disputes which threaten “to deprive any section of the country of essential transportation service”. It also will examine utilization patterns for these provisions. Part VI will present some concluding observations.

<sup>67</sup> See *id.* at 758-59.

<sup>68</sup> See *id.* at 761.

<sup>69</sup> See *id.* at 761.

## II. A BRIEF HISTORY OF U.S. COLLECTIVE LABOR RELATIONS LAWS

### A. The Railway Labor Act

One may date the modern era of U.S. labor-management relations from the Congressional enactment of the Railway Labor Act of 1926. The statute was intended to bring some stability to the railway industry.

Since their completion in the later half of the nineteenth century, the railroads had been subject to major labor disputes and mass work stoppages, disrupting what was then the most vital part of the nation's transportation system. A series of earlier laws had failed to provide a workable process which could yield industrial peace.<sup>70</sup>

The RLA was negotiated jointly by the major employer and trade union organizations in the industry, and adopted by Congress as agreed to by the bargaining partners. Unlike Europe, where legislative proposals

by the social partners are not unusual, it is the only instance in the United States of federal adoption of major labor legislation based upon a joint legislative proposal advanced by the opposing economic interest representation organizations.<sup>71</sup>

The RLA provided railway employees with a judicially-enforceable right to organize, that is, freedom of association, the right to bargain collectively through representatives of the employees' own collective choosing, and the right to conclude collective bargaining agreements.<sup>72</sup> The right to strike was implied by the Supreme Court from the structure of collective bargaining as a whole established by the RLA.<sup>73</sup> This Act was later extended to the airline industry,<sup>74</sup> and with certain amendments,

<sup>70</sup> See, e.g., *General Comm. of Adjustment v. M.-K.-T. R. Co.*, 320 U.S. 323, 328-29 & n. 3 (1943); *Texas & N.O. R. Co. v. Brotherhood of Railway Clerks*, 281 U.S. 548, 560-64 (1930).

<sup>71</sup> See *Elgin, J. & E.R. Co. v. Burley*, 325 U.S. 711, 753 (1945) (Frankfurter, J., dissenting); *Burlington N.R. Co. v. Brotherhood of Maintenance Way Employees*, 481 U.S. 429, 447 n. 13 (1987).

<sup>72</sup> Section 2, First, Third, Fourth, of the RLA, 45 U.S.C. 2, First, Third, Fourth. See *Virginia R. Co. v. System Fed'n No. 40*, 300 U.S. 515 (1937); *Texas & N.O. R. Co.*, 281 U.S. at 567-70.

<sup>73</sup> The right to "self-help", i.e., strikes, lockouts, and unilateral changes in terms of employment, has been implied by the Supreme Court from the statutory scheme. See, e.g., *Brotherhood of Railroad Trainmen v. Jacksonville Terminal*, 394 U.S. 369, 378, 384-85, 390, 392-93 (1969) (implying "right to self-help for both unions and employers from statutory scheme as a whole"); *Brotherhood of Railway Clerks v. Florida & E. C. R. Co.*, 384 U.S. 238, 244 (1966) (same).

<sup>74</sup> Sections 201-206, 45 U.S.C. 181-186.

remains in effect today. Because the RLA covers public as well as private employers, virtually the entire industry is covered by the statute.

### B. The Norris-LaGuardia Act

In 1932, Congress enacted the Norris-LaGuardia Act.<sup>75</sup> The law was a reaction to decades of abusive federal court intervention into labor disputes, enjoining union strikes, picketing, and boycotts at the behest of employers.<sup>76</sup> It constituted a Congressional recognition that by the very nature of strikes and labor disputes, judicial back-to-work orders overwhelmingly favored the employer. It was also Congress' effort for the second or third time to persuade the U.S. Supreme Court to interpret legislation exempting combinations of workers from federal anti-trust prohibitions as meaning what it said.<sup>77</sup>

The statute is deregulatory rather than regulatory in design. It imposes no duty to bargain, and dictates no structures to support collective bargaining, leaving these matters to be determined on the basis of the economic power of labor and management. Its main provision simply takes the federal courts out of the business of enjoining picketing, boycotts, strikes, and other union activities in labor disputes.<sup>78</sup>

### C. The Original Wagner Act — the NLRA— and Subsequent Legislation

In 1935, in the midst of the Great Depression, after earlier attempts towards social partnership and other progressive legislation were struck down by a very conservative U.S. Supreme Court,<sup>79</sup> Congress, with the support of President Franklin Delano Roosevelt, enacted the National Labor Relations Act. The NLRA was intended to provide rights of association and collective bargaining, similar to those railroad and airline employees had under the Railway Labor Act, to most other employees

<sup>75</sup> 29 *id.* 101-115.

<sup>76</sup> The historic work credited with helping to galvanize Congress into enacting the Norris-LaGuardia Act, is Felix Frankfurter & Nathan Greene, *The Labor Injunction* (1930).

<sup>77</sup> See *United States v. Hutchinson*, 312 U.S. 219, 235-36 (1941); *Burlington Northern*, 481 U.S. at 437-39.

<sup>78</sup> See *International Ass'n of Machinists v. Street*, 367 U.S. 740, 772 (1961); *Burlington Northern*, 481 U.S. at 440 & n. 7.

<sup>79</sup> See *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (holding unconstitutional the National Industrial Recovery Act of 1933).

in the private sector.<sup>80</sup> The NLRB has authority to make broadly-applicable rules to implement the statute,<sup>81</sup> but it also sits, much like an appellate court, to adjudicate cases arising under the National Labor Relations Act after an initial hearing before an NLRB Administrative Law Judge or Hearing Officer.<sup>82</sup> In practice, because of the strong American common law tradition of case-by-case development of precedent, the NLRB has relied almost entirely upon its adjudicatory powers to develop an intricate set of practical rules elaborating the rights and responsibilities specified under the Act.<sup>83</sup>

The NLRA, as originally enacted, was extremely favorable to workers and unions, providing them only with rights, and no duties, and imposing on management legally-binding duties, but no rights against workers or unions. By the end of World War II, unions had successfully unionized key industries and had become quite powerful. Some said, too powerful.

After the death of President Roosevelt, a Democrat, a Republican-dominated, more conservative Congress overrode a veto by Roosevelt's successor, President Harry Truman, and enacted the Labor Management Relations (or Taft-Hartley) Act of 1947 (LMRA),<sup>84</sup> amending the NLRA. These amendments for the first time imposed duties on unions, and limited the economic weapons they could bring to bear in labor disputes.<sup>85</sup>

The most important restrictions constrain unions' ability to strike and boycott other employers in order to put pressure on the particular employer with whom the union has a dispute. National emergency dispute procedures were also enacted as part of the LMRA.<sup>86</sup> Further restrictions on "secondary" pressure tactics, as well as on picketing and strikes aimed at winning recognition of the union as bargaining agent of an employer's employees, were added in the 1959 Labor-Management Re-

<sup>80</sup> See generally, e.g., Walter E. Oberer, Kurt L. Hanslowe, Jerry R. Andersen, & Timothy J. Heinsz, *Cases and Materials on Labor Law: Collective Bargaining in a Free Society* 158 (3rd ed. 1986).

<sup>81</sup> Section 6 of the NLRA, 29 U.S.C. 156. See *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 609-10, 613 (1991).

<sup>82</sup> Sections 9, 10 of the NLRA, 29 U.S.C. 159, 160. See also 29 C.F.R. Part 101 (NLRB Statement of Procedure).

<sup>83</sup> See *American Hosp. Ass'n*, 499 U.S. at 608.

<sup>84</sup> Labor Management Relations Act, popularly known as the Taft-Hartley Act, Pub. L. No. 101, 80th Cong., 1st Sess., 1947.

<sup>85</sup> See generally, e.g., Oberer, et al., *supra* note 80, at 159-160, 163.

<sup>86</sup> 29 U.S.C. 176-180.

porting and Disclosure (or Landrum-Griffin) Act (LMRDA).<sup>87</sup> In 1974, full coverage of health care employers, which had been truncated in the 1947 amendments, was restored, although with several special provisions pertaining only to the health care industry.<sup>88</sup>

The Railway Labor Act was never similarly amended to restrict the use of particular economic weapons. The limitations on secondary economic pressures added to the NLRA do not apply to the RLA.<sup>89</sup>

#### D. The Decline of Private Sector Unions and the Growth of Public Sector Labor Law

Throughout most of this period, the ranks of the labor movement were growing. Before passage of the National Labor Relations Act, unions represented about 10% of the American workforce. By the mid-1950s, the trade union movement had reached a peak of 35% or 40% of the workforce. Virtually all of this membership was in the private sector; public sector bargaining was almost unheard of.<sup>90</sup>

Beginning in the late 1950s, this situation began to reverse itself, with some public employees, usually after bitter labor disputes involving illegal work stoppages, persuading the appropriate legislative body to adopt collective bargaining legislation. By the mid-1970s a majority of states, including most of the populous, industrial states, provided legislatively for collective bargaining by at least some public employees. In 1978, Congress passed the Civil Service Reform Act, Title VII of which expanded and codified a previous Executive Order providing collective bargaining rights to most federal employees.<sup>91</sup> Thereafter, the pace of state adoption of public sector bargaining legislation slowed, although it has yet to stop entirely.

In the early 1980s, Illinois and Ohio became two of the final industrial states to adopt broad collective bargaining laws covering most state and

<sup>87</sup> Labor-Management Reporting and Disclosure Act, popularly known as the Landrum-Griffin Act, 704(a), 73 Stat. 542-543.

<sup>88</sup> See *infra* text accompanying notes 192-198, 387-392.

<sup>89</sup> See *Burlington N. R. Co. v. Brotherhood of Maintenance Way Employees*, 481 U.S. 429, 448 (1987).

<sup>90</sup> See Paul C. Weiler, *Governing the Workplace* 9, 104, 109 (1990).

<sup>91</sup> Federal Service Labor-Management Relations Act, 5 U.S.C. 7101-7135.

local government employees.<sup>92</sup> In 1992, New Mexico adopted a public sector collective bargaining law, but it was enacted subject to a seven-year sunset provision, and in 1999, the governor thwarted efforts to extend or reenact the law.<sup>93</sup> Maryland became the most recent state to adopt such legislation in 1999.<sup>94</sup> While different commentators classify state labor relations laws differently, some thirty-seven states and the District of Columbia provide collective bargaining rights for at least certain occupations, particularly public school teachers, police and fire fighters, or certain levels of government, such as state or county or city government.<sup>95</sup>

From in the late 1950s onward, private sector union membership steadily declined, while public sector union representation increased.<sup>96</sup> The U.S. Bureau of Labor Statistics estimates that private sector union membership has dropped to about 9.4% of the private sector, non-agricultural labor force,<sup>97</sup> a lower level of union representation than existed before enactment of the NLRA. Recent vigorous efforts by the AFL-CIO to organize more workers have borne some fruit; the trend seems to have halted, although it cannot yet be said to have solidly reversed. The absolute number of union members is rising, but the increase is offset by growth in the size of the total labor force, so the percentage has yet to

<sup>92</sup> See Illinois Public Labor Relations Act, P.A. 83-1012, codified as 5 ILCS 315/1 315/27; ORC Ann. 4117.01 4117.24. See generally Malin, *supra* note 41, at 336-48 (discussing Illinois and Ohio legislation).

<sup>93</sup> The statute was the Public Employee Bargaining Act, N.M. Code Ann. 1998, N.M. Stat. Ann. 10-7D-1 10-7D-26. The governor twice vetoed legislation which would have retained collective bargaining rights for state employees. See William H. Carlisle, *State Employees: New Mexico Governor Vetoes Bargaining Law; Unions Threaten Legal Action To Keep Rights*, 105 Daily Lab. Rep. (BNA) A-5 (June 2, 1999).

<sup>94</sup> Ch. 298, Acts 1999, codified as Md. State Personnel and Pensions Code Ann. 3-101 3-601. The governor had previously issued Executive Order 01.01.1996.13, providing state employees with collective bargaining rights after the legislature failed to enact legislation. See *McCulloch v. Glendening*, 347 Md. 272, 701 A.2d 99 (1997).

<sup>95</sup> See generally Public Employee Department, AFL-CIO, *Public Employees Bargain for Excellence: A Compendium of State Public Sector Labor Relations Laws* (1993) [hereinafter PED].

<sup>96</sup> See, e.g., Weiler, *supra* note 90, at 9, 109 (crediting Richard B. Freeman, *Contraction and Expansion: The Divergence of Private Sector and Public Sector Unionism in the United States*, 2 J. Econ. Perspectives 63, 64 (1988), for pointing out the significance of the simultaneity).

<sup>97</sup> The data on union membership in this paragraph are taken from Daniel J. Roy, *Leading the News: Unions: Number of Union Members Rose Slightly in 1999, But Percentage Remained Constant*, 13 Daily Lab. Rep. (BNA) AA-1 (Jan. 20, 2000).

go up. 1999 was the first year in quite a while in which the percentage did not decrease.

The proportion of public sector employees represented by a labor union and covered by a collective bargaining agreement has risen to 37.3%, a figure that has changed little over the last decade. A public sector worker today is four times as likely as a private sector employee to be a member of a trade union. The public sector, however, is less than one-fifth of the American labor force. Aggregating public and private sector unionization statistics, about 13.9% of the U.S. labor force belongs to a labor union, and a slightly higher percentage is represented by a union and covered by a collective bargaining agreement.

The severe drop in private sector unionization rates, contrasted with the much higher, and steady level in the public sector, has led to conflicting claims about the causes.<sup>98</sup> One view suggests that the less adversarial form public sector bargaining takes in many places, because of the lack of the right to strike, is a factor in increased union support among the modern generation of employees. Another position urges that increased employer resistance to private sector unionism, seldom politically or economically feasible in the public sector, accounts for a large part of the precipitous decline in private sector unionization, and is one key to the divergence.<sup>99</sup> An essential component is the weakness of the private sector strike weapon in the face of employers' rights to temporarily or permanently replace strikers, to temporarily subcontract their work, and to whipsaw employees with implicit threats of subcontracting or relocation of operations to far away facilities.<sup>100</sup> In any event, the decline in the level of private sector unionization has had the consequence of greatly weakening private sector unions when they attempt to exercise their right to strike, by decreasing public support for strikes

<sup>98</sup> A review of many of these contentions may be found in Weiler, *supra* note 90, at 10-14, 186-93.

<sup>99</sup> Jim Pope, for example, points to the inability of governmental employers to relocate operations to escape from a union, as compared to private employers' ability to use the threat or actuality of capital mobility to thwart unionization, or weaken an existing union. To some degree, however, privatization has in recent years provided an equivalent weapon to public employers for certain types of operations. See also, e.g., Weiler, *supra* note 90, at 111-12, 114, 128-29, 228.

<sup>100</sup> See, e.g., Craig Becker, "Better Than a Strike": Protecting New Forms of Collective Work Stoppages under the National Labor Relations Act, 61 *U. Chi. L. Rev.* 351, 353-55 (1994); Paul C. Weiler, *Striking a New Balance: Freedom of Contract and the Prospect for Union Representation*, 98 *Harv. L. Rev.* 351, 354-57, 387-404, 415-419 (1984); Weiler, *supra* note 90, at 231, 263-69.

and increasing the willingness of unemployed workers as well as consumers to cross union picket lines during a strike.

Hard figures shed further light on the extent of the decline in the exercise of the right to strike in the U.S. In 1999, there were fewer major work stoppages than in any year since 1947, when the Bureau of Labor Statistics began collecting data.<sup>101</sup> In all of the United States, in 1999, there were only 17 work stoppages involving 1,000 workers or more, involving 73,000 workers and 2 million work days of idleness. The estimated percentage of time lost owing to stoppages based on preliminary data for Jan.-Oct., 1999, estimate percentage of working time lost owing to stoppages as varying from .00 to .01%. In 1998, there were only 34 work stoppages, with 387,000 workers participating, causing 5,116,000 days of idleness. The estimated percentage of working time lost to owing to stoppages in 1998 was .02%.<sup>102</sup>

Before I turn to the law regarding strikes, let me provide a few basic points about the structure of the U.S. industrial relations system.

### III. THE STRUCTURE OF LABOR-MANAGEMENT RELATIONS IN THE U.S.

The labor-management relations system in the United States is organized, in several key respects, on a different basis than that of most western industrialized countries. First, and foremost, it is premised on an arms-length, adversarial bargaining relationship as the one and only method by which workers can participate in collectively determining wages, benefits, and all manner of terms and conditions of employment.<sup>103</sup> The union is the “exclusive” bargaining agent of the employees.<sup>104</sup> Union

<sup>101</sup> Economic News: Work Stoppages: Union Work Stoppages Hit New Low in 1999; Only 17 Reported, BLS Says, 38 Daily Lab. Rep. (BNA) D-4 (Feb. 25, 2000)[hereinafter “Work Stoppages”].

<sup>102</sup> Work Stoppages, *supra* note 101; Bureau of Labor Statistics, Current Labor Statistics, 123 Monthly Lab. Rev. 53 (Feb. 1, 2000). These figures include illegal as well as legal strikes, including specifically the 1999 Deroit public school teachers’ strike. See Work Stoppages, *supra*.

<sup>103</sup> See Section 8(a)(2) of the NLRA, 29 U.S.C. 158(a)(2); Sections 2(3), 2, Fourth of the RLA, 45 id. 2(3), 3, Fourth.

<sup>104</sup> Section 9(a) of the NLRA, 29 U.S.C. 159(a). See RLA Section 2, Fourth, 45 id. 152, Fourth (“The majority of each craft or class of employees shall have the right to determine who shall be the representative of the craft or class” for collective bargaining purposes under the RLA). See also, e.g., J.I. Case Co. v. NLRB, 321 U.S. 332 (1944) (NLRA); Virginian Ry. Co. v. System

representatives bargain with management, and conclude collective bargaining agreements. The agreements commonly include provisions covering a wide range of topics, including protections against arbitrary termination of employment without “just cause”, seniority-based order of priority for reductions-in-force, promotions, and job transfers, protection of health and safety in the workplace, working hours, break time, premium pay for overtime work, wages, pensions, and health and disability insurance benefits. In addition, most collective agreements provide for a grievance procedure administered between labor and management. The grievance procedure is the forum for negotiated adjustment, or, failing that, binding arbitration before a private labor arbitrator, to resolve disputes over interpretation and application of the collective bargaining agreement. Under the RLA, instead of a private arbitration, unsettled grievances are adjudicated in an arbitration-like proceeding, before a quasi-administrative tribunal, a board of adjustment.<sup>105</sup>

Thus, there is no division of jurisdiction between a works council, on the one hand, and enterprise, sectoral, or national level collective bargaining on the other hand. No separate entity or structure deals with the employer concerning plant, office, or work site level matters, or regarding participation in resolution of particular topics, such as technological or organizational restructuring. Rather, it is customary to categorize collective bargaining topics as “economic” and “non-economic”, distinguishing between matters such as wages and fringe benefit forms of compensation, on the one hand, and union recognition, dues withholding, union security, a seniority system, and grievance procedures, on the other. However, both are customarily negotiated collectively between labor and management, and embodied in a collective bargaining agreement.<sup>106</sup> These features are characteristic of all U.S. collective labor relations systems: NLRA, RLA, and the public sector regimes.

Fed’n No. 40, 300 U.S. 515 (1937) (RLA); *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 728-29 (1945).

<sup>105</sup> Under the RLA, however, unlike the NLRA, employees have greater individual rights pertaining to the handling of their grievances. See *Burley*, 325 U.S. at 733-34, 738-39.

<sup>106</sup> When bargaining takes place at the corporate level, there often are two levels of collective bargaining agreements: one covering the employer as a whole, entered into with the national union, and one separately negotiated between plant management and the local union, covering only workplace level issues.

Second, the U.S. system provides for a government agency, the NLRB under the NLRA,<sup>107</sup> and the NMB under the RLA,<sup>108</sup> to delineate an appropriate unit for collective bargaining. Most public sector systems which confer collective bargaining rights provide a labor relations agency to determine appropriate bargaining units, or otherwise legislate a dispute resolution process for union recognition issues. The defined unit determines those workers who may vote for a collective bargaining representative and also defines those workers over whose terms and conditions of employment management must bargain. If a union is elected by majority vote as bargaining agent, that union becomes the exclusive bargaining agent for all employees in the defined bargaining unit, regardless of the individual employee's union sympathies.<sup>109</sup> Under both the NLRA and the RLA, fairly standard conventions have developed to establish which job classifications should be grouped together in one bargaining unit, or in RLA parlance, as a "craft or class".

One important difference between the two laws, however, is the prevalence of workplace versus employer-wide bargaining. Under the NLRA, the statute has been construed to create a presumption in favor of the appropriateness of single workplace bargaining units, and a large portion of NLRA collective bargaining takes place at workplace level.<sup>110</sup> Under the RLA, on the other hand, bargaining is normally conducted system-wide; the multi-location integration of operations is the essence of rail and air transportation. In some cases, railroad employers bargain on a system-wide, multi-employer basis with one or more unions. This difference between the usual bargaining structure in transportation and in other industries helps explain differences between the NLRA and the RLA in the design of their respective emergency dispute provisions, as well as the very different rate at which these provisions have been invoked.

<sup>107</sup> Section 9(b) of the NLRA, 29 U.S.C. 159(b).

<sup>108</sup> Section 2, Ninth, 45 id. 152, Ninth.

<sup>109</sup> See Section 9(a) of the NLRA, 29 U.S.C. 159(a); Section 2, Ninth of the RLA, 45 id. 152,

Ninth.

<sup>110</sup> Dixie Belle Mills, Inc., 139 N.L.R.B. 629, 631 (1962) (single site unit appropriate despite argument for larger unit); Beaumont Forging Co., 110 N.L.R.B. 2200 (1954) (single site unit appropriate despite argument for smaller units) (construing Section 9(b) of the NLRA, 29 U.S.C. 159(b)). See also, e.g., General Mills Restaurants, Inc., 300 N.L.R.B. 908, 910 (1990); Esco Corp., 298 N.L.R.B. 837, 839 (1990); Kapok Tree Inn, 232 N.L.R.B. 702, 703 (1977).

#### IV. THE RIGHT TO STRIKE

##### A. Protected, Unprotected, and Illegal Work Stoppages: Protections and Penalties Depending on the Legal Status of the Strike

As will become clear shortly, the strike in the United States is often a very weak weapon, because the employer, in most circumstances, lawfully may resort to an array of effective counterweapons, the most important of which is permanently replacing the strikers. On the other hand, when the strike lacks legally protected status, further sanctions may be available to the employer to deter employees from striking or to coerce the union to get the employees back to work. When the union otherwise would have the social, economic and political power to mount an effective strike, rules of law governing the availability of these remedies to the employer or to the government may determine the outcome the labor dispute.

The employees are first and foremost interested in whether the employer can fire them, or through permanent replacement or lockout, deprive them of their jobs for a long period of time. They are also concerned about whether the employer or any injured third party can hold them personally liable for damages suffered because of a strike, although this is uncommon. The union, however, may be just as concerned about the threat of a court order or injunction, commanding the employees to return to work and the union to end the strike.

A brief overview of these legal remedies and sanctions is provided here, as background for more specific examination of particular provisions of U.S. labor law. Bear in mind that there are three, rather than two, possible legal situations: (1) a statute may expressly protect the right to strike against employer interference; (2) a strike may be deemed illegal on the basis of either statute or common law; (3) the strike may be legal but unprotected, i.e., it is not proscribed, but no statutory provision protects the strikers' job entitlements. Caselaw under the NLRA has developed three categories: protected, prohibited, and neither protected nor prohibited.<sup>111</sup> These categories grow out of a context specific

<sup>111</sup> See, e.g., *Lodge 76, Machinists v. Wisconsin Emp. Rel. Comm'n*, 427 U.S. 132 (1976). See also *United Auto Workers, AFL v. Wisconsin Emp. Rel. Bd. (Briggs-Stratton)*, 336 U.S. 245, 265 (1949) (intermittent strike tactics "neither forbidden by federal statute nor was it legalized and approved thereby"). Aaron, *supra* note 41, at 1111 & nn. 106-112, outlines major categories of concerted activities which have been held unprotected by the NLRB or the courts.

to the NLRA and refer broadly to all forms of concerted activity. Nevertheless, these three categories provide a helpful matrix for examining the legal status of strikers under other bodies of U.S. law as well as the NLRA.

### 1. Risks to the Strikers' Employment

When a statute affirmatively protects the right to strike, the employer violates the law if it fires or otherwise penalizes the worker for exercising that right. If the employer fires or disciplines the worker, the worker will be able to file charges with the labor relations board,<sup>112</sup> or to go to court,<sup>113</sup> depending on the statute. The worker will win relief including reinstatement to the worker's prior position, and back pay and benefits lost in the interim.<sup>114</sup> The threat to fire workers if they strike also violates the statute.<sup>115</sup> After a strike has ended and the strikers have returned to work, it is illegal for the employer to discriminate against them based on their previous strike activity regarding seniority, work assignments, and other conditions of employment.<sup>116</sup>

When there is no statutorily protected right to strike, however, the employer is free unilaterally to exercise whatever rights it has in dealing

<sup>112</sup> This is the case under the NLRA, see sections 8(a)(1), 8(a)(3), 29 U.S.C. 158(a)(1), 158(a)(3), and under many of the state public sector labor relations laws which are modeled on the NLRA. <sup>113</sup> Section 2, Third, Fourth, 45 id. 152, Third, Fourth. The RLA has no administrative agency charged with enforcing employee rights under the law, and the Supreme Court has found that employee's whose RLA rights have been violated have the right to sue in federal district court. See, e.g., *Texas & N.O. R. Co. v. Brotherhood of Railway Clerks*, 281 U.S. 548 (1930). The RLA also makes these types of violations criminal, if willful, and subject to prosecution by the U.S. Attorney for the district. See RLA Section 2, Tenth, 45 U.S.C. 152, Tenth. <sup>114</sup> See NLRA Section 10(c), 29 U.S.C. 160(c). There is an exception permitting the employer to fire a striker based on serious violence or other misconduct committed by the striker in the course of the strike. However, the employer must be correct in its accusation; a good faith but erroneous belief will be no defense in an unfair labor practice case charging the employer with unlawfully interfering with the employee's right to strike. *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964). <sup>115</sup> See, e.g., *Victor's Café 52, Inc.*, 321 N.L.R.B. 504 (1996); *American Freightways Co.*, 124 N.L.R.B. 146 (1959). <sup>116</sup> See, e.g., *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963) (award of twenty years of superseniority to nonstrikers unlawful). See also *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967) (unlawfully discriminatory to pay earned vacation pay to non-strikers but not strikers while strike in progress).

with the employees. In every state except Montana,<sup>117</sup> the private sector employer is entitled to a presumption that the relationship is one of employment-at-will. This means that the employer is free to terminate the employee with or without cause, and without notice. Of course, an employer may have contracted away this right. Collective bargaining agreements normally require an employer to establish just cause for the termination, but in the private sector, relatively few unrepresented employees have express or implied employment contracts restricting the employer's right to discharge. Absent a statute ensuring the right to strike, most employees in the U.S. may be fired or disciplined in the unfettered discretion of their employer.

There are two important legal differences between the situations of protected strikes and legal, but unprotected strikes: one primarily affects the employees and the other primarily affects the union. For the employees, the difference between a strike that is legally protected, and one that is not illegal but is unprotected, depends on how fast employee turnover occurs in the workplace. As will be spelled out more fully shortly, even when a strike is legally protected, the employer may in most cases permanently replace the strikers. The permanently replaced strikers retain the status of employees,<sup>118</sup> and have the right to return to work as vacancies occur.<sup>119</sup> The faster the turnover of employees, the shorter the time the strikers risk being off work, awaiting reinstatement. The lower the rate of turnover, the greater the risk the employees will never get their jobs back, since eventually, they will accept employment with other firms, severing their entitlement to rehiring by the struck employer.

In that case, from the employees' point of view, they might as well have been fired.

For the union, the difference is that if the employer has the right to fire the strikers, the union risks losing representation rights almost immediately, since in any subsequent representation election, the strikers

<sup>117</sup> Montana has adopted the Montana Wrongful Discharge from Employment Act. Mont. Code Ann. 39-2-901 39-2-909, Section 4(2) of which characterizes a discharge as "wrongful" if, *inter alia*, "the discharge was not for good cause and the employee had completed the employer's probationary period of employment". Remedies include damages, but not reinstatement.

<sup>118</sup> Section 2(3), 29 U.S.C. 152(3) (1982), defines "employee" as including "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute ... and who has not obtained any other regular and substantially equivalent employment".

<sup>119</sup> See *Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968), *enfd.*, 414 F.2d 99 (7 Cir. 1969); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967).

will have no voting rights. When the strikers have been replaced but are entitled to return to work as vacancies arise, they have prolonged voting rights in any representation elections that may occur. Under the NLRA, they retain voting rights for up to a year after the strike has commenced.<sup>120</sup>

These rules do not apply in quite the same way in the public sector.

Even under the NLRA, there is some question as to whether there are any forms of work stoppage that fit into the “neither protected nor prohibited” category.<sup>121</sup> The same question arises separately under the RLA and under each state public sector law providing for a right to strike. In the public sector, the issue is compounded by the fact that most state laws permitting strikes, include restrictions applicable to specified categories of “essential” workers, or for strikes which pose threats to the public health or safety. Public workers are more likely than their private sector counterparts to be striking under illegal or doubtfully legal circumstances, so one might think they would be highly vulnerable to termination of employment.

In the public sector, however, there are often also civil service, teacher tenure, and other laws which abrogate employment-at-will and provide some form of “good cause” prerequisite for employee dismissal. In addition, constitutional due process requirements as well as the procedural provisions of civil service and tenure laws, may require the employer to exhaust lengthy, complex administrative procedures as a pre-condition to terminating returned strikers. In the public sector, therefore, even when a strike is clearly not protected by statute, the employer may find itself legally unable to fire the strikers.<sup>122</sup> In addition, in a few states, it appears that the labor relations act statutory language may prohibit the public employer from permanently replacing legally protected strikers.<sup>123</sup> Fi-

<sup>120</sup> NLRA Section 9(c)(3), 29 U.S.C. 159(c)(3) (“Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote... in any election conducted within twelve months after the commencement of the strike”). See, e.g., *Wahl Clipper Corp.*, 195 N.L.R.B. 634 (1972). Analogous rights under state laws and the RLA vary.

<sup>121</sup> See, e.g., *Lodge 76, International Ass’n of Machinists v. Wisconsin Emp. Rel. Comm’n*, 427 U.S. 132 (1976).

<sup>122</sup> See Janet Resetar, Comment: *The Louisiana Teachers’ Tenure Act Protection from Dismissal for Striking Teachers?* 47 La. L. Rev. 1333 (1987) (Louisiana). This is, of course, aside from the political difficulties such firings may entail.

<sup>123</sup> See Malin, *supra* note 41, at 340 (Illinois); *id.* at 315 n. 11 (employer refusal to engage in “nonmandatory” factfinding or who declines to accept “non-binding” recommended settlement of factfinder is precluded from permanently replacing strikers in any ensuing strike).

nally, public employees seem to be more successful than their private sector counterparts in getting away with outright illegal, rather than merely unprotected strikes. Several studies have found a fairly high rate of illegal public sector strikes resulting in collective bargaining agreements and minimal sanctions against the strikers.<sup>124</sup>

## 2. Risks to Employees and Unions Of Monetary Damage Liability

When labor market forces or legal rules minimize the risk of termination or replacement, one might think the legal status of the strike would be unimportant. It is in these circumstances, however, that the line between legality (regardless of protected or unprotected status) and illegality of the strike may matter. One risk is that the employer may sue and recover damages for operational losses suffered because of an illegal strike, either recovering from the union or the employees. This is seldom a major concern, however.

For employees covered by the NLRA, Section 301(b) of the LMRA<sup>125</sup> treats the trade union in a fashion equivalent to that of an incorporated entity, insulating individual members against liability for contract violations committed by the union.<sup>126</sup> Even when employees engage in a “wildcat strike”, against the instructions of the union, they cannot be held personally liable for damages for breach of the no-strike clause of the contract.<sup>127</sup> Section 303 of the LMRA provides employers, as well as their injured business partners, with a federal court cause of action when the union employs secondary strikes, picketing and boycott tactics in violation of Section 8(b)(4), but there, too, liability is limited to the

<sup>124</sup> See, e.g., Malin, *supra* note 41; Janet Currie & Shena McConnell, *The Impact of Collective Bargaining Legislation on Disputes in the U.S. Public Sector: No Legislation May Be the Worst Legislation*, 37 *J. Law & Econ.* 519 (1994).

<sup>125</sup> 29 U.S.C. 185(b). This provision permits a union to sue or be sued as an entity in federal courts. It further instructs, “[a]ny money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member of his assets”. This statutory language was inserted by Congress to preclude a future judicial decision akin to the notorious *Danbury Hatters* case, *Loewe v. Lawlor*, an early anti-trust treble damage action in which union members were held liable for an employer’s losses caused by the union-directed boycott of its hats, resulting in many of them losing their homes. See *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 406-07 & 407 n. 6 (1981).

<sup>126</sup> See *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 248 (1962).

<sup>127</sup> See *Complete Auto Transit*, 451 U.S. at 407-08, 415.

union itself.<sup>128</sup> The Supreme Court has held that Section 303 itself, as well as other aspects of the NLRA, evidences Congressional intent to permit no other damage remedies to employers for secondary strike activity whether it is illegal or merely unprotected under the NLRA.<sup>129</sup>

Because both protected and prohibited forms of concerted activity fall under the exclusive jurisdiction of the NLRB, which awards no damages to employers, state courts as well as federal courts are preempted from awarding damages to businesses injured by a strike, except compensatory damages, against the union alone, awardable under Section 303.<sup>130</sup> Employees, therefore, are wholly insulated from liability for strikes and other concerted activity so long as they do not commit criminal acts of violence, sabotage, or vandalism.

Union liability, on the other hand, can only be imposed for acts of the union itself, not for unauthorized acts of its members. Union members are not employees of the union, so the usual rule of vicarious liability of the employer for the acts of its agents, its employees, does not apply.

Union officers and employees are agents of the union, for whose acts it may be held liable, but pursuant to provisions of both the LMRA and the Norris-LaGuardia Act<sup>131</sup> the union is not responsible for the acts of

<sup>128</sup> 29 U.S.C. 187. See *Complete Auto Transit*, 451 U.S. at 413-14.

<sup>129</sup> See *Local 20, Teamsters v. Morton*, 377 U.S. 252, 258-60 (1964); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

<sup>130</sup> *Morton* limits the remedies for secondary economic pressures as stated in text. As to other forms of concerted activity, if the activity is neither protected nor prohibited by the NLRA, state claims are preempted under "Machinists preemption", which actually dates back to *Morton*. See, e.g., *Local 20, Teamsters v. Morton*, 377 U.S. 252, 258 (1964) (holding that LMRA preempts state torts causes of action based on secondary strike activity whether unlawful or simply unprotected under the NLRA); *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1985) (state may not intervene or disrupt the balance between contending economic forces, even if a party uses weapons neither protected nor prohibited under the NLRA); *International Ass'n of Machinists v. Wisc. Emp. Rel. Comm'n*, 427 U.S. 132 (1976). As to strikes and other economic weapons arguably protected or arguably prohibited by the NLRA, non-NLRA remedies are likewise precluded, under the *Garmon* preemption doctrine. See, e.g., *Wisconsin Dep't of Indus. v. Gould, Inc.*, 475 U.S. 282 (1986); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

<sup>131</sup> Section 301(b) of the LMRA, 29 U.S.C. 185(b), in pertinent part provides that "any labor organization" and "any employer ... shall be bound by the acts of its agents". Section 301(e) instructs courts to apply common law agency principles to the interpretation of section 301(b). See, e.g., *Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212, 216 (1979). Section 6 of the Norris-LaGuardia Act, id. 106, provides: "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of,

mere members, unless the union ratifies the acts or has itself induced or participated in them. An international union may not be held liable for the acts of its local union, absent authorization or control sufficient to render the local its agent.<sup>132</sup> The Norris-LaGuardia Act language requires “clear proof” that the acts upon which liability is predicated were actually participated in or authorized before the fact by the union, or that the union ratified them after the fact. The Norris-LaGuardia rule creates a heightened standard of proof of agency, and applies to all liability claims growing out of a labor dispute, including torts claims and anti-trust claims, as well as labor law violation. However, the provision, by its own terms, applies only to suits in federal courts.

Damage liability for either union or worker has seldom been litigated in cases subject to the RLA.<sup>133</sup> A 1992 federal Sixth Circuit Court of Appeals decision held, over a vigorous dissent, that neither union nor employees could be sued for damages caused to their employer by a strike over what the union had contended was a major dispute. The strike had eventually been held to be over a minor dispute, which meant the strike violated the RLA. The court noted that in the history to that date of the statute, no court in an officially published opinion had ever permitted an award of damages against a union for an unlawful strike.<sup>134</sup> As the dissenting judge noted, “[r]ailways often drop their damage claim against unions after receiving injunctive relief” .<sup>135</sup> The court cited one unofficially published district court decision allowing recovery of damages against a union for an unlawful strike, which had been reversed

such acts, or of ratification of such acts after actual knowledge thereof’ . See *Brotherhood of Carpenters v. United States*, 330 U.S. 395, 401 (1947); *Ramsay v. United Mine Workers*, 401 U.S. 302 (1971).

<sup>132</sup> In *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), the Supreme Court held that an international union could not be held liable for tortious actions committed by one of its local unions unless the employer presented “clear proof” of “participation, authorization, or ratification” by the international union. Cf. *NAACP v. Overstreet*, 384 U.S. 118 (1966) (On the basis of the First Amendment, holding that the relationship between national civil rights organization and one of its branches was insufficient to impute liability to national body for actions of its branch).

<sup>133</sup> See *CSX Transp., Inc. v. Marquar*, 980 F.2d 359, 376 (6 Cir. 1992) (Batchelder, J., dissenting).

<sup>134</sup> *Id.* at 379, 380. See also *id.* at 375 (Batchelder, J., dissenting).

<sup>135</sup> *Id.* at 376.

on other grounds on appeal.<sup>136</sup> Two previous federal appellate decisions had rejected claims for damage remedies when unions unlawfully struck in major disputes before exhausting the negotiation and mediation process, in violation of RLA status quo requirements.<sup>137</sup> The Sixth Circuit majority explained that “ courts have not permitted the railroads and unions to use the club of damages against each other” , because they “ threaten the delicate balance” intended by the statute to “ facilitate collective bargaining and to achieve industrial peace” .<sup>138</sup> While the legal issue is hardly settled, the rarity of such cases indicates that the risk of damage liability against either striking workers or unions under the RLA is minimal.

In the public sector, a number of courts have balked at employers’ and businesses’ efforts to win damages for illegal strikes, not only preventing employers from reaching individual employees’ assets but hindering them from suing the union for damages as well. However, public sector unions and their members fall outside the shelter provided by Section 301 of the LMRA and the NLRA preemption doctrines. As a result, their exposure to liability appears to depend on the vagaries of state law, which varies considerably from state to state.<sup>139</sup> There remains an unforeclosed argument that the Norris-LaGuardia Act, with its limitations on imputing liability to a union for the acts of its members, applies to state and local government employee unions, although the Supreme Court’s decision holding that the federal government and its employees are excluded from Norris-LaGuardia decreases the chances of such a holding.<sup>140</sup>

<sup>136</sup> *Id.* at 381 n. 31 (citing *Denver & R.G.W. R. Co. v. Brotherhood of Railroad Trainmen*, 58 L.R.R.M. (BNA) 2568 (D. Colo. 1965), *rev’d on other grounds*, 367 F.2d 137 (10th Cir.1966), *rev’d*, 387 U.S. 556 (1967)). Such an opinion is not normally regarded as precedential.

<sup>137</sup> *Louisville & N. Ry. Co. v. Brown*, 252 F.2d 149 (5 Cir.), *cert. denied*, 356 U.S. 949 (1958); *Burlington N. Ry. Co. v. Brotherhood of Maintenance Way Employees*, 961 F.2d 86 (5th Cir. 1992), *cert. denied*, 506 U.S. 1071 (1993). See also *National Airlines, Inc. v. Airline Pilots Ass’n Int’l*, 431 F. Supp. 53, 54 (S.D. Fla. 1976) (damages not available to air carrier for union’s violation of Section 2, “ First duty to exert every reasonable effort to avoid interruption of service” ).

<sup>138</sup> *CSX*, 980 F.2d at 380 (quoting *International B’hd of Elec. Workers v. Foust*, 442 U.S. 42, 47 (1979)). See also *id.* at 381-82.

<sup>139</sup> See, e.g., *Crilly v. Southeastern Pa. Transp. Auth.*, 529 F.2d 1355, 1361-62 (3d Cir. 1976).

<sup>140</sup> See *United States v. United Mine Workers*, 330 U.S. 258 (1947). Virtually no federal court cases have been brought involving state or local government employee labor disputes, in which Norris-LaGuardia could be asserted as a defense. In *Bowman v. Township of Pennsauken*, 709 F. Supp. 1329, 1336 (D.N.J. 1989), the matter involved the employees’ right to work in a second job

On the other hand, a few public sector laws specify concrete and draconian monetary penalties for illegal work stoppages. Some also subject the union to loss of its status as bargaining agent. These provisions, which are often extremely effective in choking off strike activity, are discussed further in Part VI regarding public employees' right to strike.

### 3. Injunctive Relief

A court order requiring the union and its members to end the strike and return to work may be the most powerful remedy against a strike, and is often the one of greatest concern to the union. This is especially true as to federal court orders; only to a lesser extent, do unions perceive state judicial injunctions as posing a similar threat.

It is not that workers in the United States have extraordinary respect for the courts, but rather that the courts wield some extremely powerful sanctions to back up their orders. Federal courts may hold in contempt of court anyone—union, worker, or other person—who knowingly violates a court order. Without going into great detail, there are two types of contempt citation: civil or criminal.<sup>141</sup> The same conduct violating a court order may be the basis for both types of contempt findings at once.<sup>142</sup>

during off-duty hours, but the employees' claim was pled on the basis of a violation of their constitutional rights under 42 U.S.C. 1983. The court summarily dismissed the employer's contention that Norris-LaGuardia precluded an award of injunctive relief on grounds that the matter was not a "labor dispute" but rather, a constitutional rights case, without focusing on whether it applied to a public employer. Since the RLA covers public as well as private railroads, a holding that Norris-LaGuardia did not apply to public employers would lead to a two-tier RLA system. Courts adjudicating injunction issues under the RLA has simply assumed applicability of Norris-LaGuardia to local governmental entities. See, e.g., *Southeastern Pa. Transp. Auth. v. Brotherhood of Railroad Signalmen*, 708 F. Supp. 659, 662 (E.D. Pa.), *aff'd*, 882 F.2d 778 (3d Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990). Those few courts have examined the question have followed a portion of the reasoning in *United States v. United Mine Workers*, 330 U.S. 258 (1947), and held that state or local governments are not "persons" subject to Norris-LaGuardia. See *USX Corp. v. Pennsylvania Dep't of Lab.*, 643 F. Supp. 1567, 1571 (M.D. Pa. 1986); *Almacs, Inc. v. Hackett*, 312 F. Supp. 964 (D.R.I. 1970); *Lake Mich. Coll. Fed'n of Teachers v. Lake Mich. Comm. Coll.*, 390 F. Supp. 103, 135 (W.D. Mich. 1974), *rev'd on other grounds*, 518 F.2d 1091 (6th Cir. 1975), *cert. denied*, 427 U.S. 904 (1976).

<sup>141</sup> See *United States v. United Mine Workers*, 330 U.S. 258 (1947); *United Mine Workers v. Bagwell*, 512 U.S.821 (1994). There are important procedural differences between the two, however, which need not be addressed here.

<sup>142</sup> See *United Mine Workers*, 330 U.S. at 298-300.

Civil contempt citation has two objectives: to compensate the complaining party for losses caused by the non-compliance and to coerce the violator to comply with the court order.<sup>143</sup> Relief aimed at compensation can include a fine in the amount of proven losses payable to the injured party.<sup>144</sup> Relief aimed at coercing compliance on the other hand, should take no account of losses suffered by injured parties. Rather, the court should consider “ the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired” .<sup>145</sup> In these cases, it is appropriate for the court to take account of the union’s financial resources in considering the likely effectiveness of the contempt order.<sup>146</sup> Sentences for criminal contempt are intended to vindicate the authority of the court, and are punitive in nature.<sup>147</sup> They may include fines payable to the government treasury, and as to individual defendants, they may include imprisonment.<sup>148</sup> In deciding whether and how much to fine the contemnor, the trial judge must consider “ the extent of the willful and deliberate defiance of the court’s order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant’s defiance as required by the public interest, and the importance of deterring such acts in the future” .<sup>149</sup> Fines for contempt of court are often set on a per day basis, continuing to accumulate until the workers return to work, or otherwise cease their prohibited conduct. The level at which the fines are set may be aimed at bankrupting the union leader or the union treasury within a matter of days if compliance is not rapid.<sup>150</sup>

The historic United Mine Workers strike shortly after the end of World War II, while the federal government was still in control of the coal mines,<sup>151</sup> provides an extreme example. The union and its president, John

<sup>143</sup> *Id.* at 303-04; *Bagwell*, 512 U.S. at 827.

<sup>144</sup> *United Mine Workers*, 330 U.S. at 304; *Bagwell*, 512 U.S. at 834.

<sup>145</sup> See *United Mine Workers*, 330 U.S. at 304. However, only criminal contempt may be available to punish noncompliance (hence coerce compliance) in cases involving out-of-court disobedience to certain types of complex injunctions. See *Bagwell*, 512 U.S. at 834, 835-36, 838.

<sup>146</sup> *United Mine Workers*,

<sup>147</sup> See, e.g., *Bagwell*, 512 U.S. at 827.

<sup>148</sup> *United Mine Workers*, 330 U.S. at 302-303.

<sup>149</sup> *Id.* at 303.

<sup>150</sup> See, e.g., *id.* at 375 (Frankfurter, J., concurring).

<sup>151</sup> The government had taken possession of the mines under the authority of the War Labor Disputes Act. See *id.* at 262 & n. 1.

L. Lewis, were held in contempt by the district court, when the union had already, for 15 days, refused to comply with the court's injunction. The judge imposed a fine of \$10,000 against the union president, and \$3,500,000 against the union. On appeal, the U.S. Supreme Court reduced the fine against the union to \$700,000, as a penalty for past violation of the court order. The remaining \$2,800,000, however, was retained as a conditional fine, should the union fail within the next 5 days to fully comply with the court order.<sup>152</sup> These were immense fines in 1947 dollars, but the union and its president had directly challenged the authority of both the U.S. President and the federal court system. The miner's strike had threatened to bring not only the coal mining industry but the entire national economy to a halt, just at the beginning of the transition from a war-time economy back to a peace-time economy.<sup>153</sup>

In a more recent example, long after a state trial court issued an injunction prohibiting their conduct, the United Mine Workers persisted in a massive campaign of civil disobedience in a major labor dispute with some coal mine operators. Their actions included sitting in, obstructing ingress and egress, and mass picketing, as well as occasional threats of violence and seeding the road with objects causing blow-outs on tires of vehicles of the company and those of its employees working during the strike.<sup>154</sup> The court eventually imposed fines on the union totaling \$64 million,<sup>155</sup> although the Supreme Court in the end struck down the fines because the matter had improperly been adjudicated as a civil, rather than criminal contempt proceeding, depriving the union of its right to trial by jury.<sup>156</sup>

A federal trial court judge has great discretion in contempt of court proceedings, as well as in most types of injunction proceedings.<sup>157</sup> State court judges often are conferred with similar discretion, although in some states, public sector labor relations statutes constrain that discretion by listing criteria or factors controlling injunction or contempt proceed-

<sup>152</sup>

*Id.* at 304-05.

<sup>153</sup> See *id.* at 265-68, 289-90, 303, 305-07; *id.* at 311 (Frankfurter, J., concurring in the judgment).

<sup>154</sup> *Bagwell*, 512 U.S. at 823.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 837-38.

<sup>157</sup> See *United Mine Workers*, 330 U.S. at 303. The court's discretion is much less, however, in national emergency dispute injunction proceedings. See *infra* Part V.B.

ings.<sup>158</sup> Differences among members of the judiciary, as well as differences in the law, therefore, affect the expectations of unions and employers regarding the likelihood and degree of strictness of injunctive enforcement of a strike prohibition, as well as the severity of any sanctions imposed in the event of contempt of court.

Federal judges are appointed by for life by the President, with the advice and consent of the Senate. The lifetime appointment is designed to insulate them from political pressures and other extra-legal considerations. There are limited opportunities for federal district judges to be elevated to the courts of appeals, scarcely any opportunities for federal appellate court judges to be appointed to the Supreme Court, and relatively few members of the federal judiciary who abandon it for subsequent careers as practicing lawyers, law professors, or political officials. There are few influences which might sway a federal judge other than his or her view of the appropriate handling of a case. Because of the severity of the potential sanctions, private sector unions today rarely commit extended violations of federal court injunctions, and are to some extent discouraged at the outset from engaging in illegal strikes, picketing and boycotts when such acts may subject them to a federal court injunction.<sup>159</sup>

The state judiciary, on the other hand, in most states hold office for a fixed, fairly lengthy term, but not for life. In many states, they must run periodically for re-election, or they may be initially appointed by the governor, subject to a vote of confirmation by the general electorate at a later election. Many state judges hope for elevation to a higher bench or to a federal judgeship, and it is not unusual for judges to leave the state courts for political office, appointed positions, legal practice, or business opportunities. They tend to be much more attuned to the political and social ramifications of enjoining a strike, particularly if the strikers and their friends and families will compose an important part of the electorate who will vote on the judge's continuation in office.<sup>160</sup> When confronted with a public employer's request for an injunction, these judges are likely to use the threat of an adverse ruling against both em-

<sup>158</sup> See Aaron, *supra* note 41, at 1116-17.

<sup>159</sup> But cf. Aaron, *supra* note 41, at 1100 (suggesting that the NLRA secondary activity restrictions have had little effect on union behavior).

<sup>160</sup> Marty Malin also makes this point. See generally Malin, *supra* note 41.

ployer and union, in an attempt to mediate a settlement, thereby avoiding enjoining the illegal strike.<sup>161</sup> Unions are less likely to fear the issuance of an injunction in the first place from a state court, and their concern about contempt sanctions for violations of court orders will vary considerably depending on the locality as well as the particular judge.

## B. Norris-LaGuardia and Anti-Strike Injunctions

The Norris-LaGuardia Act of 1932 prohibits the federal courts from issuing court orders to end or prevent a strike at the request of a private employer.<sup>162</sup> Although the matter is often ignored, it remains an open question whether Norris-LaGuardia should affect state courts' authority to issue injunctions in labor disputes.<sup>163</sup>

In several ways, the Norris-LaGuardia Act responds to Congressional frustration with prior Supreme Court construction undermining the effect of earlier federal anti-injunction provisions. First, the law does not merely substantively preclude federal courts from issuing injunctions in labor disputes; it removes the courts' jurisdiction to do so. In other words, it takes labor disputes as a subject matter outside the competence of the federal courts to issue injunctive orders. In clear-cut cases, the union need not obey the order, since it is void *ab initio*.<sup>164</sup> In more uncertain cases, however, the union risks contempt of court sanctions, although if it prevails on the merits as to the proper construction of Norris-

<sup>161</sup>

See, e.g., *id.*

<sup>162</sup> Sections 1, 4, 29 U.S.C. 101, 104 (1992). "The Norris-LaGuardia Act expresses a basic policy against the injunction of activities of labor unions". *International Ass'n of Machinists v. Street*, 367 U.S. 740, 772 (1961). See also, e.g., *Burlington N.R. Co. v. Brotherhood of Maintenance Way Employees*, 481 U.S. 429 (1987); *Amazon Cotton Mill Co. v. Textile Workers Union*, 167 F.2d 183, 189 (4th Cir. 1948). Under the NLRA, an important exception has been created by judicial interpretation when a strike occurs while a collective bargaining agreement is in effect, grows out of a dispute over an arbitrable matter, and is in violation of a no-strike clause. See *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970). The analogous exception under the RLA prohibits strikes over minor disputes and permits courts to enjoin them. See *supra* note 16 and accompanying text. Under the NLRA, however, even during the term of an agreement with a no-strike clause, because a sympathy strike occurs over a non-arbitrable matter (a dispute between the employer and a different union), the matter is not subject to injunctive relief under the *Boys Markets* doctrine. See *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976).

<sup>163</sup> See *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 n. 18 (1969); *Avco Corp. v. International Ass'n of Machinists*, 390 U.S. 557, 560 n. 2 (1968).

<sup>164</sup> See *United States v. United Mineworkers*, 330 U.S. 258, 293 (1947).

LaGuardia, no civil contempt sanctions will stand for the violation of an invalid court order.<sup>165</sup>

Second, Section 4 does not just state that all forms of non-violent, concerted activity by workers are protected against judicial intervention, rather, it exhaustively details virtually every conceivable form of union activity to preclude any narrowing construction. Third, Section 13 defines “labor dispute”, “case[s] involv[ing] or grow[ing] out of a labor dispute”, and “person[s] or association[s] ... interested in a labor dispute” in the broadest terms conceivable, covering economic pressures aimed at one employer to win a dispute with another, and alliances for mutual support among workers across the spectrum of unionized labor, as well as similarly broad alliances on the employer side. This “class warfare” language was aimed at avoiding a narrow interpretation similar to the Supreme Court’s construction of Section 20 of the Clayton Act,<sup>166</sup> which had eviscerated the provision’s restrictions on federal court injunctions in labor disputes, by holding that only labor tactics between the directly involved employer and employees were covered.<sup>167</sup>

Exceptions have since been either legislatively or judicially carved out of this statute for injunctions against strikes by federal employees,<sup>168</sup> for RLA injunctions to effectuate statutory prohibitions against striking or changing conditions of employment except over major (interest) disputes after compliance with notice, negotiation, and mediation requirements of the Act,<sup>169</sup> for NLRB-initiated injunction proceedings under the NLRA,<sup>170</sup> for injunction proceedings initiated by the U.S. Attorney General under the LMRA national emergency dispute provisions,<sup>171</sup> and for injunctions to ensure compliance with an express or implied no strike clause contained in a collective bargaining agreement, while it is in force.<sup>172</sup>

<sup>165</sup>

*Id.* at 294-97.

<sup>166</sup> Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921).

<sup>167</sup> See, e.g., Burlington N.R. Co. v. Brotherhood of Maintenance Way Employees, 481 U.S. 429, 437-39 (1987); United States v. Hutcheson, 312 U.S. 219, 235-36 (1941).

<sup>168</sup> United States v. United Mineworkers, 330 U.S. 258 (1947).

<sup>169</sup> E.g., Detroit & T.S.L.R. Co. v. United Transp. Union, 396 U.S. 142 (1969) (major disputes); Brotherhood of Railroad Trainmen v. Chicago R. & I. R., 353 U.S. 30, 39, 42 (1957) (minor disputes).

<sup>170</sup> Section 10(h) of the NLRA, 29 U.S.C. 160(h). See, e.g., Muniz v. Hoffman, 422 U.S. 454 (1974).

<sup>171</sup> Section 208(b) of the LMRA, 29 U.S.C. 178(b).

<sup>172</sup> Boys’ Mkts, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970).

Nevertheless, in disputes over interests, the Norris-LaGuardia Act remains a powerful force precluding federal courts from interfering with employees' exercise of the right to strike.

The Norris-LaGuardia Act constitutes recognition in federal labor relations policy that "[a]n injunction does not settle a dispute it simply disables one of the parties".<sup>173</sup> Especially significant for purposes of the present inquiry, it is the Norris-LaGuardia Act which ensures that no federal court will issue an injunction to a private employer or a third party against a strike by workers whose union has complied with the statutory procedural prerequisites to a strike in accordance with the NLRA or RLA, no matter how "essential" the employees are claimed to be.<sup>174</sup>

The only exceptions as to interest disputes entail that the federal government request an injunction, rather than the employer.

Norris-LaGuardia was also intended to end a wide range of abuses of judicial process that had become common in federal court labor injunction proceedings. Under Norris-LaGuardia, if the employer can present specific allegations of violence, obstruction of entry or exit to the plant, or mass picketing, the federal court can exert jurisdiction, provided the employer can also show that the local police cannot or will not adequately protect its premises.<sup>175</sup> However, the court may not issue orders *ex parte*, or without an adequate opportunity for the union to present evidence controverting the employer's claims, nor may the employer rely on hearsay and other forms of inadmissible evidence to support its contentions.<sup>176</sup> Any injunctions issued must be narrowly tailored to avoid interference with lawful strike activity.<sup>177</sup>

The provisions for holding workers or unions in contempt of court for violating an anti-strike injunction also specified much clearer and higher standards, substantively and procedurally.<sup>178</sup> One especially significant requirement prevents a litigant otherwise entitled to an injunction

<sup>173</sup> Burlington Northern, 481 U.S. at 451.

<sup>174</sup> See, e.g., *Amalgamated Motor Coach Employees v. Wisconsin Emp. Rel. Bd.*, 340 U.S. 383 (1951).

<sup>175</sup> Section 7 of the Norris-LaGuardia Act, 29 U.S.C. 107. See also, e.g., *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 386 (1969) (neither NLRA nor RLA preempts state injunctions against violent or coercive conduct incident to a labor dispute).

<sup>176</sup> Section 7 of the Norris-LaGuardia Act, 29 U.S.C. 107.

<sup>177</sup> Section 9 of the Norris-LaGuardia Act, *id.* 109.

<sup>178</sup> Section 11, reenacted in 62 Stat. 844, and recodified at 18 U.S.C. 3692, applicable to federal court injunctions in all types of cases.

from obtaining one if it “has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration” .<sup>179</sup> This provision has been relied on in cases under both the RLA and the NLRA to deprive employers of injunctions they would otherwise have been entitled to under Norris-LaGuardia, if they have refused to mediate or arbitrate.<sup>180</sup>

The Norris-LaGuardia Act has been construed to exclude federal employees.<sup>181</sup> Its applicability to state and local government employees has never been authoritatively determined; injunctions are normally sought in state courts when labor disputes arise involving these workers.

The NLRA creates a special exception to the Norris-LaGuardia Act, under which the NLRB General Counsel’s office can ask a federal court to issue an interim order to stop a strike, a picket line, or a boycott, but only after the NLRB General Counsel has made a preliminary determination that the strike, picket line, or boycott violates the NLRA, and has issued its own administrative complaint commencing an unfair labor practice proceeding against the union.<sup>182</sup> This provision, however, does not permit private parties to seek injunctive relief; neither employer nor union may rely on the NLRA to seek a federal court injunction against the other in a labor dispute.<sup>183</sup>

Because there is no equivalent administrative remedial scheme for violations of the RLA, violations of the major provisions of the RLA, particularly the duty to recognize and bargain with the employee’s selected bargaining agent, the duty to “exert every reasonable effort to make and maintain agreement” , and the duty to preserve the status quo without either strikes or unilateral changes in rates of pay, rules, or conditions of work except after exhaustion of notice, negotiation, and mediation procedures, have been construed to be exceptions to the Norris-LaGuardia Section 4 anti-injunction prohibition,<sup>184</sup> rendering the

<sup>179</sup> Section 8 of the Norris-LaGuardia Act, 29 U.S.C. 108.

<sup>180</sup> See, e.g., *Brotherhood of Railroad Trainmen v. Toledo, P. & W. R.*, 321 U.S. 50 (1944).

<sup>181</sup> See *United States v. United Mine Workers*, 330 U.S. 258, 271-80, 282 (1947).

<sup>182</sup> See Sections 10(h), 10(j), 10(l) of the NLRA, 29 U.S.C. 160(h), 160(j), 160(l).

<sup>183</sup> See, e.g., *Burlington N. R.R. v. Brotherhood of Maintenance Way Employees*, 481 U.S. 429, 448 (1987); *San Antonio Comm. Hosp. V. Southern Cal. Dist. Council*, 125 F.3d 1230, 1235 (9th Cir. 1997) (collecting citations).

<sup>184</sup> See, e.g., *Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 582 (1971); *Virginian Ry. Co. v. System Fed’n*, No. 40, 300 U.S. 515 (1937).

procedural limitations of Norris-LaGuardia particularly important in major labor disputes under the RLA.

State courts can, under most circumstances, enjoin the location of a picket line, if the picketers are trespassing upon the employer's private property. This is, in most circumstances, considered strictly a matter of state common law real property and tort doctrine.<sup>185</sup> State courts are without jurisdiction, however, to enjoin violations of the NLRA. In addition, many states have enacted a state version of the Norris-LaGuardia Act, often referred to as an anti-injunction statute, which limits state courts in much the same way that Norris-LaGuardia curtails federal court authority to enjoin strikes and other economic weapons during labor disputes.

### C. The Right to Strike and Employ Other Economic Weapons Under the NLRA

Recall that most workers delivering essential services in the U.S., such as utility company employees, hospital workers, ambulance drivers, bus drivers, railway workers and airline employees, are in the private sector, because they are employed by private businesses or non-profit organizations. For the most part, therefore, to discuss the right to strike of workers employed in essential services, requires an examination of private sector labor law. These workers have the right to strike by statute, and also the right to refrain from striking. In only a few respects does the right to strike of these workers differ from the rights of other workers, such as automobile assembly line workers, restaurant waiters and waitresses, or janitors cleaning office buildings. Consideration of the right to strike of workers performing essential services will therefore start, in this subsection, with a description of the general rules regarding the use of economic weapons under the NLRA. The next subsection will look

<sup>185</sup> See *Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180 (1978) (unless union files charge of unlawful interference, employer may seek state court injunction based on trespassory location of picketers or leafletters). See also *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (treating non-employee trespass rights for purposes of union organizing as almost exclusively determined by state law). NLRB caselaw, however, continues to apply the pre-*Lechmere* balancing test of *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) to consumer boycott appeals by persons not employed by the owner of the premises. See generally Douglas E. Ray, *Labor-Management Relations: Strikers, Lockouts and Boycotts* (Cum. Supp. 1999) 11:08, at 82-83 [hereinafter, Ray 1999 Supp.].

at the rules under the RLA. This will be followed by Part V of this article, which will address the very narrow categories of national emergency disputes, which receive special treatment under the NLRA, and presidential emergency boards under the RLA.

This subsection will first address the unions' general right to engage in a primary strike or picketing under the NLRA, a right much more limited and complicated than in many other countries. It also will consider the employer's right to lockout workers. After that, there will be a brief discussion of the complex and restrictive rules about secondary strikes and secondary boycotts. The section will conclude by mentioning some union tactics of uncertain legal status, such as partial strikes, slowdowns, and "working to rule", as well as the so-called "corporate campaign" or systematic efforts to use corporate structures, apart from the labor relations laws, to pressure employers in collective bargaining.

#### 1. NLRA Procedural Requirements Regarding Primary Strikes and Lockouts

Section 7 of the NLRA guarantees employees the right to bargain collectively and to engage in "concerted activities for mutual aid or protection".<sup>186</sup> Section 13 further assures the right to strike.<sup>187</sup> The Supreme Court has held that "[c]ollective bargaining, with the right to strike at its core, is the essence of the federal scheme".<sup>188</sup> The right, however, is far from absolute. In some other countries, the employer must subsidize a lawful strike by paying strikers their lost wages at the strike's conclusion. In many countries, the employer may not operate during a lawful strike, so that parallel economic pressures are placed on both sides to induce settlement: the workers earn no pay and the employer earns no profits. In the U.S. and a few other countries, however, the employer may always try to continue operations, meaning the strikers earn no pay, but the employer may be earning profits, depending on its ability to obtain temporary, substitute labor. In the U.S., on top of that, the employer has the often potent weapon of permanently replacing the strikers.

186

29 U.S.C. 157.

187

29 U.S.C. 163.

188

Division 1287, *Amalgamated Motor Coach Employees v. Missouri*, 374 U.S. 74, 82 (1963).

As a precondition to engaging in any strike, lockout, or other use of economic force, either the union or employer must comply with a requirement that they provide their bargaining partner at least sixty days advance notification of their intent to terminate or modify the agreement. This provision is designed to ensure an “insulated” period of collective negotiations for sixty days prior to the expiration of the previous agreement without risk of the use of economic weapons. Unless a new agreement is reached, within thirty days of notifying the other party to the labor contract, the party seeking to terminate or modify the labor contract must also notify the Federal Mediation and Conciliation Service of the dispute, to ensure adequate time for that agency to mediate in an effort to resolve the dispute peacefully. All existing terms and conditions of employment must be maintained, unaltered, throughout the sixty day period.<sup>189</sup> After that, the union is free to strike. The employer, however, is not permitted to change terms and conditions of employment if the employees remain on the job, until an impasse in bargaining has been reached.<sup>190</sup>

In the health care field, the period of advance notification to the other party to the contract is extended from sixty to ninety days, and the period for advance notice to FMCS is extended to sixty days.<sup>191</sup> This measure is intended to decrease the incidence of picket lines and strikes disrupting patient care in hospitals. Another provision unique to health care specifies that health care facilities can neither be struck nor picketed without the union giving the hospital at least ten days advance written notice.<sup>192</sup> This sometimes complicates the union’s task, if negotiations continue and the union would be willing to defer beginning a strike. In general, however, the goal of the provision was not to prevent strikes or picket lines at hospitals but to make sure that the hospital has an adequate opportunity to move critically ill patients to another facility, or to take other action to protect the needs of patients. A third, special provision allows FMCS to establish a factfinding board of inquiry, which may sometimes briefly delay a strike or lockout, if a stoppage would “substantially interrupt the delivery of health care in the locality” .<sup>193</sup> is dis-

<sup>189</sup> Section 8(d) of the National Labor Relations Act, 29 U.S.C. 158(d) (1992).

<sup>190</sup> See *NLRB v. Katz*, 369 U.S. 736 (1962).

<sup>191</sup> Section 8(d) of the National Labor Relations Act, 29 U.S.C. 158(d) (1992).

<sup>192</sup> Section 8(g) of the NLRA, id. 158(g).

<sup>193</sup> Sections 213(a), 213(c) of the LMRA, id. 183(a), 183(c).

cussed in Part V together with other LMRA emergency dispute procedures.

The health care provisions are the product of a historical accident: health care was originally covered by the NLRA, but the 1947 amendments removed all except for-profit institutions from NLRA coverage.

In 1974, the statute was amended to resume coverage of the entire industry, and at that time, these special provisions were inserted to largely retain the existing NLRA scheme, while placating those who were concerned about the risk to public welfare of disruption in health care services.<sup>194</sup>

Health care is the only sector receiving such protective treatment; public utility workers, local commuter line bus drivers, and others performing services essential to the public welfare, are treated exactly like factory workers and secretaries, and may strike upon a moment's notice once they have satisfied the Section 8(d) contract termination or modification notice requirements. It should be added that many hospital unions, especially unions representing registered nurses, work out voluntary agreements with management before they strike to assure maintenance of minimum levels of staffing; they do this because of professionalism and for public relations reasons, however, not because of the law.<sup>195</sup>

Compliance with the Section 8(d) and 8(g) notice provisions is normally a matter of mechanics and advance planning, and does not unduly burden the right to strike. However, the consequences of a mistake can be serious. If the union fails to properly notice the employer or FMCS, either of intent to terminate or modify the contract, or in case of a health care institution, intent to picket or strike, the striking workers lose their status as employees for the duration of the strike.<sup>196</sup> The employer is free to terminate them without violating the NLRA. If they are reinstated at the conclusion of the strike, however, they regain employee status as though they had never participated in an unprotected work stoppage.<sup>197</sup>

<sup>194</sup> See, e.g., *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 609-10, 614-16 (1991).

<sup>195</sup> This statement is primarily based on the author's ten years of experience as counsel for the Professional Staff Nurses' Association of Maryland, from 1986-1996.

<sup>196</sup> Section 8(d) of the NLRA, *id.* 158(d).

<sup>197</sup> *Id.*

## 2. Strikes, Lockouts, and Other Lawful Primary Weapons under the NLRA

The parties, both labor and management, are under a duty to bargain in good faith with each other, “but such obligation does not compel either party to agree to a proposal or require the making of a concession”<sup>198</sup>. The essential idea here is that both sides must genuinely try to reach mutual agreement. However, this simple concept is extremely difficult to enforce, and employers too often resort to bad faith bargaining, bargaining on the surface with no real intention of concluding an agreement, as part of a strategy to eliminate union representation from the workplace.<sup>199</sup>

In addition, the duty to bargain is limited to matters falling within the Section 8(d) statutory phrase, “wages, hours, and other terms and conditions of employment”, and the right to strike is similarly limited to issues falling within the scope of mandatory bargaining as defined by that phrase.<sup>200</sup> Although the phrase has been broadly construed in many respects, as to certain issues, the contrary has been the case. Capital redeployment, that is, relocation of operations, disinvestment in unionized plants, subcontracting, and plant closure decisions, provide employers with a potent set of weapons against unions. While bargaining over the effects of such decisions is plainly mandatory, the extent to which bargaining is required over the decisions themselves has been hotly contested.<sup>201</sup>

In practice, the right to strike is frequently of limited value. As one commentator put it, “[s]ince the NLRA’s passage... the potency of the

<sup>198</sup>

Id.

<sup>199</sup> See, e.g., Weiler, *supra* note 100, at 390-93.

<sup>200</sup> See *NLRB v. Borg-Warner*, 356 U.S. 342 (1958).

<sup>201</sup> Compare *First Nat’l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) (holding complete closure of operation to be permissive bargaining subject) with *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964) (subcontracting of on-premises work is mandatory subject). Current NLRB caselaw requires bargaining over such decisions if they turn on labor costs. See *Dubuque Packing Co.*, 303 NLRB 386, 391 (1991), *enfd sub nom. United Food & Commercial Workers, Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), *cert. dismissed sub nom. Dubuque Packing Co. v. United Food & Commercial Workers, Local No. 150-A*, 511 U.S. 1138 (1994). Contract provisions specifying in advance limitations or prohibitions on particular forms of capital redeployment for the term of the agreement, at least when concretely linked to job security, have been deemed mandatory bargaining subjects. See, e.g., *AlliedSignal Aero, Inc.*, 330 N.L.R.B. No. 175 (April 12, 2000).

strike has been annihilated” .<sup>202</sup> When a union strikes over disputed issues connected with the negotiation for a new contract, the law, as it has been interpreted pursuant to the forty-five year-old Supreme Court decision in *NLRB v. Mackay Radio & Tel. Co.*,<sup>203</sup> permits the employer either temporarily, for the duration of the strike, or permanently, to replace the striking workers. In addition, the employer may subcontract the struck work for the duration of the strike, <sup>204</sup> or may attempt to operate using supervisory and other non-bargaining unit personnel. The employer also is free to lock out the workforce as an economic pressure tactic to win a favorable collective bargaining agreement,<sup>205</sup> and may even operate during the lockout with non-bargaining unit staff or temporary (but not permanent) replacements.<sup>206</sup>

When the employer operates with temporary replacements or supervisory personnel, or temporarily subcontracts work during the strike, at the conclusion of the strike, the strikers are normally entitled to promptly return to their jobs, even if this entails the discharge of the temporary replacements or contractors.<sup>207</sup> Exercise of the union’s right to strike, in these circumstances, pits the strikers, surviving on modest union-provided strike benefits, or their own savings, against an employer operating with substitutes, albeit with less than full productivity.<sup>208</sup>

<sup>202</sup> Becker, *supra* note 100, at 353.

<sup>203</sup> 304 U.S. 333 (1938).

<sup>204</sup> Permanent subcontracting, however, has been held unlawful when instituted during a strike or lockout, without first bargaining to impasse over the decision with the union. See, e.g., *International Paper Co.*, 319 N.L.R.B. 1253 (1996), *enf. denied*, 115 F.3d 1045 (D.C. Cir. 1997).

<sup>205</sup> See, e.g., *NLRB v. Truck Drivers, Local Union No. 449*, 353 U.S. 87 (1957) (lockout in response to union strike against one employer in attempt to fragment multi-employer bargaining unit); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965) (lockout intended to control timing of shutdown); *NLRB v. Brown Food Store*, 380 U.S. 278 (1965).

<sup>206</sup> See, e.g., *Harter Equipment, Inc. (Harter I)*, 280 N.L.R.B. 597 (1986), *rev. denied sub nom. Operating Engineers Local 825 v. NLRB*, 829 F.2d 458 (3d Cir. 1987); *Harter Equipment, Inc. (Harter II)*, 293 N.L.R.B. 647 (1989) (permissible to lock out, and to temporarily but not permanently replace); *Ancor Concepts, Inc.*, 323 N.L.R.B. No. 134 (1997) (permissible to lock out, but not to permanently replace), *enf. denied*, 166 F.3d 55 (2d Cir. 1999); *Goldsmith Motors Corp.*, 310 N.L.R.B. 1279 (1993).

<sup>207</sup> See *Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968), *enf’d*, 414 F.2d 99 (7 Cir. 1969), *cert. denied*, 397 U.S. 920 (1970); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967).

<sup>208</sup> A few states permit strikers, after passage of a disqualification period of several weeks, to obtain unemployment insurance benefits. See *New York Tel. Co. v. New York State Dep’t of Lab.*, 440 U.S. 519 (1979). Almost half the states, however, permit workers unemployed as a result of a lockout, to obtain unemployment benefits; a few go farther and will treat an employee work stoppage as a “lockout” caused by the employer based on the employer’s bargaining position,

It is the threat of permanent replacement, however, that has most greatly undermined the effectiveness of the right to strike. Under the law, the permanently replaced striker is not formally fired, but retains “employee” status.<sup>209</sup> It is on this basis that the U.S. claims to preserve the right to strike.<sup>210</sup> However, when the strike is settled, if a worker has been “permanently replaced” he or she no longer has a vacant position to return to. She or he has the right to return to employment, but only as vacancies occur.<sup>211</sup> This is dependent upon the size of the workforce, rate of turnover, and subsequent expansion or contraction of the production or services provided by that workforce, at that facility, much of which is partly or totally within the control of the employer.

Of course, the employer’s ability to resort to this tactic depends upon the availability of striker replacements. Availability is mainly influenced by two sets of factors: (1) the situation in the labor market, and (2) community social attitudes. When there is high unemployment, workers in traditionally unionized, heavy industry jobs, which are predominantly unskilled or semi-skilled positions, are usually easily replaced. Only in two situations do workers have reasonable assurance that the employer will not replace them if they strike. Workers in skilled trades, and highly educated technical and professional workers have scarce training and knowledge and prove more difficult to replace. Very large employers, such as automobile manufacturers employing 50,000 to 300,000 factory workers who may all strike at once, find it hard to replace a workforce on such a large scale. But for most small, medium, and even large businesses, until quite recently, it has been fairly easy to hire permanent replacements for most striking employees in a normal labor market. At the time of this writing, however, the labor market in many parts of the U.S. is so tight that this is much less true than usual. Predictions are that the present U.S. labor shortage will end within the next decade or sooner.

qualifying the workers for unemployment benefits. See Douglas E. Ray, *Labor-Management Relations: Strikers, Lockouts and Boycotts* 1:08, at 14-15 (1997).

<sup>209</sup> Section 2(3) of the NLRA, 29 U.S.C. 152(3).

<sup>210</sup> *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938). See also *Trans World Airlines v. Independent Fed’n of Flight Attendants*, 489 U.S. 426 (1989) (RLA).

<sup>211</sup> *Laidlaw Corp.*, 171 N.L.R.B. at 1369-70.

Losses in union membership, and a decline in the general sense of social solidarity, contribute significantly to employers' ability to operate during strikes. The right to replace strikers would mean little were no workers willing to be employed while a labor dispute is in progress. Declining support for the labor movement has made other workers far more willing than they were fifty years ago to cross a picket line and break a strike. Workers in the bargaining unit represented by the union also have the right to refrain from striking, if the employer continues to operate;<sup>212</sup> many choose to do so. Some walk out on strike but later abandon the strike and "cross over" the picket line to return to work.<sup>213</sup> Supreme Court decisions have also weakened the ability of unions to use fines, expulsion, and other internal union disciplinary measures to reinforce the strike commitment of union members, even if they initially voted to commence the strike. All the members need to do is formally resign from union membership before they cross the picketline.<sup>214</sup> Even after a strike has begun, the greater the risk of permanent replacement, and the lower the rate of workforce turnover, the more the striker's incentive to abandon the strike, and the greater the pressure on the union to end it prematurely.

The Caterpillar strike presents a clear example.<sup>215</sup> The United Auto Workers (UAW), a very strong union, struck Caterpillar in 1991, in an effort to maintain the traditional industry-wide pattern bargaining system in the agricultural implement manufacturing industry. The union attempted to pressure Caterpillar to enter into a collective bargaining agreement similar to the one the union had reached with John Deere Co. After a five month strike, involving over 12,000 employees, the union returned to work, without a contract, working under the terms of the employer's previously-rejected last contract offer. The employer had

<sup>212</sup> Sections 7, 8(b)(1)(A) of the NLRA, 29 U.S.C. 157, 158(b)(1)(A).

<sup>213</sup> See, e.g., *Trans World Airlines v. Independent Fed'n of Flight Attendants*, 489 U.S. 426 (1989); *Pattern Makers' League v. NLRB*, 473 U.S. 95 (1985); *NLRB v. Textile Workers Union (Granite State Joint Board)*, 409 U.S. 213 (1972).

<sup>214</sup> See *Pattern Makers' League*, 473 U.S. at 100, 106-07, 115; *NLRB v. Textile Workers Union (Granite State Joint Board)*, 409 U.S. at 215-17. See generally Becker, *supra* note 100, at 364; Michael H. LeRoy, *The Mackay Radio Doctrine of Permanent Striker Replacements and the Minnesota Picket Line Peace Act: Questions of Preemption*, 77 *Minn. L. Rev.* 843, 849 & n. 43 (1993).

<sup>215</sup> The Caterpillar narrative is largely drawn from the report of the strike contained in Ray, *supra* note 208, 1:20, at 36-38; Ray 1999 *Supp.*, *supra* note 185, 1:20, at 7-8.

threatened to hire permanent replacements, and its job advertisements had generated thousands of applicants to work as permanent striker replacements. After working without a contract for two more years, a second, bitter strike lasted from June, 1994 to December, 1995. Management estimated that nearly 4,000 of the strikers crossed the picketline and returned to work before the strike was over, although such figures are sometimes inflated. In the end, the union was again forced to return to work without a contract.

The employer had discharged some 60 strikers for supposedly illegal conduct during the strike. The union had filed about 1,000 unfair labor practice (ULP) charges against Caterpillar in the course of the strike, and the NLRB General Counsel has issued a formal complaint on over 400 of these charges. Litigation of the ULP cases threatened to overwhelm the NLRB's resources, not to mention draining both the employer and the union with legal costs. In March, 1998, a strike settlement was reached. All outstanding litigation between the UAW and Caterpillar was settled, and all discharged strikers were reinstated. A collective bargaining agreement was entered into on terms that must be labeled a victory for management, although not a complete one. The Caterpillar strike demonstrated to employers and unions alike, that a determined employer can, under the right conditions, permanently replace an entire workforce on a larger scale than had been tried previously, and that when labor market conditions make the threat credible, exposure to the threat of permanent replacement can bring to its knees even a powerful union in a strongly unionized company.

Under the law, strikers retain their employee status indefinitely, hence their right to reinstatement as vacancies occur, until they obtain substantially equivalent, regular employment elsewhere.<sup>216</sup> However, after one year, strikers cease to be eligible to vote if an NLRB representation election is held.<sup>217</sup> At that point, some employers withdraw recognition and unilaterally cease bargaining with the union, or themselves petition the NLRB to conduct a representation election.<sup>218</sup>

<sup>216</sup>

Section 2(3), 29 U.S.C. 152(3).

<sup>217</sup> Section 9(c)(3), id. 159(c)(3).

<sup>218</sup> See LeRoy, *supra* note 214, at 863 & n. 133 (citing John J. Lawler, *Unionization and Deunionization: Strategies, Tactics, and Outcomes* 182 (1990), on employer utilization of strike-related tactics to "deunionize" ).

Either course of action is an unfair labor practice unless the employer harbors a good faith doubt of the union's continued majority support among the employees in the bargaining unit, including non-strikers, permanent replacements, and strikers. The good faith doubt must be based on objective considerations going beyond merely the numbers of strikers as opposed to others then employed; the evidence must be free of any taint of the employer threatening or coercing employees to abandon the union or commission of other unfair labor practices.<sup>219</sup> Employers increasingly often claim to have such evidence, however.

If a new election is held, either upon the employer's request, or upon the request of the union seeking restoration of its bargaining rights, it is not unusual for the new workforce to vote to end representation by the union. The electorate at that point is composed of non-strikers, permanent striker replacements, and "cross-overs", that is, workers who abandoned the strike before its conclusion, together with a few strikers reinstated at the end of the strike. Once the employer has waited more than a year after the strike began, those strikers still awaiting reemployment will be ineligible to vote. When proportionately few strikers have succeeded in regaining employment, the employer has a fairly good chance of becoming non-unionized.<sup>220</sup>

The strike often is thus a snare and delusion for both the union and its members. The costs of a lost strike are not merely a poor collective bargaining agreement. The strikers risk losing their jobs and their union representation, while the union risks losing its right to represent the bargaining unit. Small wonder that unions are engaging in fewer primary strikes, that is, walking off the job and picketing their own employers.<sup>221</sup>

There is very little difference to a striker between being fired outright, with no right to return to work, and being "permanently replaced", when

<sup>219</sup> See *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 361, 366 (1998). See also *NLRB v. Curtin Matheson Scientific, Inc.*, 495 U.S. 775, 787-88, 796 (1990). See generally Marley S. Weiss, *The Supreme Court 1997-1998 Labor and Employment Law Term (Part II): The NLRA, Takings Clause, and ADA Cases*, 14 *The Lab. Law.* 533, 548-68 (1999).

<sup>220</sup> Note, however, that the NLRB, in a change in its caselaw, now presumes replacements to be temporary in representation election proceedings, and places the burden of proof on the employer to show a shared understanding between the replacements and management that the replacements would have permanent status, before the NLRB will deem the replacements permanent, hence eligible to vote. See *O.E. Butterfield, Inc.*, 319 N.L.R.B. 1004 (1995).

<sup>221</sup> See *supra* notes 101-102 and accompanying text.

low attrition means few vacancies will occur and her or his entitlement to reinstatement will never be made effective.

There is an important exception to these rules if the strike begins or is prolonged because of unfair labor practices committed by management.

In such a case, the employer is forbidden to permanently replace the strikers, who are identified in legal terminology as “unfair labor practice strikers”. At any point when they make an unconditional offer to return to work, these employees are entitled to full reinstatement in their jobs, even if workers hired to replace them must lose their jobs as a consequence. Unfair labor practice strikers may only be temporarily, never permanently replaced.<sup>222</sup> Put another way, an employer adjudged to have committed unfair labor practices which caused or prolonged the strike will have to discharge “permanent” replacements if necessary to reinstate the returning strikers, even if this exposes the employer to state common law liability for breaking promises of job permanence to the replacements, or misleading them about their status.<sup>223</sup> The union’s bargaining power is therefore greatly enhanced in its efforts to negotiate a reasonable set of terms in a new collective agreement to settle the strike.

The result of these rules is that both labor and management often engage in bargaining strategies that have little to do with good faith exploration of each other’s problems in an attempt to find mutually beneficial, or at least acceptable, solutions. The union often tries to trap the employer into committing a legally provable unfair labor practice, while the employer seeks to avoid bargaining any new agreement, while giving sufficient appearance of doing so to prevent a successful unfair labor practice charge from being proven before the National Labor Relations Board.

It is easy to see at least one explanation for why the private sector unionization rate is declining and union power decreasing compared to that of employers. When a union’s main economic weapon is the primary strike, against the workers’ own employer, it is often too weak to bargain successfully under these rules.

Over the last decade, the trade union movement has mounted a major effort to enact legislation which would overturn the *Mackay Radio* rule,

<sup>222</sup> See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956). See also *Belknap, Inc. v. Hale*, 463 U.S. 491, 508 (1983).

<sup>223</sup> See *id.*; *Caterpillar, Inc.*, 322 N.L.R.B. 690 (1996).

and would, at least in part, preclude employers from permanently replacing strikers. However, prospects for passage of such an amendment to the NLRA currently appear slim.<sup>224</sup>

### 3. Pressures Based on Appeals to Third Parties for Support

Some unions are in a position to use economic weapons relying on the support of third parties, rather than merely their own economic power. In addition to striking, most American unions picket outside the facilities where the strike is taking place. Picketing here means five or ten or thirty people, walking back and forth in a line or a circle, in front of each entrance and exit. The picketers customarily carry signs announcing the existence of the labor dispute, and urging everybody, including fellow workers, striker replacements, suppliers, persons making deliveries, customers, and the general public, not to cross the picket line and enter the premises.

Sometimes, the struck operations depend upon deliveries of goods or material. Under these circumstances, the union that obtains the support of the Teamsters' Union, whose members may refuse to cross the picket line, greatly strengthens its economic leverage. Similarly, highly skilled workers who are difficult to replace may work for the same employer as the workers who are on strike, but in a different bargaining unit. If essential co-workers refuse to cross the picket line, the employer may be unable to replace these workers, hence the strike may prove successful. In addition, if the same employer company owns other factories, offices or shops, the union is entitled to picket outside those facilities asking other workers, suppliers, contractors, and customers not to cross the picket line. Depending upon the response, this tactic may provide an otherwise weak union with substantial economic leverage in collective bargaining negotiations.

All of these tactics fall within the legal definition of primary striking and picketing, hence are lawful, protected activity under the National

<sup>224</sup> See, e.g., Becker, *supra* note 100, at 371-72 (reviewing striker replacement bills and summarizing their failure to be enacted); Leonard Bierman & Rafael Gely, *Striker Replacement: A Law, Economics, and Negotiations Approach*, 68 *s. Cal. L. Rev.* 363, 363 (1995); LeRoy, *supra* note 214, at 843 & n. 2 (same); Ray, *supra* note 208, 1:07, at 8-10. A listing of some of the voluminous academic literature on the striker replacement issue may be found in Becker, *supra*, at 362 n. 49, and Bierman & Gely, *supra*, at 365-66 & nn. 13-17.

Labor Relations Act. In all of these cases, the economic pressure is directed against the employer with whom the dispute arose. There is no question that the picketers are engaging in protected, concerted activity under the Act. Employees who refuse to cross the picket line, whether they are employed by the primary employer inside the bargaining unit, in another bargaining unit, outside any bargaining unit, or by a different employer, are all usually treated as primary strikers, entitled to the rights, such as they are, of primary strikers.<sup>225</sup>

Even as amplified by these additional sources of support, however, the primary strike continues to be a weak weapon against most employers. In the 1930s and 1940s, when primary weapons failed, unions could resort to secondary weapons. They could indirectly bring pressure to bear upon the primary employer, with whom the dispute existed, by directly pressuring other businesses to disrupt business relationships with the primary employer unless the labor dispute was resolved on their terms. However, changes in the NLRA, initiated in the Taft-Hartley Act of 1947, and expanded in the Landrum-Griffin Act of 1959,<sup>226</sup> prohibit some important forms of secondary activity. The NLRA does not “contain a ‘sweeping prohibition’ of secondary activity; instead it ‘describes and condemns specific union conduct direct to specific objectives’”<sup>227</sup>. Secondary weapons spread the picketing, boycotts and work stoppages to other company’s premises, seeking to pressure the other, or “secondary” employer to stop doing business with the employer who is in-

<sup>225</sup> “The protected primary strike ‘is aimed at applying economic pressure by halting the day-to-day operations of the struck employer ... and protected primary picketing has characteristically been aimed at all those approaching the site whose mission is selling, delivering, or otherwise contributing to the operations which the strike is endeavoring to halt’, including other employers and their employees”. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 388 (1969) (quoting *United Steelworkers v. NLRB*, 376 U.S. 492, 499 (1964)). See also, e.g., *Business Servs. by Manpower, Inc. v. NLRB*, 784 F.2d 442, 446-53 (2d Cir. 1986) (reviewing caselaw regarding “stranger picketlines”). A few cases, however, have held the employer entitled to fire an employee who refuses to cross a picket line at another company if the employer can demonstrate “business justification”. Caselaw on the status of these workers is complicated by the possibility that their own workplace is covered by a collective bargaining agreement containing a no-strike clause, which, depending on its wording, may encompass refusals to cross pickets lines of other unions.

<sup>226</sup> Sections 8(b)(4) and 8(e) of the National Labor Relations Act, 29 U.S.C. 158(b)(4), 158(e).

<sup>227</sup> *Burlington N.R.Co. v. Brotherhood of Maintenance Way Employees*, 481 U.S. 429, 448 (1987) (quoting *International B’hd of Carpenters v. NLRB*, 357 U.S. 93, 98 (1958)). Only a sketchy outline of the interpretations stemming from this prohibition can be presented here.

volved in the labor disputes, the “primary” employer. “The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give into his employees”<sup>228</sup> Picketing to induce the secondary employer’s workers or contractors to stop work is generally illegal.<sup>229</sup> The intent of this portion of the NLRA is to prevent the spreading of labor disputes, economic disruption, and work stoppages beyond the immediate parties to the underlying dispute. It is legal for the union to ask a supplier or contractor not to patronize the struck employer for the duration of the dispute, but without use of the prohibited pressures,<sup>230</sup> few businesses do so voluntarily.

Consumer appeals, however, are treated much more permissively, both under the terms of the Act and because the First Amendment to the Constitution is considered to be implicated. When the employer is itself a retailer, consumer appeals may take place as part of primary pressures.

When the primary employer sells goods or services to a retail outlet, appeals to consumers are secondary appeals, but many types of consumer appeals are nevertheless allowed. Picketing by the union, requesting consumers to boycott the products of the manufacturer directly involved in the dispute, for example, may take place at the premises of a second employer, the retailer, so long as neither the retailer’s employees nor employees of the firms making deliveries are requested to refuse to work.<sup>231</sup> Leafleting, but not picketing, is permitted requesting consumers

<sup>228</sup> *International B’hd of Elec. Workers, Local 501 v. NLRB*, 181 F.2d 34, 37 (2d Cir. 1950), *aff’d*, 341 U.S. 694 (1951), quoted in *Jacksonville Terminal*, 394 U.S. at 388.

<sup>229</sup> Section 8(b)(4)(i)(B), 29 U.S.C. 158(b)(4)(i)(B). See, e.g., *International B’hd of Elec. Workers v. NLRB*, 341 U.S. 694 (1951). There are important exceptions if the secondary employer is an “ally”, performing the struck work of the primary, or if the secondary employer is so closely tied by corporate affiliation to the primary as to be treated as if they were one entity. See, e.g., *Douds v. Metropolitan Fed’n of Architects (Ebasco)*, 75 F.Supp. 672 (S.D.N.Y. 1948); *NLRB v. Business Machine & Office Appliance Mechanics Conf. Bd. (Royal Typewriter)*, 228 F.2d 553, 557-59 (2d Cir. 1955), *cert. denied*, 351 U.S. 962 (1956).

<sup>230</sup> Under Section 8(b)(4)(ii)(B), 29 U.S.C. 158(b)(4)(ii)(B), an appeal directed to the secondary employer, rather than its employees, is only unlawful if it involves tactics that “threaten, coerce, or restrain” the neutral firm.

<sup>231</sup> *NLRB v. Fruit & Vegetable Packers, Local 760 (Tree Fruits)*, 377 U.S. 58, 63-64, 71-72 (1964). In *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 447 U.S. 607, 614 (1980), however, the Supreme Court excluded from the *Tree Fruits* “struck product” doctrine, those cases

to boycott the retailer entirely, until it ceases to carry the products of the struck primary employer.<sup>232</sup> An important, 1988 Supreme Court decision held lawful a union's handbilling of a shopping mall asking consumers not to patronize any of the stores in the mall. One tenant, a department store, had been using a non-union contractor paying substandard wages, to construct its new building in the mall. There were no business relationships whatsoever between the tenants and the department store, so the pressures aimed at the department store and the mall owner, as well as the non-union contractor, were quite indirect. Nevertheless, to avoid potential conflict with First Amendment free speech protection, the Supreme Court interpreted the NLRA statutory language, which prohibits acts that "threaten, coerce or restrain" one company with an object to "force or require" it to cease doing business with someone else, as not applying to purely verbal appeals. As long as the union confines itself to leafleting rather than picketing, consumer appeals are now generally treated as protected, concerted activity under the NLRA.

These are protected forms of pressures under the NLRA, but they can only be brought to bear effectively in certain situations. Nonunion suppliers, contractors and customers may ignore picketers or leafleters. If the primary employer sells only to wholesalers or businesses, consumer pressures are usually impossible to bring to bear. If the primary employer's retail outlets sell via catalogues and the internet, consumers cannot be reached by picketing or leafleting a physical site of the secondary.

Note that the entire primary/secondary distinction is a function of the level at which collective bargaining is conducted. Because the bargaining units are mainly designed to operate at plant or company level, restrictions on secondary pressures have a great deal of force. In the handful of industries in which bargaining is conducted on a multi-employer basis

in which the secondary firm carries mostly products or services provided by the primary employer.

At that point, there is little difference between picketing which requests consumers to boycott the struck product and picketing which requests consumers to cease patronizing the secondary employer. Section 8(b)(4)(ii)(B) plainly prohibits picketing asking consumers to totally boycott the secondary until it stops carrying the primary's goods and services. The Supreme Court, in *Safeco*, regarded the case of a retailer the majority of whose sales came from the struck product to be closer to the total boycott case than the product boycott case. *Id.* at 613-14.

<sup>232</sup> *NLRB v. Servette*, 377 U.S. 46 (1964). *Servette* construes the consumer publicity proviso to Section 8(b)(4), 29 U.S.C. 158(b)(4), as allowing such leafleting, 377 U.S. at 55. As to picketing, see *supra* note 229 and accompanying text.

in the local area, the exclusion of secondary strikes is less important. If most of the employers in the industry locally are bargaining in one unit, pressures directed throughout the industry are primary, not secondary.

It is mainly unions representing workers in retail businesses, or workers whose employers sell or deliver products or services directly to retailers, who are in a position to effectively use consumer appeals. Hospitals and universities, to some extent, fall into this category, as do passenger transportation workers, but only some cargo transport workers.

Moreover, the effectiveness of these strategies depends on the degree of public support in the locality for the labor movement in general as well as their sympathies toward the particular labor dispute. If workers are truly “essential”, substitution for the goods or services they produce is difficult, making it difficult to mobilize consumer support for a boycott request.

Remedies for exertion of unlawful secondary pressures are much more stringent than for other NLRA violations. Once it is determined that there is sufficient merit in a Section 8(b)(4) charge for a formal complaint to be issued, the NLRB General Counsel must seek preliminary injunctive relief under Section 10(l), asking a federal court to enjoin the secondary picketing or strikes, pending the outcome of the litigation on the merits before the NLRB. If a violation is found on the merits, the NLRB, and a federal appellate court on petition for enforcement, will enter an order permanently prohibiting the unlawful secondary activity. The employer cannot itself obtain an injunction, and the NLRB will not award it compensation for its losses. However, the employer, as well as third party businesses, may sue the union in federal district under Section 303 of the LMRA and recover compensatory damages for injuries caused by the union’s violations.<sup>233</sup>

#### 4. Alternatives to the Strike

Most U.S. unions must live by their wits, not their muscles. The declining ability of unions to mount successful strikes has encouraged them to search for alternative strategies, entailing little or no risk of permanent replacement, to pressure employers to meet unions’ bargaining demands. Unions who can neither mount successful strikes against their own em-

<sup>233</sup> 29 U.S.C. 160(l), 187.

ployer, nor useful pressure through lawful secondary activities are in a position similar to that of those public sector union members who are prohibited entirely from striking and provided with no binding alternative form of dispute resolution. Unions are increasingly resorting to a range of concerted activities that are of questionable legal status, but difficult for employers to prove or, as a practical matter, to defend against.<sup>234</sup> These tactics are sometimes lumped together under the label “partial strikes”.<sup>235</sup> Besides decreasing the risk of replacement and job loss, another advantage of these strategies to the union is that they minimize union members’ time off the job, so members suffer less income loss than they would in a traditional strike. In general, these actions are not prohibited, but whether they are protected or unprotected is an open question.<sup>236</sup>

Work slowdowns, particularly the popular “work-to-rule” is the most common tactic. The workers announce that so long as negotiations fail to reach a successful conclusion, they will follow fully, exactly, and precisely, every single rule, instruction or command laid down and not formally rescinded by management. In big businesses and government operations, work is greatly decreased by such a strategy. Similarly, the use of quickie strikes of a few hours or days duration, too short to permit the employer as a practical matter to hire permanent replacements, is a strategy of uncertain legal status and increasingly frequent use. Intermittent strikes and conduct of a series of short strikes over separate, individual grievances, are related strategies. Concerted refusals to work overtime, and strikes by part, but not all of a bargaining unit, may also fall into this category.

Under both the NLRA and the RLA, these forms of behavior are not prohibited, but it is unclear whether they are protected, and whether the employer may lawfully permanently replace or fire the employees.<sup>237</sup> The

<sup>234</sup> See, e.g., Becker, *supra* note 100, at 355 n. 23.

<sup>235</sup> See, e.g., *id.*, at 356 & n. 24, 369-70.

<sup>236</sup> See *id.*, at 382 (acknowledging that the Supreme Court has “never held that intermittent or partial strikes are unprotected”).

<sup>237</sup> See, e.g., *Lodge 76, Machinists v. Wisconsin Emp. Rel. Comm’n*, 427 U.S. 132, 150 n. 12, 152-53, 153 n. 14 (1976) (reversing preemption holding of *Briggs-Stratton*, and pointing out that it was unsettled whether on the job slowdown was unprotected or whether it was protected, concerted activity, leaving to NLRB to reconsider the question). See also *NLRB v. Insurance Agents’ Int’l Union*, 361 U.S. 477 (1960) (holding NLRB precluded from finding union’s concerted refusal to work overtime and other partial strike tactics prohibited under NLRA); *United Auto Workers, AFL*

employer may in any case have a hard time exercising whatever rights it has to replace to replace partial strikers, and if it chooses instead to lock them out, it may not permanently replace them if their activities in the end turn out to be protected.<sup>238</sup>

Last spring's threatened strike at US Airways included a plan for the flight crews to refuse to fly only on selected flights or selected routes, a good example.<sup>239</sup> The union called the planned action "CHAOS", for "Creating Havoc Around Our System". The employer, in return, threatened to shut down,<sup>240</sup> engaging in a lockout, which under such defensive circumstances is lawful under both the NLRA and the RLA.<sup>241</sup> Fortunately, the parties reached a new agreement a few hours after the midnight deadline, and the union called off its work stoppages.<sup>242</sup>

The trade unions have also devised a wide range of strategies, sometimes lumped under the general label "corporate campaign", aimed at using corporate law and other aspects of corporate structure and operations to provide leverage lacking in the traditional labor arsenal of weapons.<sup>243</sup> Unions have attempted to place labor dispute issues on proxy

v. Wisconsin Emp. Rel. Bd. (Briggs-Stratton), 336 U.S. 245, 265 (1949) (intermittent strike tactics "neither forbidden by federal statute nor was it legalized and approved thereby"). In light of the Supreme Court's 1939 decision in *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 280 (1939), holding a sit-down strike to be unprotected by the right to strike, along with the holdings in *Briggs-Stratton* that intermittent work stoppages were unprotected, and *Insurance Agents*, which in dicta characterizes the partial strike as unprotected, Craig Becker regards the prevailing view among both NLRB and the courts as being that all forms of labor withdrawal short of a total and continuous work stoppage are unprotected. See Becker, *supra* note 100, at 365-71, 376-93. I read *Machinists* more strongly than he does, however, as an invitation to the NLRB to reconsider this body of caselaw. Becker argues that a series of strikes over employee grievances should be deemed protected, even if other forms of partial strikes are held to be unprotected. *Id.* at 399-420, a position which seems unexceptionable. See also Ray 1999 Supp., *supra* note 185, 7:17, at 52-53, collecting recent cases.

<sup>238</sup> See Becker, *supra* note 100, at 389-90.

<sup>239</sup> The airline is, of course, covered by the RLA rather than the NLRB, but the issue is the same. <sup>240</sup> Pam Ginsbach, NMB: Chairman Hopeful on US Airways Dispute; Agency Sees Expansion in ADR Requests, 54 Daily Lab. Rep. (BNA) B-1 (Mar. 20, 2000).

<sup>241</sup> See, e.g., *NLRB v. Truck Drivers, Local Union No. 449*, 353 U.S. 87 (1957) (lockout in response to union strike against one employer in attempt to fragment multi-employer bargaining unit); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965) (lockout intended to control timing of shutdown).

<sup>242</sup> Michelle Amber, Airlines: Flight Attendants Would Receive Pay Hikes of 11 Percent in Five Year US Airways Pact, 60 Daily Lab. Rep. (BNA) at AA-1 (Mar. 28, 2000).

<sup>243</sup> Becker, *supra* note 100, at 372-75 contains a good summary of these strategies, their strengths and weaknesses.

ballots sent to shareholders in conjunction with the annual election of the corporate board of directors, they have sought to persuade shareholders to replace present management with new management less hostile to collective bargaining, and they have pressured members of corporate boards to step down in protest over the management's handling of the labor dispute, particularly when the Board member is an officer of a second company with whom the trade union movement does considerable business. Such strategies are occasionally successful, but depend on the existence of very particular, favorable pressure points, that seldom can be found by union representatives. In addition, campaigns directed to shareholders in a broadly held, publicly traded company can be very expensive.

In summary, when the primary strike weapon is inadequate, U.S. unions systematically consider a range of alternative options to exert pressures on the employer. The net effect of rules weakening the primary strike has been to increase resort to all sorts of third party appeals. This compels union dependence upon third party support, and reduces trade unionists' ability independently, on the basis of their own solidarity, to win labor disputes.<sup>244</sup> The very nature of what a labor union is, and its members' participatory role, is undermined. Ironically, this result also undercuts accomplishment of the purpose of the Section 8(b)(4) restrictions on secondary strikes and boycotts, by greatly multiplying union efforts to enmesh neutral businesses in their labor disputes. Finally, the economic results are also perverse: these policies encourage partial strikes and other job actions likely to more greatly interfere with productivity than would a single, outright economic strike without permanent replacement.

#### D. The Right to Strike Under The Railway Labor Act

The Railway Labor Act exclusively regulates the labor relations of common carriers in the rail and air transportation industries, which in

<sup>244</sup> Becker makes this latter point, highlighting three drawbacks, first, the risk the third parties will be insufficiently supportive or responsive, second, dependence on third party actors means the union loses control over the weaponry, and sometimes cannot terminate aspects of a campaign, even when it would facilitate a settlement, and third, some types of campaigns play on weaknesses of the employer at most indirectly related to the employee grievances underlying the labor dispute. See *id.* at 354, 373-75.

many countries would be labeled “essential public services”. The statute was “designed to maximize settlements and minimize strikes”.<sup>245</sup> The RLA has been quite successful in this goal: the NMB estimates that in the course of over 70 years, about 97% of labor disputes in the two industries have been resolved without disruption to operations.<sup>246</sup> Neither outright prohibitions against strikes nor a requirement of binding arbitration were used for this purpose, however, nor were the terms of employment subject to judicial intervention or regulatory establishment.<sup>247</sup> Instead, the dispute resolution procedures resolve collective bargaining disputes primarily by freezing the bargaining parties into their positions for extended periods of negotiation, mediation, and conciliation, as a prerequisite to any strike or unilateral change in conditions of employment.<sup>248</sup> In the end, however, unless both parties agree to interest arbitration, which they are free to reject, each has the right to exercise self-help.<sup>249</sup>

The RLA rules regarding bargaining and economic weaponry are more straightforward than those of the NLRA.<sup>250</sup> Normally, collective bargaining agreements under the RLA do not have a fixed duration, but only a date upon which they become amendable.<sup>251</sup> A major dispute commences when a party serves upon the other a Section 6 notice of its intent to change specified provisions of the agreement pertaining to rates of pay, rules, and working conditions.<sup>252</sup> Absent a Section 6 notice and for at least 30 days after one has been issued, existing practices must

<sup>245</sup> *Brotherhood of Railway Clerks v. Florida East Coast Ry. Co.*, 384 U.S. 238, 250 (1966) (White, J., dissenting). See also, e.g., *Detroit & T.S.L. R. Co. v. United Transp. Union (Shore Line)*, 396 U.S. 142, 148 (1969) (“to encourage collective bargaining by railroads and their employees in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce”).

<sup>246</sup> Pamela M. Prah, NMB: DuBester Says Focus on Preventative Mediation Is Showing Results in Rail, Airline Bargaining, 1998 Daily Lab. Rep. (BNA) No. 86, at D25.

<sup>247</sup> See, e.g., *General Comm. of Adjustment v. Missouri-Kansas-Texas R. Co.*, 320 U.S. 323, 337 (1943).

<sup>248</sup> See, e.g., *id.*; *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969); *Elgin J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 725 (1945).

<sup>249</sup> See, e.g., *Brotherhood of Locomotive Engineers v. Baltimore & O.R. Co.*, 372 U.S. 284, 290-91 (1963); *Jacksonville Terminal Co.*, 394 U.S. at 378-79; *Burlington N.R.Co. v. Brotherhood of Maintenance Way Employees*, 481 U.S. 429, 445 (1987).

<sup>250</sup> The standard Supreme Court summary of the processes may be found in *Jacksonville Terminal*, 394 U.S. at 377-78.

<sup>251</sup> See Prah, *supra* note 246.

<sup>252</sup> 45 U.S.C. 156.

be maintained in effect unchanged.<sup>253</sup> Both the employer and the union must confer and “ exert every reasonable effort to make and maintain agreements” ,<sup>254</sup> a duty analogous, but not identical to the NLRA duty to bargain in good faith,<sup>255</sup> until the NMB declares prospects for successful mediation to have been exhausted, offers the parties binding interest arbitration, at least one party has refused the offer, and a thirty day cooling off period has elapsed.<sup>256</sup> Throughout this period, neither party may strike, lock out, otherwise deploy economic weapons, or change rates of pay, rules, or “actual objective working conditions and practices”.<sup>257</sup>

This is said to be the “freeze” or “status quo” period, because the requirement of preservation of the status quo freezes the parties in place until its conclusion.<sup>258</sup> If the Section 9A or 10 emergency board procedures, described in Part V, are invoked, they simply extend the status quo period through factfinding and an additional cooling-off period.<sup>259</sup>

Under an implied exception to the Norris-LaGuardia Act, the federal courts will enjoin violations of the freeze period. A union attempting to strike will be enjoined at the employer’s request, and an employer unilaterally changing existing rates or pay or other terms of employment will also be enjoined.<sup>260</sup> In addition, a party’s violation of the requirement

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Section 2, Seventh, *id.* 152, Seventh.<sup>254</sup> Sections 2, First; 2, Second of the RLA, *id.* 152, First; 152, Second.<sup>255</sup> See *Chicago & N. W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 579 n. 11 (1971).<sup>256</sup> Section 5, First, 45 U.S.C. 155, First. Both parties have the right to request NMB mediation. *Id.* If neither party requests mediation of the NMB, the NMB may unilaterally initiate its involvement in the dispute in any case when “ a labor emergency is found by it to exist” . *Id.* In those cases in which the NMB is uninvolved, parties must wait at least the 30 days from issuance of the Section 6 notice, as well as at least 10 days after bargaining sessions have ceased, before striking or otherwise engaging in self-help. Section 6, *id.* 156. It is very rare, however, for neither party to request NMB mediation and for the Board to fail on its own to intervene.<sup>257</sup> *Shore Line*, 396 U.S. at 152. See Section 2, Seventh, 45 U.S.C. 152, Seventh; Section 6, *id.* 156. The obligation to preserve existing practices about which the labor agreement is silent, however, assumes the employer cannot reasonably argue that the existing collective bargaining agreement gives it the discretion to make such a change. The Supreme Court has held that a minor dispute exists whenever the employer has claimed “ that the terms of an existing agreement either establish or refute the presence of a right to take the disputed action. The distinguishing feature of such a case is that the dispute may be conclusively resolved by interpreting the existing agreement” . *Consolidated Rail Corp. v. Railway Lab. Execs. Ass’n*, 491 U.S. 299, 305, 306 (1989).<sup>258</sup> See, e.g., *Shore Line*, 396 U.S. at 150; *National Airlines, Inc. v. International Ass’n of Machinists*, 416 F.2d 998, 1001 (5th Cir. 1969).<sup>259</sup> 45 U.S.C. 159a, 160.<sup>260</sup> See, e.g., *Shore Line*, 396 U.S. at 153 (enjoining employer from unilaterally changing work rules).

contained in RLA Section 2, First that both sides “ exert every reasonable effort to make ... [an] agreement concerning rates of pay, rules, and working conditions” ,<sup>261</sup> will be grounds for a federal court to enjoin their exercise of self-help.<sup>262</sup> If the employer first violates the *status quo* requirement by unilaterally changing a term or condition of employment, however, the union is free to strike until the *status quo ante* has been restored.<sup>263</sup>

The Supreme Court has more than once labeled the collective bargaining process under the RLA as “ almost interminable” ,<sup>264</sup> and “ purposely long and drawn out” .<sup>265</sup> The rationale for this process is simple:

[The immediate] effect [of the freezing of the *status quo*] is to prevent the union from striking and management from doing anything that would justify a strike. In the long run, delaying the time when the parties can resort to self-help provides time for tempers to cool, helps create an atmosphere in which rational bargaining can occur, and permits the forces of public opinion to be mobilized in favor of a settlement without a strike or lockout. Moreover, since disputes usually arise when one party wants to change the *status quo* without undue delay, the power which the Act gives the other party to preserve the *status quo* for a prolonged period will frequently make it worthwhile for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce.<sup>266</sup>

The RLA subjects major “ disputes to virtually endless ’negotiation, mediation, voluntary arbitration and conciliation” .<sup>267</sup> A bargaining party may properly notify the other side of its desire to modify specified terms of the collective bargaining agreement, bargaining may ensue, and the NMB may preclude a strike and require the parties to maintain in place all terms and conditions of employment for one or two years, or more, while negotiations drag onward, so long as the NMB sees realistic hope

<sup>261</sup> See *Pittsburgh & L.E. R.R. v. Railway Lab. Exec. Ass’n*, 491 U.S. 490, 503-04 (1989).

<sup>262</sup> See *Chicago & N. W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 578-80 (1971).

<sup>263</sup> *Shore Line*, 396 U.S. at 154; *Atlanta & W.P.R.Co. v. United Transp. Union*, 439 F. 2d 73, 80 (5th Cir.), cert. denied, 404 U.S. 825 (1971).

<sup>264</sup> See, e.g., *Shore Line*, 396 U.S. at 149.

<sup>265</sup> *Brotherhood of Railway Clerks v. Florida E.C.R.Co.*, 384 U.S. 238, 246 (1966); *Shore Line*, 396 U.S. at 143, 149.

<sup>266</sup> *Shore Line*, 396 U.S. at 150.

<sup>267</sup> *Burlington N. R. Co. v. Brotherhood of Maintenance Way Employees*, 481 U.S. 429, 444 (1987) (quoting *Shore Line*, 396 U.S. at 148-49).

that they may reconcile their differences. The NMB's discretion in this matter is almost unreviewable.<sup>268</sup> Courts may intervene only after a showing of "patent official bad faith" on the part of the NMB, or that the agency has continued mediation and withheld release for self-help "on a basis that is completely and patently arbitrary ... for a period that is completely and patently unreasonable".<sup>269</sup> Courts have in several cases refused to order the NMB to terminate mediation and proffer arbitration, none appear to have granted such an order.<sup>270</sup>

NMB data presented in one court case indicated that in 1988, 155 cases out of the NMB's active mediation docket of 359 cases, or 43%, had been in the mediation process for over twenty-four months.<sup>271</sup> This period did not include whatever time the parties spent negotiating before one of the them invited the NMB to intervene, or the agency unilaterally did so after finding "a labor emergency to exist".<sup>272</sup>

Sooner or later, however, the parties either settle their dispute by agreeing on terms of a new agreement, or the NMB acknowledges the failure of mediation, and upon rejection of arbitration, frees the parties thirty days later to take action. If the Section 9A or Section 10 Presidential Emergency Board procedures have been invoked, then at their conclusion, after the cooling off period, the parties may commence self-help actions. The union is free to strike. For so long as employees remain on the job, the employer is free to unilaterally change those aspects of pay, work rules and conditions of employment that were specified in the original contract modification notices of either party, but unless the entire contract was reopened, it must maintain all other terms of employment.<sup>273</sup>

If the union strikes, the employer has the right, and perhaps even the duty as a common carrier under the Interstate Commerce Act, to attempt

<sup>268</sup> See *Local 808, Bldg. Maintenance Workers v. NMB (Metro-North)*, 888 F.2d 1428, 1429 (D.C. Cir. 1989); *International Ass'n of Machinists v. NMB*, 425 F.2d 527, 535-37, 540 (D.C. Cir. 1970); *Delaware & H. Ry. v. United Transp. Union*, 450 F.2d 603, 608 & n. 11 (D.C. Cir.), cert. denied, 403 U.S. 911 (1971).

<sup>269</sup> *Metro-North*, 888 F.2d at 1434 (quoting *Machinists*, 425 F.2d at 537, 543).

<sup>270</sup> See *id.* at 1433.

<sup>271</sup> *Id.* at 1440.

<sup>272</sup> The NMB may enter a case only under upon invitation by at least one party, or after it has made such a finding. Section 5, First of the RLA, 45 U.S.C. 155, First.

<sup>273</sup> RLA Section 2, Seventh, 45 U.S.C. 152, Seventh; RLA Section 6, *id.* 156. See, e.g., *Brotherhood of Locomotive Engineers v. Baltimore & O.R. Co.*, 372 U.S. 284, 290-91 (1963).

to operate, if possible.<sup>274</sup> It may do so using supervisory staff, and it may hire striker replacements, either temporary or permanent.<sup>275</sup> Unopened provisions of the collective bargaining agreement remain in effect throughout, so in theory, the replacements, too, must be paid and employed under the pre-existing work rules and terms and conditions of employment, except to the extent that they were re-opened by the original notices of intent to modify the agreement, under most circumstances.<sup>276</sup>

In some cases, however, this would make it impossible for the railroad to operate during a strike. In such instances, the employer is permitted to seek an order of the federal district court granting it relief from the RLA requirement that it abide by the non-opened provisions of the existing agreement. The district court is to strictly limit and supervise such deviations.<sup>277</sup> The federal court is authorized to allow the carrier to “make only such changes as are truly necessary in light of the inexperience and lack of training, of the new labor force” or the fact that it is operating with a smaller employee complement, and the employer bears the burden of proof to demonstrate that its requested changes meet this standard.<sup>278</sup> The Supreme Court’s attitude toward the use of replacements and toward the employer’s efforts to unilaterally dictate their terms of employment is in striking contrast to its approach to the use of striker replacements under the NLRA. Under the RLA,

collective bargaining agreements are the product of years of struggle and negotiation; they represent the rules governing the community of striking employees and the carrier. That community is not destroyed by the strike, as the strike represents only an interruption in the continuity of the relation.

Were the strike to be the occasion for a carrier to tear up and annul, so to speak, the entire collective bargaining agreement, labor-management relations would revert to the jungle. \* \* \* [A] carrier might indeed have a strong reason

<sup>274</sup> See *Brotherhood of Ry. Clerks v. Florida East Coast Ry. Co.*, 384 U.S. 238, 244-45 (1966) (citing Interstate Commerce Act, 49 U.S.C. 1(4), 1(11)). The Supreme Court carefully did not “say that the carrier’s duty to operate is absolute, but only to emphasize that it owes the public reasonable efforts to maintain the public service at all times, even when beset by labor-management controversies and that this duty continues even when all the mediation provisions of the Act have been exhausted and self-help becomes available to both sides...” *Id.* at 245.

<sup>275</sup> See *id.* at 238.

<sup>276</sup> RLA Section 2, Seventh, 45 U.S.C. 152, Seventh; RLA Section 6, *id.* 156.

<sup>277</sup> *Brotherhood of Ry. Clerks v. Florida East Coast Ry. Co.*, 384 U.S. at 246.

<sup>278</sup> *Id.* at 248.

to prolong the strike and even break the union. The temptation might be strong to precipitate a strike in order to permit the carrier to abrogate the entire collective bargaining agreement on terms most favorable to it. The processes of bargaining and mediation... would indeed become a sham if a carrier could unilaterally achieve what the Act requires be done by the other orderly procedures.<sup>279</sup>

The interest arbitration provisions of the RLA are wholly optional with the parties; both must agree to arbitrate before either is bound.<sup>280</sup> Sometimes, however, one party can derive a tactical advantage from accepting the NMB's offer of arbitration when the party has reason to believe the other side will reject the offer. Section 8 of the Norris-LaGuardia Act<sup>281</sup> contains a clean hands requirement precluding issuance of an otherwise proper injunction in a labor dispute to a party "who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration". This provision has been applied in RLA cases to prevent issuance of an injunction, despite allegations of picketline violence directed against those attempting to continue operations, when the union had offered to arbitrate but the employer had declined.<sup>282</sup> Thus, while there is no enforceable legal duty to arbitrate,<sup>283</sup> one party's expression of willingness to do so may change the rules of economic warfare as to the other, placing pressure upon the other to accede to arbitration to resolve the dispute.<sup>284</sup>

It should be noted that the Railway Labor Act never underwent an amendment similar to Section 8(b)(4) of the NLRA; consequently, secondary strikes, boycotts and picketing are theoretically just as legal as primary economic pressures during railway and airline labor disputes.<sup>285</sup>

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Id. at 246-47.

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See, e.g., *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 722-28 (1945).

281 29 U.S.C. 108.

282 See *Brotherhood of Railroad Trainmen v. Toledo, P & W R.R.*, 321 U.S. 50, 56, 65 (1944).

283 Section 7, First of the RLA, 45 U.S.C. 157, First.

284 See *Toledo, P & W R.R.*, 321 U.S. at 63 ("This is not compulsory arbitration. It is compulsory choice between the right to decline arbitration and the right to have the aid of equity in a federal court").285 See *Burlington N. R. Co. v. Brotherhood of Maintenance Way Employees*, 481 U.S. 429 (1987). See also *Delaware & H. Ry. Co. v. United Transp. Union*, 450 F.2d 603, 610-11 (D.C. Cir.), cert. denied, 403 U.S. 911 (1971) (holding protected a selective strike against one employer of a multi-employer bargaining unit, where the goal was not to fragment the employer association, but to achieve a better collective bargaining agreement with the association).

Neither state nor federal courts are permitted to enjoin such picketing.<sup>286</sup> The fact that most bargaining occurs on a multi-employer basis or with a single employer system-wide, that is, on a national scale, also makes it difficult for employers to operate during a strike. The rail and airline industries have remained highly unionized, further discouraging efforts to permanently replace strikers and eventually eliminate the union. 1998 NMB data indicate that over 70% of the one million employees in the two RLA industries are unionized,<sup>287</sup> compared to the 10% figure for the private sector workforce as a whole. The right to utilize secondary pressures, moreover, permits even a union in a dispute with a small railroad to shut down large portions of the national transportation system to pressure the employer.<sup>288</sup> Unlike the situation under the NLRA, therefore, the strike has remained an effective weapon for unions under the RLA, although more so in rail than air transportation.<sup>289</sup>

<sup>286</sup> *Burlington Northern*, 481 U.S. at 453 (federal court injunctions); *Jacksonville Terminal*, 394 U.S. at 392-93 (state injunctions).

<sup>287</sup> Prah, *supra* note 246.

<sup>288</sup> See, e.g., *Jacksonville Terminal*, 394 U.S. at 381 (“railroad [and airline labor] disputes typically present problems of national magnitude. A strike in one State often paralyzes transportation in an entire section of the United States and transportation labor disputes frequently result in simultaneous work stoppages in many states”). The *Burlington Northern* strike represents a good example. In a dispute triggered by a local railroad’s plan to eliminate the jobs of 300 out of its 400 employees represented by the union, after four or five years of negotiation, the parties exhausted the mediation requirement and were free to engage in self-help. The union first struck its own employer, and two days later extended the strike to the employer’s two other railroad subsidiaries. When the employer’s use of supervisory personnel threatened to undermine the effectiveness of the strike, the union commenced picketing other railroad lines along the East Coast with whom its employer interchanged a significant volume of traffic, and notified the American Association of Railroads of its intent to picket other carriers and request their employees to strike in sympathy. Several injunction proceedings ensued in which various railroads sought to preclude the union from picketing their installations, culminating in the eventual Supreme Court decision holding the secondary activities to be legal under the RLA and not enjoined under Norris-LaGuardia. In the interim, a Presidential Emergency Board was convened, which automatically reinstated the freeze of the status quo under the RLA. After its report and the expiration of the attendant 30 day cooling off period, the parties were again free to strike, but Congress again intervened, setting up another advisory board to report, and this time recommend a settlement, with a further freeze of the status quo. On the basis of this report, Congress expeditiously enacted a legislated settlement, ensuring that the parties could not resume their economic warfare. See *Burlington Northern*, 481 U.S. at 432-36.

<sup>289</sup> One prominent example of a union loss in the airline industry is the successful manipulation of bankruptcy proceedings by Continental Airlines to repudiate its collective bargaining agreement. The airline provoked a pilots strike, in which many strikers were permanently replaced, culminating in a strike settlement which provoked a group of disgruntled strikers to sue the union unsuccessfully for breaching its duty of fair representation, in a case which went to the Supreme Court. See *Air*

Because the strike continues to be a viable form of economic pressure in this critical industry, the Presidential Emergency Board procedures under the RLA continue to be invoked on occasion. When key transportation hubs nevertheless have been disrupted by such strikes, Congress has sometimes intervened with special legislation halting the strike.<sup>290</sup>

#### E. The Right To Strike Under Public Sector Labor Law

“ The only illegal strike is an unsuccessful one” , Robert Polli is quote as saying.<sup>291</sup> Ironically, he was the leader of PATCO, and he made this statement just before President Reagan broke the strike he led and crushed his union. Nevertheless, the point is an essential one; in the United States, there are many extremely successful strikes in the public sector, despite their illegality under the prevailing labor law. In fact, it may be easier for a union to win a strike in some jurisdictions where strikes are nominally prohibited than it is in some states where strikes are legally, but so highly regulated that it is difficult for workers to

Line Pilots Ass’n v. O’Neill, 499 U.S. 65, 68-71 (1991). The opinion of the federal appeals court in the case characterized the strike settlement as “ worse than the result the union would have obtained by unilateral termination of the strike” . Id. at 78-79 (citing 886 F.2d 1445-46). Another example might be the Trans World Airlines v. Independent Fed’n of Flight Attendants, 489 U.S. 426 (1989), previously discussed in connection with the Supreme Court’s treatment of strikers who cross over the picket line and return to work. The employer’s policy of giving cross-overs priority along with permanent replacements to retain the domicile assignments they had obtained during the strike, resulted in displacement from their previous home bases of those strikers who finally obtained reinstatement, and no doubt led some to decline reinstatement when it was conditioned on their acceptance of assignment to a new home base.

<sup>290</sup> In several instances, Congress adopted legislation as an interim solution, imposing certain terms on an interim basis or simply extending the *status quo* freeze period and requiring the parties to resume bargaining. See, for example, Brotherhood of Railroad Trainmen v. Akron & B.B.R. Co., 385 F.2d 581 (D.C. Cir. 1967), cert. denied, 390 U.S. 923 (1968); Delaware & H. Ry. Co., 450 F.2d at 606. In other cases, Congress enacted legislation fully resolving a strike or lockout by imposing a solution intended to operate in lieu of a collective bargaining agreement. See, for example, Burlington Northern, 481 U.S. at 436 (enactment of legislatively imposed settlement to the Burlington Northern strike after PEB failed to produce settlement); Akron & B.B. R. Co., 385 F.2d at 596 (upon failure to interim legislation to produce agreement, legislation imposed compulsory arbitration with the award equivalent to a two year labor contract); Brotherhood of Locomotive Engineers v. Kansas City S. Ry. Co., 26 F.3d 787 (8th Cir. 1994) (permanent legislative settlement), cert. denied, 513 U.S. 930 (1994); International B’hd of Elec. Workers v. Washington Terminal Co., 473 F.2d 1156 (D.C. Cir. 1972) (same), cert. denied, 411 U.S. 906 (1973).

<sup>291</sup> Meltzer & Sunstein, *supra* note 24, at 754 n. 110 (quoting Aviation Daily, Feb. 5, 1981, at 177).

exercise their right to strike, and the penalties for improper strikes are more effective.

The state laws, to varying degrees, follow the National Labor Relations Act collective bargaining model, but there are major differences in the area of the right to strike and interest dispute resolution.<sup>292</sup> In all but about ten states, as well as in the federal sector under the FLRA, public employees are entirely prohibited from striking. A variety of alternative approaches are substituted as a means of inducing the parties to take collective bargaining seriously in the absence of the threat of a strike. One common solution is binding interest arbitration, so that if the parties do not reach their own agreement, an arbitrator will impose one upon them. Another alternative is non-binding factfinding.

Public sector bargaining laws often cover civil servants, police, firefighters, public elementary and secondary school teachers, and other staff, and less frequently, public universities and hospitals. Even in those states, police and firefighters are exempted, are prohibited from striking, and usually bargain collectively subject to binding interest arbitration.

More interesting for our purposes, a few of those states recognize an exception not present under the NLRA or RLA, in which the need to maintain essential services justifies the government in requiring certain, specified employees to continue work despite a lawful strike, either by job category or by a general requirement that the parties negotiate a list of specified workers.<sup>293</sup>

In states where public employees lack a right to strike, they may nevertheless effectively be able to do so, while in others, sanctions for strikers are so severe that there are virtually no strikes. Public school teachers in many cities have won strikes in the face of statutory prohibitions, especially in areas where unions are strong, and they issues over which they are striking include matters such as class size, where students, parents, and other citizens can be mobilized to support the strike. For example, the City of Detroit public school system and teachers' union were involved last year in a nine day strike of some 11,000 teachers. In the face of strong opposition by the state governor and legislature, the teachers closed the schools and won the strike, concluding with a new col-

<sup>292</sup> See generally, e.g., Aaron, *supra* note 41; Malin, *supra* note 41; Developments, *supra* note 24. A summary description of each state law may be found in PED, *supra* note 95.

<sup>293</sup> See generally Malin, *supra* note 41.

lective bargaining agreement achieving many of the gains they had sought.<sup>294</sup>

#### F. Does A Legal Right to Strike Matter?

Let me conclude this discussion of the rules pertaining to strikes by highlighting two points. First, in the U.S., there often is little practical difference between a legal and an illegal strike. Second, the economics of a strike are very different if the law prohibits replacement of legally striking workers. Let us take for illustration of the first point, a teachers' union striking a private high school, as compared to a teachers' union striking a public school system. The former are in the private sector, hence covered by the right to strike, while the latter are employees of a local governmental entity, so in most states they are prohibited from striking. The private school teachers' strike may not be enjoined by a court, and they cannot be fired for engaging in the strike. The public school teachers' strike is illegal, so a court may issue an injunction ordering its cessation, and the union and its leaders may be threatened with fines or even jail sentences for contempt of court if the union continues to strike in violation of the court order. In the end, however, in both the private and public sector cases, the strike will be won or lost based on the employer's ability to keep the school operating, by using administrators as temporary instructors, by hiring temporary substitute teachers, or by permanently replacing the strikers. This will also depend on the parents' willingness to send their children to school while a strike is going on, either because of their sympathies for or against the strikers, or because of their concerns about risks of violence or social ostracism if their children cross the teachers' picket line. If the strikers are determined and most remain off the job in solidarity, whether the strikers are "fired", or "permanently replaced" makes little difference to the outcome. The key is the employer's ability to replace the strikers and to persuade the students to continue to attend school. Ironically, this is likely to be much easier to do in the private school, where the strike is legal, but only a small number of teachers must be replaced, then it

<sup>294</sup> See, e.g., *Detroit Teachers Reach Tentative Contract Providing Higher Wages and Smaller Classes*, 37 Gov't Emp. Rel. Rep. (BNA) No. 1828, at 1200 (Sept. 13, 1999); *Detroit Teachers Ratify Contract*, 37 Gov't Emp. Rel. Rep. (BNA) No. 1830, at 1266 (Sept. 27, 1999); *Work Stoppages*, supra note 102.

is in a large, public school system. There, hundreds or even thousands of teachers may have to be replaced at one time, and the public and political nature of the issues means much greater publicity and a stronger potential for public support of the strike. The second point is that the economic consequences of permitting strikes in essential services differs greatly if no permanent replacement is permitted from the U.S. case, in which replacement and continued operation is allowed. When no replacement is allowed, a strike by a majority of the workforce usually results in the operation being shut down. There is no risk of the strike being broken, employees cannot be enticed to cross over the picket line and return to work, and no replacements can be hired. The issue is how long the workers can last without their paychecks, as opposed to how long the employer can last without revenue coming in from operations. Even in public services such as the Metro system or public hospitals, this is approximately accurate. In services financed out of the budget alone rather than through user fees, such as the public schools, the employer is less concerned about lack of incoming revenues, and more concerned about the political consequences of voter reaction to the loss of the service, and its impact upon their children's education as well as upon local businesses whose parents' work schedules are disrupted by child care problems.

A strike in which replacement of strikers is not permitted, in short, carries much less risk and is much more effective than one in which replacement is permitted. Only when labor market economics, either of scarce skill supply in the labor market, or sheer scale of the largest employers, makes replacement and continued operation in the face of a strike unfeasible, are the two equivalent in practical impact. The key factor in the U.S., then, is less whether the strike is legal or illegal, and more whether the employer is able to operate despite the strike, both in terms of consumer support for the strike and in terms of the realistic possibility of replacing a high enough proportion of the strikers.

V. PRIVATE SECTOR “ESSENTIAL SERVICES” PROVISIONS: LMRA  
NATIONAL EMERGENCY DISPUTES AND RLA  
PRESIDENTIAL EMERGENCY BOARDS

A. Injunctions, Seizures, and Enactment of the LMRA

There is an abundant history in the U.S. of governmental intervention into labor disputes which were perceived to threaten the national economy or welfare. Prior to Norris-LaGuardia, the employers, as well as the government, found it relatively easy to use anti-trust and other laws to enjoin most forms of strikes affecting any significant portion of the economy. No proof of impact upon the health, safety, or welfare of the populace was necessary, although the pretext of “public emergency” was often asserted.<sup>295</sup>

Enactment of Norris-LaGuardia changed the landscape. Leaving aside the Railway Labor Act, with its solution specific to the railroad, and later airline industries, the Norris-LaGuardia Act on its face precluded federal injunctions against continuation of private sector lockouts, strikes, and other work stoppages at the behest of the private employer or the federal government.<sup>296</sup> Until 1947, when the Taft-Hartley amendments created an avenue for federal government intervention into the most serious disputes, the entire economy seemed to be at the mercy of the private bargaining partners, whose recalcitrance often tested the patience of the public. The pre-Norris-LaGuardia history of governmental, employer, and judicial abuse of the power of judicial injunctions lays behind

<sup>295</sup> See, e.g., *United States v. United Mineworkers*, 330 U.S. 258, 277-78 (1947); *id.* at 315-16 (Frankfurter, J., concurring).

<sup>296</sup> See *United States v. United Mineworkers*, 330 U.S. 258, 277-78 (1947) (Legislative history recites instances in which the U.S. government obtained injunctions in private sector labor disputes “where some public interest was thought to have become involved;” these were used to illustrate “the abuses flowing from the use of injunctions in labor disputes... [T]hey indicate that Congress, in passing the [Norris-LaGuardia] Act, did not intend to permit the United States to continue to intervene by injunction in purely private labor disputes” ). See also *id.* at 270-71, 274-76 (differentiating situations in which the U.S. is itself an employer, hence may obtain an injunction, from labor disputes between private parties); *id.* at 310 (Frankfurter, J., concurring in the judgment) (statute explicitly withdraws “power from federal courts to issue injunctions in an ordinary labor dispute between a private employer and his employees” ); *id.* at 312-15, 321 (arguing that Norris-LaGuardia precludes federal courts from issuing injunctions in all labor disputes, including those where federal government is a party or plants it has seized); *id.* at 336-38 (Murphy, J., dissenting) (same); *id.* at 343 (Rutledge, J., dissenting) (same).

the limited scope of the Taft-Hartley exceptions. This history is also an important factor in the judicial reluctance in later years to accept expansive interpretations of the Taft-Hartley exceptions, and the refusal of Congress to enact an “essential services” provision in any federal law governing collective bargaining which would preclude, rather than temporarily postpone, the right to strike.

The use of federal government seizures of private facilities as a means to solve intractable labor disputes also became important, particularly after enactment of Norris-LaGuardia precluded the possibility of a court order halting a strike or lockout. By 1952, one Supreme Court Justice counted at least sixteen separate pieces of federal legislation authorizing federal seizures of facilities for production, communications, transportation, or storage, and listed seizures occurring during the Civil War, World War I, and World War II.<sup>297</sup> The seizure was always for a limited period of time, and the exercise of seizure authority conditioned upon “time of war”, “national security or defense”, “urgent and impending need” or “public safety”. In actuality, almost all seizures occurred in the context of a war.<sup>298</sup> Seizures were also usually predicated upon the owner’s failure or inability to make the plant available to supply the government’s needs.<sup>299</sup> As a temporary form of government taking, under the Constitution the government was required to pay just compensation to the owner for the period of the seizure.<sup>300</sup>

During World War II, the threat of disruption of production was regarded as unacceptable. At the urging of the government, a no-strike, no-lockout pledge was entered into by top union and employer representatives at a national labor-management conference.<sup>301</sup> In 1943, Congress enacted the War Labor Disputes Act.<sup>302</sup> This law provided the President with authorization to seize possession and operating control of facilities necessary to the war effort if a strike or labor dispute disrupts their ability to function; it remained in effect for the duration of the war

<sup>297</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 611-13, 620 (1952) (Frankfurter, J., concurring).

<sup>298</sup> See *id.*

<sup>299</sup> *Id.* at 597-98, 615 (Frankfurter, J., concurring).

<sup>300</sup> See *id.* at 631 (Douglas, J., concurring).

<sup>301</sup> See *id.* at 605 (Frankfurter, J., concurring) (citing S. Rep. No. 2250, 81 Cong., 2d Sess.

<sup>302</sup> 41; H.R. Rep. No. 3042, 81 Cong., 2d Sess. 35).

<sup>302</sup> 57 Stat. 163. See *United Mineworkers*, 330 U.S. at 262, 284; *id.* at 347 (Rutledge, J., dissenting).

and as to already seized plants, for six months thereafter.<sup>303</sup> In 1943, four facilities were seized under its authority; in 1944, the number was seventeen; in the first eight months of 1945, fifteen seizure cases arose, including the coal mine seizures which culminated in the strike and anti-strike injunction that went to the Supreme Court as *United States v. United Mineworkers*.<sup>304</sup>

A wave of labor unrest helped galvanize a more conservative, post-World War II Congress into enacting the Taft-Hartley Act in 1947, including the national emergency dispute provisions of the LMRA. During the winter of 1946, major strikes in telephone and coal mining occurred,<sup>305</sup> heightening the sense that with the war-time discipline ending, the situation was escalating out of control. Statistics help comprehend the magnitude of the labor unrest: in 1943, in the midst of the war, 13'500,529 worker days were lost through work stoppages; by 1945, the number was 38,025,000; in 1946, the number was 113'00,000.<sup>306</sup> Congress considered but consciously rejected alternatives which would have authorized federal seizures of strike-bound plants, as well as interest arbitration or some other form of dispute resolution imposed upon the bargaining partners by third parties. Instead, it deliberately adopted an emergency dispute approach, drawing to some degree upon the RLA model, imposing a series of special processes totaling up to 80 days, including factfinding, and a cooling-off period under possible court order, in the hope that public pressure and the risk of further Congressional intervention would induce the parties to settle.<sup>307</sup> As had been the case during enactment many years earlier of the RLA, the legislative history of the LMRA emergency dispute provisions demonstrates that labor and management, with rare unanimity, joined hands to urge Congress against adoption of any stronger forms of intervention which might reduce their autonomy.<sup>308</sup> After the conclusion of the 80 period, the parties are again free to strike or lock out. Congress chose to retain the possibility of

<sup>303</sup> See *id.* at 348 & n. 10 (Rutledge, J., dissenting).

<sup>304</sup> See *id.* at 348 n. 9 (Rutledge, J., dissenting).

<sup>305</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 598-99 (Frankfurter, J., concurring).

<sup>306</sup> See *United Mineworkers*, 330 U. S. at 348 n. 7 (Rutledge, J., dissenting) (citing U.S. Bureau of Labor Statistics sources).

<sup>307</sup> See *Youngstown Sheet & Tube Co.*, 343 U.S. at 586; *id.* at 598-602 & nn. 1-3 (Frankfurter, J., concurring); *id.* at 657 & n. 4 (Burton, J., concurring); *id.* at 663-64 (Clark, J., concurring).

<sup>308</sup> See *id.* at 601 & n. 5 (Frankfurter, J., concurring).

crafting legislation to intervene at that point, in the specific labor dispute, rather than to prescribe broad rules applicable generically.<sup>309</sup>

The threat of a nationwide steel strike in 1952, in the midst of the Korean War, led President Harry Truman to order the federal government to seize and operate most of the affected steel mills. This precipitated a constitutional crisis, culminating in the Supreme Court's landmark decision in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>310</sup> the **Steel Seizure Case**. The case put an end to any Presidential claim of authority without legislative authorization to use seizure and operation of a facility as a means to resolve settle labor disputes. Because the United States has not been involved in a formally-declared war since that time, and Congress has normally limited legislative authorization for seizures to war-time situations, governmental seizure has since then faded from view as even a possible tool in government's arsenal to ensure labor peace. The President had not relied upon the recently-enacted LMRA national emergency dispute provisions, which could not have supported seizure of facilities. Nor did he rely upon another piece of legislation, which might have supported at least some of the seizures, had the administration first completed a series of complicated prerequisite procedures. Instead, reasoning that steel production was essential to the manufacture of virtually all defense materiel for the conflict, the President acted on the basis of the executive powers of his office, as well as his powers as Commander-in-Chief of the armed forces.<sup>311</sup>

A six member majority of the nine member Supreme Court held the steel plant seizures unconstitutional, although there was a difference of views regarding the rationale. The majority opinion, authored by Justice Black, held that no provision of the constitution could support the seizure, absent Congressional legislative authorization, and suggested that a contrary holding would permit assertion of legislative-type powers by the President, violating the constitutional principle of separation of powers.<sup>312</sup>

Justice Frankfurter, joined by four other justices, wrote a concurring opinion on narrower grounds. The opinion reasoned that the issue was

<sup>309</sup> See *id.* at 600 & nn. 1-3, 601-03, 607 & n. 10 (Frankfurter, J., concurring); *id.* at 657 & n. 4 (Burton, J., concurring); *id.* at 663 (Clark, J., concurring).

<sup>310</sup> 343 U.S. 579 (1952).

<sup>311</sup> *Id.* at 585-87. See also *id.* at 589-92 (reprinting the text of the Executive Order directing the seizures).

<sup>312</sup> *Id.* at 587-89.

not what powers the President could exercise had there been no legislation in the field. Instead, the question posed was whether the President could unilaterally take the type of action in a labor dispute that Congress itself had rejected in enacting the LMRA, as well as failing to comply with requirements of other legislation authorizing seizures under specified conditions.<sup>313</sup> Wise or unwise, the concurring opinion concluded, even in an armed conflict such as the Korean War, if the President wanted to engage in plant seizures, Congressional authorization would have to be obtained first.<sup>314</sup>

Justice Douglas separately concurred, reasoning that a government seizure of property was a taking under the constitution, and without authorizing legislation, there would be no funds appropriated to pay the constitutionally mandatory just compensation to the owners, rendering the taking itself unconstitutional from the outset. Seizures therefore entail legislative power, and the President's attempt at its unilateral exercise violated the separation of powers reserving legislative authority to the Congress.<sup>315</sup>

Justice Jackson's concurring opinion differentiated three categories of Presidential actions: those taken when authorized by Congress, those taken when Congress has not acted in the field, and "measures [taken which are] incompatible with the expressed or implied will of Congress"<sup>316</sup> into which category he placed the steel mill seizures.<sup>317</sup> For actions taken in this third, least-favored category, he reasoned, "we can sustain the President only by holding that seizure of such strike-bound industries is within his domain and beyond control by Congress"<sup>318</sup> a conclusion he rejected. Justices Burton and Clark, as well as Justice Jackson, held that since Congress had reserved to itself the power to authorize labor dispute-related seizures on an *ad hoc* basis, except if very specific provisions in certain defense-related facility seizure laws, the President could not unilaterally formulate and implement different seizure procedures without unconstitutionally invading Congress' legislative authority.<sup>319</sup>

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*  
(Clark, J.,

at 597-604.

at 602-04.

at 631-33.

at 637.

at 638.

at 640.

at 655 (Jackson, J. concurring); *id.* at 660 (Burton, J., concurring); *id.* at 662-63, 665-66

concurring).

In response to the government's urging that "we declare the existence of inherent powers *ex necessitate* to meet an emergency", Justice Jackson wrote two pages reviewing the uses and abuses of emergency powers in the German Weimar Republic, the French Republic, and Great Britain,<sup>320</sup> concluding that this

contemporary foreign experience... suggests that emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them. That is the safeguard that would be nullified by our adoption of the "inherent powers" formula. Nothing in my experience convinces me that such risks are warranted by any real necessity, although such powers would, of course, be convenient.<sup>321</sup>

Justice Jackson concluded by emphasizing the Court's responsibility to preserve the rule of law:

No one, perhaps not even the President, knows the limits of the power he may seek to exert in this instance and the parties affected cannot learn the limit of their rights. We do not know today what powers over labor or property would be claimed to flow from Government possession if we should legalize it, what rights to compensation would be claimed or recognized, or on what contingency it would end. With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.

Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.<sup>322</sup>

## B. The LMRA National Emergency Dispute Provisions

### 1. The Statutory Provisions

The national emergency dispute procedures of the LMRA authorize the President to appoint a board of inquiry whenever, in his opinion, a threatened or actual strike or lockout, which affects an entire industry or substantial part of an industry, will "imperil the national health or safety" if

<sup>320</sup> *Id.* at 651-52.

<sup>321</sup> *Id.* at 652.

<sup>322</sup> *Id.* at 655.

permitted to continue.<sup>323</sup> The board of inquiry is an ad hoc body, separately appointed by the President for each national emergency dispute, with the power to hold hearings and take evidence, “to ascertain the facts with respect to the causes and circumstances of the dispute”,<sup>324</sup> and the duty to issue a written report to the president, within a time limit specified by the President at the time the board is appointed.<sup>325</sup> The report is also filed with the FMCS and its contents made public.<sup>326</sup> The report is to include the board’s identification and description of the issues pertaining to the dispute, as well as each party’s statement of its position.<sup>327</sup> The board of inquiry has no power to make a recommendation as to the terms of settlement (unlike the power of the Presidential Emergency Board under the RLA). Since the board of inquiry is a purely investigatory body, without any power to adjudicate, its procedures are wholly within its own discretion, and need not include adjudicatory hearings or other elements of due process.<sup>328</sup>

Unless a settlement occurs in the interim, upon receipt of the report, the President has the discretion to instruct the Attorney General to petition appropriate federal district courts for injunctions against the strike or lockout under Section 208 of the LMRA. The conditions upon a court’s issuance of such an order are similar to those prerequisite to appointment of the board of inquiry. “The court must find that the threatened or actual strike or lockout (i) affects an entire industry or a substantial part thereof... and (ii) if permitted to occur or to continue, will imperil the national health or safety...”<sup>329</sup> Unlike the presidential “opinion” that these criteria have been met, however, the district court’s findings may be subjected to appellate review.<sup>330</sup> Such injunctions constitute an express exception to the Norris-LaGuardia Act.<sup>331</sup>

If the district court issues an injunction, a sixty-day cooling-off period ensues, in which the collective bargaining parties must “make every ef-

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Sections 206-210 of the LMRA, 29 U.S.C. 176-180.

<sup>324</sup> Section 207 of the LMRA, *id.* 177.<sup>325</sup> Section 206 of the LMRA, *id.* 176.<sup>326</sup> *Id.*<sup>327</sup> *Id.*<sup>328</sup> See, e.g., *United Steelworkers v. International Longshoremen’s Ass’n*, 246 F. Supp. 849, 854-55 (S.D.N.Y. 1964).<sup>329</sup> Section 208(a) of the LMRA, 29 U.S.C. 178(a).<sup>330</sup> Section 208(c) of the LMRA, *id.* U.S.C. 178(c).<sup>331</sup> Section 208(b) of the LMRA, *id.* 178(b).

fort” to settle their dispute.<sup>332</sup> The President is required to reconvene the board of inquiry, which, if no settlement is reached by the end of the sixty day period, “ shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer’s last offer...”<sup>333</sup> This report, too, is to be made public, and may be used to mobilize public pressure upon the parties. Within the next fifteen days, the NLRB must conduct a secret ballot vote of the employees of each employer involved in the matter, to determine whether they are willing to accept the employer’s final offer. The NLRB must certify the results to the Attorney General within five more days. At that point, however, or sooner if the dispute is settled sooner by the parties’ agreement, the Attorney General must return to court and have the injunction dissolved.<sup>334</sup>

The Section 208 injunction is in effect, therefore, for a maximum of 80 days. Upon dissolution of the injunction, the bargaining parties are restored to the *status quo* in effect prior to the injunction.<sup>335</sup> Assuming no settlement, the President at that point submits to Congress a comprehensive report of the proceedings, including the board of inquiry reports and the outcome of the secret ballot vote, as well as any recommendations the President may make to Congress for legislative action.<sup>336</sup> Depending upon the economic ramifications of the dispute, as well as the political repercussions of action versus inaction, Congress has on a few occasions, enacted a legislatively imposed settlement. Like other provisions allowing the government to seek injunctive relief against strikes or lockouts, Section 208 has been construed not to permit a private party to seek such relief, even when the company claimed that the union was violating an injunction issued under Section 208 at the behest of the Attorney General in another federal district court.<sup>337</sup>

<sup>332</sup> Sections 209(a), 209(b) of the LMRA, *id.* 179(a), 179(b).

<sup>333</sup> *Id.*

<sup>334</sup> Section 210 of the LMRA, *id.* at 180.

<sup>335</sup> See, e.g., *Seafarers Int’l Union, Pac. Dist. V. United States*, 304 F.2d 437, 443, 445 (9 Cir.), cert. denied, 370 U.S. 924 (1962).

<sup>336</sup> *Id.*

<sup>337</sup> *Universal Shipping Corp. v. Local 953, Checkers Int’l Ass’n*, 294 F. Supp. 4, 6-7 (D. Md. 1969).

## 2. Experience in Implementation

These provisions were invoked relatively frequently in the years shortly after their enactment in 1947, but with decreasing frequency thereafter. Since 1978, they have remained totally unused. From 1947-1954, the emergency dispute provisions were commenced through presidential appointment of a board of inquiry twelve times: once each in the meat packing industry, telephone industry, maritime industry, nonferrous metals industry, and once, at a single, pipe manufacturing plant, which was a sole source supplier for the atomic energy industry. Two disputes involved atomic energy facilities, two involved the East Coast longshoring industry, and three involved the bituminous coal industry. In three matters the meat packing industry, telephone industry, and one bituminous coal industry dispute no injunction was sought. In all three cases, a settlement was reached before the board of inquiry report was filed. In all of the other cases, judicial injunctions were obtained, and with the exception of one, a bituminous coal industry dispute, all injunctions were effective in stopping or preventing the strike.

In two cases in which an injunction had been issued, the dispute was settled while the injunction was still in effect. In five cases, no settlement was reached while the injunction remained in effect. In all five, the NLRB conducted a strike vote, and in four, the employer's final offer was rejected by majority vote. In the fifth, the union boycotted the balloting, and not a single vote was cast. In three of these cases, a major strike followed the dissolution of the injunction.<sup>338</sup>

The requirement of submission of the employer's final offer to an NLRB-conducted vote of the employees was imposed on the theory that the union leaders were often out of touch with their less militant rank and file. Experience suggests just the opposite, however. In addition to the data above, a summary covering the period from 1947-1967 indicates that management's final offer was **never** accepted in NLRB-conducted balloting under the emergency dispute procedures.<sup>339</sup>

Donald E. Cullen's review of the first twenty years the national emergency dispute provisions were in effect indicates that during the longer period, there were a total of twenty-four labor disputes culminating in

<sup>338</sup> These materials are summarized on the basis of Rehmus, *supra* note 7, at 262.  
<sup>339</sup> Cullen, *supra* note 7, at 61.

injunction proceedings, and twenty-eight in which a board of inquiry was appointed.<sup>340</sup> This is a rate of 1.4 disputes per year in which the President appointed a board of inquiry, and 1.2 per year in which an injunction was obtained. While many of the early emergency disputes occurred in the coal industry, in later years, longshoring (loading and unloading ships) and the maritime industry (ocean shipping) predominated, together accounting for nine of the twenty-four injunctions. Another twelve cases arose in what Cullen characterized as “direct defense industries”, five of which involved the atomic energy industry, two the aerospace industry, one the aircraft production industry, three in plants manufacturing military aircraft engines, and one in shipbuilding.

During this longer period, the judicial injunction remained highly effective at temporarily stopping strikes. In the twenty cases identified in which an injunction was issued after a work stoppage was in progress, all but two strikes ceased immediately and one additional strike stopped three weeks later, after the union and its president were held in contempt of court and fined. Of the total of twenty-four cases in which an injunction was issued against threatened or actual strikes, seventeen were wholly settled without further work stoppages, and two more were partially settled. However, in eight of the twenty-four, or one-quarter of the total, major post-injunction strikes occurred.<sup>341</sup>

After 1967, however, utilization of the national emergency dispute procedures began to decline. There are very few reported injunction proceedings after that time, and all involved longshore or maritime industry strikes.<sup>342</sup> According to another study, in the first year after adoption of the LMRA, the President commenced the procedure by appointing a board of inquiry seven times; in the first thirty years, however, a board of inquiry was appointed only thirty-five times in total. Cases were con-

<sup>340</sup> These materials are drawn from Cullen’s review and analysis of the 1947-1967 period in *id.*, at 55-59.

<sup>341</sup> *Id.* at 60-61.

<sup>342</sup> *United States v. International Longshoremen’s Ass’n*, 337 F. Supp. 381 (S.D.N.Y. 1971); *United States v. Portland Longshoremen’s Benevolent Soc., Local 861*, 336 F. Supp. 504 (D. Me. 1971); *United States v. International Longshoremen’s Ass’n*, 335 F. Supp. 501 (N.D. Ill. 1971), *emergency relief denied*, 78 L.R.R.M. (BNA) 2801 (7th Cir. 1971); *United States v. International Longshoremen’s Ass’n*, 334 F. Supp. 1134 (S.D. Ga. 1971); *Universal Shipping Corp. v. Local 953, Checkers Int’l Ass’n*, 294 F. Supp. 4 (D. Md. 1969); *United States v. International Longshoremen’s Ass’n*, 293 F. Supp. 97 (S.D.N.Y. 1968).

centrated in four industries: longshore, aircraft-aerospace, bituminous coal, and atomic energy.<sup>343</sup>

Research into this area is largely historical in nature. No president has used these procedures since Jimmy Carter's unsuccessful efforts in 1978 to end a coal strike.<sup>344</sup> In 1980, the FMCS terminated a position it had listed in the federal government personnel system as Executive Secretary to a Board of Inquiry appointed under Section 208 "because the authority is no longer used".<sup>345</sup> Subsequent presidents have resisted calls to use these provisions to intervene in labor disputes. The most recent example was President Clinton's rejection of Congressional and business demands that he appoint a board of inquiry during the 1997 United Parcel Service strike by some 185,000 Teamsters Union members.

UPS is the biggest delivery service in the U.S., handling 80% of the market volume. At the start of the strike, the company operated using about 50,000 supervisors and non-union personnel to perform tasks normally handled by the strikers, and delivered about 10% of its usual volume of about 12 million packages per day, with priority going to packages containing pharmaceutical products and similar urgent delivery items. Nevertheless, the President took the position that the stringent requirements of the national emergency dispute procedures were not met; there were other carriers transporting a sizeable portion of the volume UPS had previously handled, and economic experts estimated that the overall effect of the strike on the economy would not be too great.<sup>346</sup>

<sup>343</sup> Yuill, *supra* note 9.

<sup>344</sup> *Id.*

<sup>345</sup> 45 Fed. Reg. 81025 (Dec. 9, 1980) (revoking 5 C.F.R. 213.3147(a)).

<sup>346</sup> See, e.g., Elizabeth Walpole-Hofmeister, *Trucking: No Talks Set in UPS/Teamsters Dispute; White House Reiterates Hands-Off Stance*, 1997 Daily Lab. Rep. (BNA) 151, at D18 (Aug. 6, 1997); Elizabeth Walpole-Hofmeister, *Trucking: Teamsters, UPS Agree to Resume Talks; Sweeney Pledges Labor's Support for IBT*, 1997 Daily Lab. Rep. (BNA) 152, at D 7 (Aug. 7, 1997); Michelle Amber, *Trucking: Labor Secretary Herman Enters Dispute Between UPS and Teamsters*, 1997 Daily Lab. Rep. (BNA) 155, at D7 (Aug. 12, 1997); *Summary/Highlights*, 1997 Daily Lab. Rep. (BNA) 155, at D2 (Aug. 12, 1997); *Analysts Say Economic Impact of UPS Strike Likely to Be Spotty, Small*, 1997 Daily Lab. Rep. (BNA) 155, at AA-2 (Aug. 12, 1997); Pam Ginsbach, *Trucking: UPS Says Job Losses Likely by Week's End if Strike Continues; Union to Augment Funds*, 1997 Daily Lab. Rep. (BNA) 156, at D7 (Aug. 13, 1997).

### 3. Judicial Construction

In contending that the UPS strike did not satisfy the Taft-Hartley Act emergency dispute requirements, the President was on safe ground. The statute may be invoked only when “ in the opinion of the President” , the statutory criteria are met; in exercising his discretion to decline to appoint a board of inquiry, his decision was wholly unreviewable. This is in accord with the Congressional framers’ notion that the president be subject to political accountability for his choices about such intervention, rather than an unelected, politically unaccountable, federal judge serving a lifetime appointment to the bench.<sup>347</sup>

He was also on safe ground in his interpretation of the legal pre-conditions. Effectively, there are two conditions: (1) that the threatened or actual strike affect all or a substantial part of an industry; and (2) that it imperil the national health or safety. One can guess that, had the matter ever come before a court, the UPS strike would have been held to affect a substantial part of an industry, but not to imperil the national health or safety. Too many alternative means existed for transporting urgent deliveries, and the overall impact on the economy, while not insignificant, was not disastrous.

#### a. The Local Essential Services Cases

There has been surprisingly little authoritative interpretation of these provisions. In two Supreme Court decisions, the Court has overturned state efforts to emulate the national emergency dispute provisions as to essential local services.

In *Amalgamated Coach Employees v. Wisconsin Employment Relations Board*,<sup>348</sup> the Supreme Court struck down the State of Wisconsin’s Public Utility Anti-Strike Law,<sup>349</sup> applying the Supremacy clause of the U.S. Constitution to hold it preempted by the federal NLRA. Two consolidated cases were decided together by the Court, the first arose from a labor dispute between mass transit workers and their private employer, the Milwaukee Electric Railway & Transport Company, while the second

<sup>347</sup> See *United States v. United Steelworkers*, 361 U.S. 39, 48, 57-58 (1959).

<sup>348</sup> 340 U.S. 383 (1951).

<sup>349</sup> Wis. Stat., 1949, 111.50 et seq.

involved a strike at the local utility company responsible for providing natural gas to households and businesses.<sup>350</sup> In each case, the Wisconsin state labor relations agency had obtained a state court injunction to stop the strike under the Wisconsin law.<sup>351</sup> The law forbade “employees of a public utility” to engage in any type of work stoppage, and forbade these employers to lock out its employees, when these actions “would cause an interruption of an essential service”.<sup>352</sup> Whenever a bargaining stalemate threatened to result in an interruption of services, the Wisconsin board was to substitute binding interest arbitration for a strike or lockout.<sup>353</sup> Covered employers included privately-owned water, heat, gas, electric, power, public passenger transportation and communications utilities.<sup>354</sup> The Supreme Court held that Congress in enacting the NLRA and LMRA, had intended to fully occupy the field, to the exclusion of state regulation of the right to strike over wages, hours, and terms and conditions of employment,<sup>355</sup> and further that the Wisconsin legislation directly conflicted with the federal law.<sup>356</sup> The Court noted that in enacting the national emergency procedures, Congress had considered and decided not to adopt provisions which would have specially treated “public utilities”, “local emergency disputes”, “public emergencies” or “essential public services”.<sup>357</sup>

In a subsequent case, the Supreme Court rejected on similar grounds the State of Missouri’s seizure of Kansas City Transit, Inc., a private corporation operating mass transit systems in Kansas and Missouri, when a different division of the same bus employees’ union called a strike. The state governmental seizure was intended to transform the entity into a public employer, much as the federal government had done during the post-World War II coal mining strike, thereby exempting the strike from federal private sector labor law, and allowing the state court to enjoin a strike that, according to the governor’s proclamation, by interrupting

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340 U.S. at 360 &amp; n. 2, 386 &amp; n. 3.

351 *Id.* at 386.352 *Id.* at 387, 388 n. 4 (quoting Wis. Stat., 1949, 111.63, 111.64).353 *Id.* at 388.354 *Id.* at 388 (citing Wis. Stat., 1949, 111.51).355 *Id.* at 389-90, 390 n. 12, 314 (relying on *United Auto Workers v. O’Brien*, 389 U.S. 454 (1950)).356 *Id.* at 399.357 *Id.* at 391-95, & nn. 13-16, 20, 21; 397. *Accord* *Div’n 1287, Amalgamated Motor Coach Employees v. Missouri*, 374 U.S. 74, 82 n. 9 (1963).

services endangered the public interest, health, and welfare.<sup>358</sup> The court rejected the state's effort to characterize the employer as now a public entity, viewing the change as one of form rather than substance, and insufficient to take the company out from under the jurisdiction of the NLRA, since no property was actually conveyed or transferred, the employees continued to be treated for other purposes not as state employees but as employees of the private company, and private management continued in all respects to operate the company exactly as before.<sup>359</sup> The Court also rejected the state's argument that the law was "strictly emergency legislation", in the state's effort to distinguish the earlier *Bus Employees* case. It reiterated its holding from the earlier decision that when "the state seeks to deny entirely a federally guaranteed right which Congress itself restricted only to a limited extent in case of national emergencies, however serious, it is manifest that the state legislation is in conflict with federal law"<sup>360</sup>

In short, if the impact of a strike or lockout is too local to satisfy the national impact aspect of an LMRA national emergency dispute, it must be handled like any other collective bargaining dispute under the NLRA. The *Bus Employees* cases leave open two options to state and local governments concerned about the impact of labor disputes on delivery of essential services. One is for the government to actually own and operate the public utility, permanently, rather than on a temporary and purely formal basis.<sup>361</sup> Private sector operating efficiencies and other factors, however, may dissuade a government from adopting this approach. Rarely will the workers' NLRA right to strike be the decisive factor in the face of a strong trend in favor of privatization.

Alternatively, the State retains its customary authority "to deal with emergency conditions of public danger, violence, or disaster under appropriate provisions of the State's organic or statutory law"<sup>362</sup> The state may not, however, enact special rules pertaining to strikes and lockouts, nor may it differentially treat problems incident to labor disputes in applying its general body of emergency law pertaining to public violence, danger or disaster.

<sup>358</sup> *Id.* at

79, 81.

<sup>359</sup> *Id.* at

81.

<sup>360</sup> *Id.* at

82 (quoting *Amalgamated Motor Coach Employees*, 340 U.S. at 394).

<sup>361</sup> *Id.* at

83.

<sup>362</sup> *Id.*

## b. The Steelworkers Case

The Supreme Court has only decided one case directly arising under the national emergency dispute provisions of the LMRA: *United Steelworkers v. United States*.<sup>363</sup> In a *per curiam* decision, the Supreme Court affirmed the lower court's issuance of an injunction to prevent continuation of an industry-wide strike in the basic steel industry. The core of the decision was that when the Attorney General sought an injunction, so long as the two criteria of industry-wide disruption and peril to national health or safety were both met, it should be granted, without further consideration of "the merits of the parties' [bargaining] positions or the conduct of their negotiations".<sup>364</sup> Equitable considerations normally applicable to requests for injunctive relief, in other words, were irrelevant.

The decision, however, did little to elucidate the scope of either of the two preconditions for emergency dispute procedures. The steel strike was national and industry-wide, so it plainly satisfied what the Court termed the "breadth of involvement" criterion.<sup>365</sup> As for the second criterion, pertaining to peril to national health or safety, the Court relied upon evidence of the strike's disruptive effect on a series of specifically identified defense projects for which key materials were rendered unavailable by the strike, and held that this sufficed to "imperil the national safety".<sup>366</sup> The Supreme Court thereby avoided addressing the government's arguments favoring broader construction of "national safety". The Court also left unresolved the litigants' competing interpretation of "national health", which the government argued included "the country's general well-being and economic health" while the union argued that the term is limited to the physical health of the populace.<sup>367</sup> Today, over forty years later, these points of statutory construction remain unsettled.

The Supreme Court did elaborate on the purposes the statute was enacted to serve, which in U.S. judicial reasoning may be relied on to inform future judicial interpretation of the statute in conformity with

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361 U.S. 39 (1959).

<sup>364</sup> *Id.* at 41.

<sup>365</sup> *Id.*

<sup>366</sup> *Id.* at 42 & n.\*; *id.* at 46-47 (Frankfurter, J., concurring).

<sup>367</sup> *Id.* at 42. See also *id.* at 65-68 (Douglas, J., dissenting) (citing legislative history rejecting "public welfare" and "public interest" as statutory phrases, as well as the history of enactment of the Norris-LaGuardia Act in support of a narrow interpretation).

Congressional objectives. The “ statute ... recognize[s] certain rights in the public” , of which the federal government is the guardian, “ to have unimpeded for a time production in industries vital to the national health or safety” , despite the fact that the injunction only lasts a maximum of eighty days.<sup>368</sup>

c. Lower court decisions on “breadth of involvement”

Most of the lower court cases find the entire industry or a substantial part of it to have been affected by a work stoppage. In some cases, however, the lower courts permitted the government to manipulate the definition of “ industry” to make it easy to establish that a substantial part had been disrupted. One court, for example, held that a maritime strike that would immobilize 45% of the vessels in the U.S. merchant fleet affects “ a substantial part” of the industry, without taking into account the availability of foreign flag shipping, on the theory that one function of the domestic merchant marine fleet was to serve in a backup military capacity for which the foreign flag vessels were ineligible.<sup>369</sup> While Congress’ primary focus was plainly “ strikes of a substantially industry-wide scope” , the Second Circuit Court of Appeals held in one case that the breadth criterion was also satisfied by a purely local strike which caused a bottleneck disrupting an entire, albeit different, industry, crucial to the national defense. The union members worked at a plant producing heat exchangers, pressure vessels, and prefabricated pipe, and a strike at this one plant would clearly not have affect a substantial part of that industry. However, much of the plant’s production was in fulfillment of a contract in which it was the sole source to supply highly specialized parts to some of the prime contractors to the U.S. Atomic Energy Commission; ultimately, the bottleneck threatened to jeopardize the manufacturing of atomic bombs. In the midst of the Cold War, the risk to the national defense seemed manifest to the court, which refused to require that the affects on an entire industry or substantial part, be on the same industry as that in which the labor dispute had arisen.<sup>370</sup>

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*Id.* at 43.

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*United States v. National Marine Engineers’ Beneficial Ass’n*, 294 F. 2d 385, 386 & n. 3 (2d Cir. 1961).

<sup>370</sup> *United States v. United Steelworkers*, 202 F. 2d 132, 134, 136-38 (2d Cir. 1953).

Courts in several similar cases adopted this construction, holding strikes at sole suppliers of crucial military aircraft or munitions parts to affect substantial parts of those industries by creating production bottlenecks, even though the affect on the industry in which the labor dispute itself arose was negligibly affected by single plant strikes.<sup>371</sup> Reading the language of these opinions, however, it is plain that they were influenced by the Cold War and later Vietnam War mentality, rejecting all arguments about alternative sourcing or the union's willingness to permit production allocated to the defense contractor, and readily applying the national defense label, equated with the national safety criterion, to hold the statutory requirements satisfied.

d. "National Health or Safety"

Until the end of the Vietnam War, virtually all cases brought to court seeking a national emergency injunction were successful, in large measure because the government routinely submitted evidence indicating some impact on national defense, defense contractors, or overseas military partners, which the courts routinely accepted as sufficient to show imperilment of national safety. When a maritime strike disrupted half the U.S. fleet, the federal government submitted evidence about the impact on pharmaceuticals and food supplies, for example, but it was easiest, and sufficient for the court to rely on the legal obligation that the merchant marine serve as a military and naval auxiliary in time of war or national emergency.<sup>372</sup>

Some lower courts uncritically accepted government evidence of purely economic impact as sufficient to "imperil the national health or safety".<sup>373</sup> In one of the many cases involving a strike by dockworkers,

<sup>371</sup> See *United States v. Avco Corp.*, 270 F. Supp. 665 (D. Conn. 1967); *United States v. American Locomotive Co.*, 109 F. Supp. 78 (W.D.N.Y. 1952), *aff'd sub nom. United States v. United Steelworkers*, 202 F.2d 132 (2d Cir.), *cert. denied*, 344 U.S. 915 (1953); *United States v. General Elec. Co.*, Civil No. 3350 (S.D. Ohio 1966), cited in *Avco*, 270 F. Supp. at 672 n. 16; *United States v. International Ass'n of Machinists*, Civil No. 62C662 (E.D.N.Y. 1962), cited in *Avco*, 270 F. Supp. at 672 n. 16, 674; *United States v. Lockheed Aircraft Corp.*, Civil No. 62-1575 (S.D. Cal. 1962), cited in *Avco*, 270 F. Supp. at 672 n. 16, 674.

<sup>372</sup> *United States v. National Marine Engineers' Beneficial Ass'n*, 294 F. 2d 385, 388 (2d Cir. 1961).

<sup>373</sup> E.g., *United States v. International Longshoremen's Ass'n*, 337 F. Supp. 381, 383 (S.D.N.Y. 1971).

a district court relied on evidence of the impact to the strike on food deliveries to U.S. ports, on employment in cities up and down the East Coast, and on the country's balance of payments in finding peril to the national health and safety and issuing an injunction against the strike.<sup>374</sup> Many cases uncritically cite an array of government evidence of impact on direct military defense activities, indirect military defense activities, international military and civilian foreign aid, delivery of food and medicine, macroeconomic impact affecting the balance of payments, levels of unemployment and wage loss, and then, without specifying how each or any of these relates to either national health or national safety, simply conclude that in the aggregate, the impact suffices.<sup>375</sup>

#### e. Clauses to Preserve the Status Quo

Courts are divided over a point which would be important were these statutory provisions in regular use today: whether they should include in a Section 208 injunction a clause preserving in effect the terms and conditions of employment under the collective bargaining agreement. The purpose of the Section 208 injunction is to preserve the *status quo* as it existed prior to the actual or threatened strike or lockout.<sup>376</sup> The statute is unclear, however, as to whether the *status quo ante* to be preserved or restored is composed only of the performance of work and provision of services or production, that is, is defined from the employer's perspective, or whether it also includes the terms under which the work is performed, that is, it is also defined from the employees' perspective. Courts have espoused three possible positions: (1) it is beyond the district court's authority to include a clause preserving terms and conditions of employment in a Section 208 injunction;<sup>377</sup> (2) it is

<sup>374</sup> *United States v. International Longshoremen's Ass'n*, 293 F. Supp. 97 (S.D.N.Y. 1968).

<sup>375</sup> *See, e.g., United States v. International Longshoremen's Ass'n*, 336 F. Supp. 504, 506 (D. Me. 1971).

<sup>376</sup> *See, e.g., United States v. International Longshoremen's Ass'n*, 246 F. Supp. 849, 855 (S.D.N.Y. 1964).

<sup>377</sup> *See, e.g., United States v. Boeing*, 215 F. Supp. 821 (W.D. Wash.), vacated and remanded *sub nom. International Ass'n of Machinists v. Boeing*, *id.* at 825, 315 F.2d 359 (9th Cir. 1963) (per curiam).

within the district court's sound, equitable discretion to do so;<sup>378</sup> and (3) the district court as a rule ought to do so.<sup>379</sup>

#### f. Post-Vietnam War Developments

It was not until public support for the Vietnam War waned, that the extent of reliance by the government on defense-related arguments, and more tacitly, judges' patriotic sentiments, began to become manifest in cases in which the courts refused to issue injunctions requested under Section 208. Until then, in almost every case, the courts granted the Attorney General's request for an injunction. In addition, fragmentation of bargaining units meant that fewer and fewer labor disputes occurred on a sufficiently large scale to trigger applicability of these provisions.

Bear in mind that in 1999, there were only 17 work stoppages in the entire country involving over 1,000 employees.<sup>380</sup>

In one of the few cases in which a formal government request for a Section 208 injunction was rejected, a federal court refused to consider the aggregate effects of a series of simultaneous strikes by independently acting longshoremen's unions.<sup>381</sup> The court found that the strike by a Chicago local union, involving 200 longshoremen working inside grain elevators, would affect only a small portion of the industry, measured in number of workers, volume of cargo handled, value of the cargo, and that the proportion of total corn and soybean shipments affected would be about 3.8% of total U.S. shipments. The court also found that the businesses which would be affected were unrelated to any U.S. defense programs. It concluded that neither element of Section 208 was satisfied: the strike would not have an effect on a substantial part of the maritime industry, and it would neither imperil national health or safety.<sup>382</sup> The court also construed Section 208 to "preclude enjoining of a strike on

<sup>378</sup> See, e.g., *International Longshoremen's Ass'n*, 293 F. Supp. at 104.

<sup>379</sup> See, e.g., *Seafarers Int'l Union v. United States*, 304 F. 2d 437 (9 Cir.), cert denied subn nom. *Pacific Maritime Ass'n v. Seafarers Int'l Union*, 370 U.S. 924 (1962); *International Ass'n of Machinists v. Boeing Co.*, 215 F. Supp. 821, 825, 315 F.2d 359 (9th Cir. 1963) (per curiam); *United States v. International Longshoremen's Ass'n*, 246 F. Supp. 849, 856 (S.D.N.Y. 1964); *United States v. Avco Corp.*, 270 F. Supp. 665, 673, 675 (D. Conn. 1967).

<sup>380</sup> See *supra* text accompany note 101.

<sup>381</sup> *United States v. International Longshoremen's Ass'n*, 335 F. Supp. 501 (N.D. Ill. 1971), emergency relief denied, 78 L.R.R.M. (BNA) 2801 (7th Cir. 1971).

<sup>382</sup> *Id.* at 503-505.

purely economic grounds absent some element of national defense”<sup>.383</sup> The court reasoned that “ ‘national health or safety’ cannot be interpreted as fiscal health or national economic welfare and [that the government] is foreclosed from picturing this strike as a defense threat to the ‘national safety’ by the complete lack of any defense or war effort considerations”<sup>.384</sup>

The courts’ attitude was plainly changing. Of the four main industries previously subjected to Section 208 injunctions —longshore, aircraft-aerospace, bituminous coal, and atomic energy—<sup>385</sup> aircraft-aerospace manufacture and to a great extent, atomic energy, mainly fall under the statute because of defense considerations. Arguments about peril to the nation’s safety became regarded much more critically as the Vietnam War wound to a close, and thereafter. A delay of several months in completion of an atomic energy plant or production of a new fighter jet no longer sounds like a very great threat to the national defense, since the country is not in a state of armed conflict.

The remaining two industries, as well as to a great extent, other manufacturing industries, were always primarily subject to national emergency dispute procedures on the basis of national health, rather than national safety and defense. Removal of somewhat specious claims of defense-related issues, however, made it easier for the courts to recognize availability of substitutes and alternatives which prevented a finding of peril to national health, and made it harder for the government to argue that a substantial part of an industry was affected by a purely local strike. Moreover, only a strike affecting a substantial part of an industry qualifies for national emergency dispute procedures. Over time, fragmentation of collective bargaining within industries, along with increased numbers of successful non-union competitors, both domestic and foreign, has meant that fewer and fewer strikes surpass the “substantial part” of the industry threshold, even before consideration of the availability of substitutes reduces the possibility that peril to national health or safety will develop.

Presidential political and philosophical attitudes have also changed, in favor of a hands-off, *laissez faire* attitude which decreases their willingness to use their emergency powers to intervene. If the strike is not

<sup>383</sup> *Id.* at 506.

<sup>384</sup> *Id.* at 507.

<sup>385</sup> Yuill, *supra* note 9.

causing an overwhelming impact, the upshot of the entire national emergency dispute process is merely to suspend the strike or lockout for 80 days, after which, if it still has not been settled, the parties are free to resume their economic warfare. They may continue to battle it out indefinitely, regardless of the harm to national health or safety, unless the President recommends and Congress adopts legislation specific to the dispute to terminate the strike.

#### g. The Health Care Local Emergency Disputes Provision

As has already been observed, local disputes receive no special treatment under the LMRA. Even the involvement of an employer whose products or services lack equivalent substitutes, does not permit the government to intervene against the workers' right to strike. However, the U.S. market for goods and services in most fields has so much competition that it is rare for a strike to do more than inconvenience consumers and force them to rely on a substitute. Perhaps otherwise, the law would have been framed to take a different approach.

In health care, the political circumstances at the time of the industry's reinsertion into NLRA coverage in 1974 were very different from those prevailing either in 1935, when the original Wagner Act version of the NLRA was adopted, or in 1947, when the LMRA was passed. In recognition of the local market for most health care services, and its intrinsically essential nature, Congress crafted a special emergency dispute provision added as Section 213 of the LMRA, triggered by a finding of the Director of FMCS that "a threatened or actual strike or lockout affecting a health care institution will, if permitted to occur or to continue, substantially interrupts the delivery of health care in the locality concerned..."<sup>386</sup>

The Director of the FMCS, rather than the President, is to appoint a board of inquiry; the appointment must be made within thirty days of receiving notice from the union or employer, a notice required to be provided to FMCS under Section 8(d), at least sixty days before the labor agreement is due to expire.<sup>387</sup> The board, once appointed, is to

<sup>386</sup> 29 U.S.C. 183. Cf. *Sinai Hosp. v. Horvitz*, 621 F.2d 1267, 1270 (4th Cir. 1980) (holding NMB determination judicially unreviewable).

<sup>387</sup> *Id.* 158(d), 183. See, e.g., *Sinai Hosp. v. Searce*, 561 F.2d 547 (4 Cir. 1977).

investigate the issues and make a written report within fifteen days of its appointment, including findings of fact and non-binding recommendations for settling the dispute.<sup>388</sup> The parties are required to preserve the *status quo* for an additional fifteen day cooling off period after the board of inquiry report has been issued.<sup>389</sup> Courts which have examined these provisions have held that the FMCS has thirty days after receipt of the union's or employer's notice of intent to renegotiate within which to appoint the board of inquiry, or any appointment will be void and it will be unable to utilize this procedure.<sup>390</sup>

In the normal course of events, this provision does not prolong the period in which the parties must maintain the *status quo*, since they must do so in any event under Section 8(d) for ninety days after the one party notifies the other of its intent to terminate or modify the agreement, and for at least sixty days after their notice to the same effect to FMCS. If FMCS is notified on the last possible day, and it uses all thirty days to appoint the board of inquiry, and the board of inquiry uses the full fifteen days to make its written report, the subsequent fifteen days will end on the same day as the Section 8(d) *status quo* requirement.<sup>391</sup> The provision, in any case, seems to be ineffectual in most circumstances, since it requires appointment of the board of inquiry, and for them to make their recommendations, early in the bargaining process as it occurs in many health care institutions. Unlike a presidentially appointed board of inquiry or national emergency board, whose report is likely to receive substantial press coverage and to engender considerable political and social pressure upon the bargaining parties, an FMCS-ap-

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29 U.S.C. 183(a).

389 *Id.* 183(c).

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<sup>390</sup> See, e.g., *Affiliated Hosps. v. Scearce*, 583 F.2d 1097, 1099 (9 Cir. 1978); *Sinai Hosp. v. Scearce*, 561 F.2d at 552-54. See also *Southwest La. Hosp. Ass'n v. Local Union No. 87, Office Employees Int'l Union*, 664 F.2d 1321, 1328 (5th Cir. 1982).

<sup>391</sup> See *id.* at 554 & n. 11. See also *Sinai Hosp.*, 621 F.2d at 1270-71 (outlining strict timing of steps). In new bargaining units, however, appointment of a board of inquiry may briefly extend the *status quo* period; Section 8(d) requires thirty days notice to FMCS, and Section 213(a) gives FMCS ten days to appoint the board of inquiry in such cases. If the board takes the full fifteen days to report, the *status quo* in such cases will be frozen for tens days longer than it would if the FMCS did not appoint a board of inquiry. However, for the most part., these are cases in which there is no incumbent union and no collective bargaining agreement. The union is likely to bargain longer before striking, whether or not a board of inquiry is appointed; the employer cannot in any case alter the *status quo* until it has bargained with the union to impasse.

pointed board's report will often receive little or no public notice. Presidentially-appointed boards generate a trail in the public record, making it fairly easy to ascertain when and how many have been appointed; the FMCS Section 213 appointment process generates no similar records, so it is unclear how frequently the provision has been utilized. Certainly every bargaining dispute at every health care institution does not threaten to deprive the local community of essential services, but there is no record to indicate the FMCS' construction of this language. However, after the first few years, when parties challenged FMCS' belated appointment of boards of inquiry in several cases, there have been no published decisions under Section 213. This suggests that either FMCS is seldom resorting to it, or it has so little impact that it is any event not worth either party's efforts to litigate.

## B. The RLA Section 10 Presidential Emergency Board Provisions

### 1. The Section 10 Provisions

The RLA contains an provision analogous to the LMRA national emergency dispute provisions. Section 10 of the RLA is triggered if, in the judgment of the NMB, a dispute unresolved through all the usual, prolonged RLA steps of negotiation, mediation, and proffer of arbitration, "threatens substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service". In such a case, the NMB is to notify the President, who has the discretion to appoint a Presidential Emergency Board (PEB), of however many persons the President chooses, to investigate the facts and provide a report to the President regarding the dispute within thirty days of the board's appointment. Unlike the LMRA boards of inquiry, which are expressly prohibited from making recommendations, the RLA PEB's are permitted to recommend a resolution for the labor dispute, and often do. The Section 10 procedures operate to further extend the regular RLA status quo freeze period by an additional sixty days, since upon appointment of the PEB, the status quo is frozen until the board makes its report and for thirty days thereafter. The same body of law developed regarding the maintenance of the status quo during negotiation, mediation, and for the thirty day cooling off period after NMB proffer of

mediation and its rejection by at least one party, applies to this sixty day extension of the *status quo* period.<sup>392</sup>

Unlike the LMRA emergency dispute procedures, no injunction proceedings are necessary under the RLA, since the extended *status quo* obligation automatically comes into force once a PEB has been appointed. However, if one of the parties violates the *status quo* requirement, the other may sue in court to enjoin the observation of the *status quo*, just as is the case regarding the *status quo* requirement during negotiations, mediation, and the thirty-day cooling off period.<sup>393</sup> Enforcement is thus in the hands of the bargaining parties, rather than the government; on the other hand, the drastic remedies for contempt of court do not apply until after the union or employer breach the *status quo* obligation, the other side obtains a federal court injunction, and then the party continues to violate the *status quo*.

There has been little litigation about the NMB's decision that to refer a case to the President under Section 10, on grounds that a strike "threatens to ... deprive any section of the country of essential transportation services". Since the statute reserves this question to the "judgment" of the NMB, and the appointment of an emergency board thereafter to the "discretion" of the President, Courts would be likely to construe this matter as unreviewable, or reviewable on narrow grounds such as bad faith or corruption on the part of the agency; this is what the courts have done regarding the NMB's determination that the prospects for successful mediation have been exhausted, leading to proffer of arbitration, and release of the parties to engage in self-help. The presidential appointment of a board does, however, of its own force, deprive the parties of the right to strike and lockout for an additional sixty days; one might imagine either party in a proper case, challenging the determination that a section of the country was being deprived of "essential" transportation services, particularly where trucking, buses, automobiles and airplanes provide ready substitutes.

Comparing the statutory triggering conditions under Section 10 of the RLA for PEB appointment with those of the Section 206 of the LMRA for board of inquiry appointment, at first glance, the RLA language seems to encompass a much broader set of disputes. Unlike the LMRA,

<sup>392</sup> See, e.g., *Detroit & T.S.L.R. Co. v. United Transp. Union*, 396 U.S. 142, 150-52 (1969).

<sup>393</sup> See, e.g., *id.*

no national impact need be shown to utilize the RLA language; an impact on a section of the country is enough. Nor is there any threshold based on all or a substantial part of an industry being affected. Under the RLA, a strike involving even a small segment of the national rail or air system may be subject to Section 10 if it threatens to deprive “a section of the country of essential service”. Nor need any impact on national health or safety be demonstrated. In effect, Congress in enacting Section 10, determined that rail, and later air, transportation was sufficiently important to the health, safety, and welfare of the populace that depriving any section of the country of essential transportation service would in and of itself warrant intervention in the form of the PEB and the extended status quo period. There is some irony in this, since Congress has stood by, refusing government subsidies, and permitted the rail transport system, particular the passenger transportation system, to wither in many parts of the country for lack of profitability.

## 2. Rates of Appointment of PEB's under the RLA

It is illuminating to compare the number of LMRA presidentially-appointed board of inquiry with the number of RLA presidentially-appointed emergency boards, notwithstanding the differences between the two statutes. From 1947-54, there were 70 PEB's appointed in the railroad industry, and 11 in the airline industry, for a total of 81; this compares to 12 boards of inquiry under the LMRA. From 1955-1967, rail have 40 and air had 22 PEB's, for a total of 62, as compared to 16 boards of inquiry under the LMRA national emergency dispute provisions.<sup>394</sup>

From 1982 to the present, my own research reveals that the President appointed a total of 39 PEB's under the RLA.<sup>395</sup> This, of course, compares with 0 boards of inquiry appointed under the LMRA during the

<sup>394</sup> The RLA figures are based on a summation of data drawn from Cullen, *supra* note 7, at 70-71. LMRA data are derived from *id.*, at 55-59 and Rehmus, *supra* note 7, at 261-62.

<sup>395</sup> These figures are based on the following search performed on June 13, 2000, in LEXIS, Labor library, Fed.Reg. file: (emergency board or PEB or P.E.B.) & (RLA or R.L.A. or railway labor). This data base goes back only to 1982. Two of these PEB's were technically appointed under the terms of the Rail Passenger Service Act, 45 U.S.C. 5901, regarding collective bargaining related to transfer of certain operations from Conrail to local governmental commuter rail service providers, but they were designed to function on a basis equivalent to Section 10 PEBs under the RLA, so that is how they are treated here.

same time period. In several instances, two RLA boards were appointed in succession in connection with the same dispute, so the number of labor disputes involved is actually 29. All but one involved rail carriers, the exception being a 1997 labor dispute between American Airlines and its pilots' union.<sup>396</sup> Publicly funded and operated rail commuter lines, including the Southeastern Pennsylvania Transportation Authority (SEPTA), Metro-North Commuter Railroad, the Long Island Railroad, the Port Authority Trans-Hudson Corp. (PATH), and the New Jersey Transit Rail Operation together account for 22 boards, a majority of the PEB's appointed during the period, although they only account for 12 of 29 labor disputes during the period. In light of the relatively small proportion of both RLA-covered employers and RLA-covered employees working on such commuter lines, these figures might seem startling; but in fact, they reflect that under the special Section 9A provisions applicable to such commuter rail carriers, one PEB is appointed in virtually every case, and in most cases, a second one is later appointed as well. A few general statements may be made on the basis of these statistics. First, RLA figures have been consistently decreasing at a moderate rate over time, while the LMRA figures have been plummeting dramatically. The RLA figures, when disaggregated, also reflect a trend toward fewer rail and more air disputes. This is even more evident if we exclude the commuter line Section 9A PEB's, which are all but automatic in every unresolved dispute, and examine only the rail and air PEB's under Section 10. However, this may not be a product of more harmonious labor relations and smoother contract settlements in the railroad industry, and the converse in among the airlines. The decline in RLA numbers is somewhat misleading. The number of carriers and the number of employees has also dropped drastically over the past 50 years as the railroad industry has consolidated and reorganized, so one would expect fewer disputes. The number of airlines and their employees has fluctuated over this time period, as, after an initial period of expansion, deregulation led to several carriers merging and consolidating operations, including some who went bankrupt, but also led to new, low-cost, non-union entrants, and disputes pertaining to their organization.

Second, many more boards have been appointed under the RLA than the NLRA/LMRA at any given point in time, even though the scope of

<sup>396</sup> See E.O. 13036, 62 Fed. Reg. 7653 (Feb. 15, 1997).

coverage under the NLRA/LMRA, in terms of numbers of employers and numbers of employees covered, is many times greater than that of the RLA. Even limiting the figures to unionized workers under each statute, there are several times more unionized workers under the NLRA/LMRA than the approximately 700,000 under the RLA;<sup>397</sup> earlier in time the ratio was much greater than it is today.

One might think that appointment of a PEB under the RLA is all but automatic, but this has not been the case, at least under Section 10. Presidents prefer to avoid using these powers, in part because even after they have been invoked, it is not uncommon for no solution to be reached. In such cases, the strike is merely deferred, but then it finally occurs and may be even harder to settle. The *status quo* usually favors employers, and unions often wield considerable pressure against presidential intervention. In addition, neither the NMB nor the President wish to create expectations of appointment of a board among the bargaining parties, lest it produce the syndrome whereby no serious bargaining occurs until the PEB stage, undermining the process as a whole.

There have been several actual or imminently threatened strikes, particularly against airlines in recent years, without government intervention. The strike which came within a few moments of occurring against US Airways this past spring is the most recent example. Because there is a lot of competition in air transportation, there has been relatively moderate public pressure in favor of government intervention.

One may contrast this with the situation in passenger rail traffic. In the last 20 years, there have been numerous instances of presidential intervention, because the situation is usually a monopoly, although of course, rail passengers have airplanes, buses, and cars as alternatives and freight shippers have trucks. At about the same time, for example, the President Clinton was refusing to appoint an LMRA board of inquiry in the UPS strike, he appointed an RLA Section 10 PEB, over strenuous objections by labor, to avoid a threatened strike at Amtrak, the primary rail passenger carrier in the U.S.<sup>398</sup> The President has expressly pointed to the more stringent criteria for applicability under the LMRA in de-

<sup>397</sup> The 700,000 figure is derived by multiplying the number of employees subject to the RLA by the percentage of the RLA workforce covered by collective bargaining agreements; both figures come from Prah, *supra* note 246.

<sup>398</sup> See Pamela M. Prah, *Railroads: Clinton Intervenes to Prevent Strike at Amtrak; Creates Emergency Panel*, 1997 Daily Lab. Rep.(BNA) 163, at D6 (Aug. 22, 1997).

clining to appoint a board under the one statute, while appointing one under the other.<sup>399</sup>

In the commuter railroad field, on the other hand, strict application of the Section 10 criteria that a “section of the country” be deprived of “essential transportation services”, tended to result in those cases, which most upset the greatest number of citizens, being least likely to trigger appointment of a board. After unsuccessful efforts by public agencies to establish a constitutional basis for exempting their commuter lines from the RLA entirely,<sup>400</sup> the problem led to enactment of a special emergency board provision, Section 9A.

#### 4. Section 9A PEB Procedures for Commuter Lines

The Section 9A process for appointing a presidential emergency board looks deceptively similar to that under Section 10. In practice, however, it operates as an almost automatic extension of the *status quo* freeze period for 240 days. It usually involves two PEBs, one after the other, and culminates in a form of final offer factfinding which, although not quite binding interest arbitration, is coupled with a cut-off in important economic supports for the losing side which makes its operation very close. While rail commuter line employees still have the right to strike, it has been considerably weakened, particularly when compared to employees of other rail carriers.

Section 9A may be invoked whenever the President fails to appoint a PEB under Section 10 in a rail commuter line case; if the President does respond under Section, the rules of Section 9A provide the applicable procedures in any event.<sup>401</sup> Under Section 9A(b),<sup>402</sup> either labor or management, or the governor of any State through which the line operates, may request the President to appoint a PEB, and upon such a request, under Section 9A(c)(1), the President is required to make the appointment.<sup>403</sup> It is a virtual certainty that at least one of these actors will make such a request in every commuter rail labor dispute.

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See, e.g., *id*; Yuill, *supra* note 9.

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See *United Transp. Union v. L.I.R.R. Co.*, 455 U.S. 678 (1982).

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Section 9A(c)(2), 45 U.S.C. 159a(c)(2).

402

*Id.* 159a(b).

403

*Id.* 159a(c)(1).

The presidential appointment of the board triggers a 120 day freeze of the *status quo* for the bargaining partners. During those 120 days, two separate procedures take place. During the initial thirty days, this first PEB operates under Section 10 procedures, investigating the facts and circumstances of the dispute, and a recommendation for its settlement, reporting to the President within thirty days.<sup>404</sup> If there has been no settlement, within sixty days of creation of the PEB, the NMB must hold a public hearing, at which the parties must present testimony regarding why they have not accepted the board's recommendation for settlement.<sup>405</sup>

When the 120 days *status quo* period expires, the parties are only theoretically free to engage in self-help. Either bargaining partner or any governor through whose state the commuter line operates may immediately request the President to appoint a second PEB. Upon such request, presidential appointment is again mandatory.<sup>406</sup> Appointment of the second PEB triggers a second *status quo* period, which in total freezes the parties for up to another 120 days.

When the second PEB has been appointed, the bargaining parties have thirty days to submit to the board their final contract offers.<sup>407</sup> The board then has thirty days to submit a report to the President selecting one of the two final offers.<sup>408</sup> The bargaining parties must maintain the *status quo* throughout these proceedings and for sixty days after the board submits its report.<sup>409</sup>

The second board's selection of a final offer does not bind either party. After expiration of the second, 120 day, *status quo* period, the parties may strike, lockout, or change conditions of employment. However, whichever party's offer was selected by the board, then rejected by the other side, will have an advantage compared to the usual RLA labor disputant. If the employer's final offer is selected by the board, and the union strikes, the workers will be ineligible to receive unemployment benefits, which are otherwise normally available to striking

404 *Id.*

405 *Id.* 159a(d).

406 *Id.* 159a(e).

407 *Id.* 159a(f).

408 *Id.* 159a(g).

409 *Id.* 159a(h).

workers under the Railroad Unemployment Insurance Act.<sup>410</sup> If the union's final offer is selected by the board, the carrier is prohibited from drawing benefits from any fund created by agreement among carriers to provide financial support during a work stoppage.<sup>411</sup>

As one might expect under this system, once the parties fail to settle their contract dispute before appointment of the first board, they are unlikely to settle until after appointment of the second board. From 1982 to the present, of the twelve rail commuter line labor disputes in which a first PEB was appointed, a second PEB was appointed in ten, or 83% of the cases; the twelve disputes accounted for twenty-two boards appointed during that period.<sup>412</sup>

## VI. CONCLUSION

I will summarize in closing by suggesting that there are several reasons for the U.S. permissiveness allowing workers to strike even when the services are quasi-public in nature, when they are either "essential" or at least of great societal importance. The answer may lie in the following factors. First, the weakness of the strike weapon itself makes both the threat and the actuality less powerful and disruptive than would be the case if, for example, no striker replacement were permitted. Second, the strike may be a far less economically and socially disruptive weapon than the alternatives which would surface in its absence or its prohibition. Work-to-rule strategies and intermittent, hit-and-run work stoppages are two examples. Third, competitiveness in the U.S. market rarely leaves consumers, hence voters, without a feasible substitute for a struck service or product, despite the strike causing some hardship or inconvenience. If one hospital is on strike and unable to accept patients, another one in the vicinity is usually available to accept the more urgent cases. If the commuter railroad is on strike, the Metro and the buses are still operating, as are private cars, not to mention pedestrian's feet. Fourth, the limitations on secondary strikes and boycotts help ensure that so long as there is competition among employers providing the same or

<sup>410</sup> *Id.* 159a(i) (citing 45 U.S.C. 351 et seq.).

<sup>411</sup> *Id.* 159a(j).

<sup>412</sup> These computations are based on the research cited *supra* note 394.

substitutable services or products, a strike at one employer will leave others operating to supply the substitute.

One might say that most of the time, in the U.S., the competitive market coupled with the restrictions on secondary economic pressure tactics means that almost no service can properly be called “essential” . Nearly always, there is a reasonable substitute. These last two factors are inseparable from the employer-based or establishment-based structure of the majority of collective bargaining units in the U.S. It is precisely because most collective bargaining agreements cover only one employer or one establishment that the limitations on secondary activity have so much applicability. It is precisely because a strike normally occurs at only one employer, or one facility, that consumers normally retain many options. This is much less true for the Railway Labor Act, where the bargaining unit is usually employer-wide, and the employer is much more likely to control a majority of the market in particular localities for rail or air transport services. It is not a coincidence that the Railway Labor Act contains many more legally specified opportunities for mediators to step in, factfinding to be invoked, and the strike to be delayed in hopes a settlement will be reached. Nor is it coincidental that Congress has several times stepped in and imposed interim or long-term legislated terms in place of disputed provisions of a labor contract, when RLA bargaining partners have been deadlocked, along with service disruption, for extended period of time.

Comparisons across time, like those between the NLRA and the RLA, bolster this conclusion. In the late 1940s and 1950s, basic industries such as steel, automobile, aerospace, and agricultural implement manufacturing and coal mining, were almost entirely unionized. Collective bargaining in those fields was mainly conducted at the national level, with pattern bargaining producing a result almost equivalent to industry-wide bargaining with an employer association; in coal mining, a peak employer association collective bargaining agreement with the union applied to most major employers in the industry and the smaller ones followed its terms as a pattern. In those years, the threat of a coal strike meant the threat of lack of heating fuel in cold weather; the threat of a nation-wide steel strike meant the threat that the economy, and particularly the militarily-related production portion of the economy, would grind to a halt.

Years of increased global and local competition, bankruptcies and corporate reorganization have fragmented these industries and introduced new, competitive, non-union producers, vastly decreased union power and reduced the effects of strikes. The last national steel strike was in 1959, although the labor peace during the next twenty-five or so years was mainly attributable to voluntary adoption of interest arbitration in the industry, to break a cycle of customer strike expectations and inventory stockpiling that was injuring employer and union alike. A key justification for presidential and judicial intervention, the risk to military preparedness created by major strikes in many industries, disappeared with the ending of the Vietnam War. Public, and indeed, judicial acceptance of vague arguments about the impact of a work stoppage on the American military and its domestic and overseas commitments reversed from almost instant acceptance to incredulity.<sup>413</sup>

During the same period, deregulation, technological change, and increased global trade have led to collapse of union control over major industries and segments of the labor market. In automotive manufacturing, competition resulting both from foreign manufacturers' imports, and from direct investment into U.S. manufacturing plants of those foreign manufacturers, has shaken the UAW's ability to set labor standards in the industry, especially in the more fragmented parts suppliers segment.

Deregulation has undercut the Teamsters' hold on trucking, and both deregulation and foreign penetration have adversely affected the airline pilots union's bargaining leverage.<sup>414</sup> Containerization and adoption of a complex set of rules regarding allocation of work in light of the new technologies played an important role in eliminating many of the disputes on the docks.<sup>415</sup>

Were these factors regarding the U.S. industrial relations system, and the economy as a whole to change, one might conjecture that the rules regarding strikes in "essential" services might change, too.

<sup>413</sup> See Julius Getman & John D. Blackburn, *Labor Relations Law, Practice, and Policy* 323 (2d ed. 1983).

<sup>414</sup> See Weiler, *supra* note 100, at 132.

<sup>415</sup> See *NLRB v. International Longshoremen's Ass'n*, 473 U.S. 61, 64-69 (1985); *NLRB v. International Longshoremen's Ass'n*, 447 U.S. 490, 494-500, 513-22 (1980).